FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

No QUD 183 of 2020

CLIVE FREDERICK PALMER and another
Applicants

STATE OF WESTERN AUSTRALIA and another
Respondents

CLOSING SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Attorney-General of the Commonwealth (Intervening):

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PART I INTRODUCTION

1. On 18 June 2020, the Chief Justice of the High Court ordered that "so much of this matter as concerns the claim by the defendants of the reasonable need for and efficacy of the community isolation measures contained in the [Directions] be remitted to the Federal Court of Australia for hearing and determination" [**CB bk 1 tab 23**].

2. The purpose of the remitter is to determine, as at the date of the trial, the factual issues relevant to the respondents' pleading that the Directions are justified [**CB bk 1 tab 12**]. The respondents (who bear the onus) contend that the Directions are justified by the purpose of protecting the population of Western Australia against the health risks of COVID-19, and that there are no other equally effective means of achieving that purpose that impose a lesser burden on interstate intercourse or interstate trade or commerce.

3. This Court is not required to determine whether the Directions are justified. Its task is to make findings on disputed questions of fact so as to allow the High Court to make that determination.[1] That said, to assist the Court in understanding the type of submissions to which the facts found will ultimately relate, the Commonwealth's position as to the validity of the Directions in the High Court will be as follows:

   3.1. The Directions cannot be justified by the need to remove the risk from "even a single case" of COVID-19 being reintroduced into Western Australia because the Directions do not have that effect. Western Australia already tolerates a non-trivial risk from returned international travellers, and State and Territory travellers who arrive pursuant to exemptions to the Directions. Another way of putting that point is that the Directions are not rationally connected to the purpose of removing the risk from "even a single case" of COVID-19 being reintroduced into Western Australia. Instead, the Directions are no more or less than one of a number of measures adopted by Western Australia to reduce the probability of an outbreak of COVID-19 in Western Australia.

   3.2. For Western Australia to allow travel from jurisdictions in which there has been no community transmission from an unknown source in the last 28 days (**NCT jurisdictions**) would not appreciably increase the probability of an outbreak of COVID-19 in Western Australia. Any trivial reduction in that probability that arises from the Directions cannot justify the burden that the Directions impose on the freedom of interstate intercourse guaranteed by s 92.

   3.3. Even in the case of travellers from a jurisdiction that has low levels of community transmission from an unknown source in the last 28 days, such as New South Wales, the probability of such a traveller causing an outbreak of COVID-19 in Western Australia is very low or minimal. Further, there are reasonably available measures to reduce that probability still further that impose considerably lower burdens on interstate intercourse than the burden imposed by the Directions. In those circumstances, even if the Directions would reduce the probability of travellers from New South Wales causing an outbreak by more than any

[1] The same procedural course was taken in the *Mabo* litigation: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 6. See *Mabo v Queensland* (1986) 60 ALJR 255.

alternative measures (which cannot be assumed, for it would depend on the detail of the proposed alternative measures: T394.29–394.40, 407.8–13 (Blakely)), a small reduction in an already very small probability cannot justify the burden that the Directions impose on the freedom of interstate intercourse guaranteed by s 92.

3.4. In contrast, the Commonwealth will submit that it is open to a State to close its borders to people coming from Victoria, because the risk posed by such people is significantly higher. The Directions, if they only applied to prevent travel by people who had been in Victoria in the last 14 days, would be justifiable.

4. The disputed questions of fact on which this Court is required to make findings relate to the issues set out in the agreed "List of Issues in Dispute" filed 24 July 2020 [**CB bk 1 Tab 16**]. However, as explained further below, it is not necessary for the Court to make findings in relation to all of those issues.

5. The factual findings that the Commonwealth seeks are addressed in Part III below. It is first necessary to identify some important matters of approach.

PART II APPROACH

The time as at which facts are to be found

6. It is common ground between the parties that the respondents' contention that the Directions are justified is to be resolved, not by asking whether they were justified at the time they were made, but rather by asking whether they are currently justified. Accordingly, the extent to which the Directions contributed to preventing the spread of COVID-19 within Western Australia when they were introduced (List of Issues, **CB bk 1 Tab 16,** [1]) is not, in itself, relevant. Given that the circumstances in Western Australia, and other States and Territories, are now quite different from those which existed at the time the Directions were made, it is difficult to see how their previous contribution (if any) could bear on their present contribution (if any). It follows that there is little, if any, utility in the Court making findings of fact concerning when the Directions were introduced (List of Issues, **CB bk 1 Tab 16,** [1]).

7. This Court's task is to make findings on the current evidence before it, and in relation to the facts as at the current time. Although changes in the prevalence of COVID-19 in different jurisdictions will affect the risk posed by travellers from those jurisdictions, it does not follow that, at any particular point in time, the risk posed by travellers from a particular jurisdiction cannot be assessed. It is no part of the Court's function to try to take into account the possibility of an outbreak in the future. The Court should find the facts necessary to enable the High Court to determine whether the Directions are justified as at the date on which the trial ends. If the facts change in material respects thereafter, then that may affect the way any principles that are decided in this case apply in the future. That does not, however, change the nature of this Court's task (particularly as the evidence before this Court does not enable the Court to forecast what may happen in the future).

Expertise and credit

8. As will be apparent from the course of the trial, the Commonwealth does not contest the credit or expertise of the experts called on behalf of the respondents. The Court should summarily reject the extended but baseless attack on the expertise of Professor Collignon AM (T249.27-267.15). Far from exposing a want of expertise, the cross-examination showed precisely the opposite. The other experts who were asked disassociated themselves from the attack (T336.41-338.9). Likewise, the suggestion of an "ideological" opposition to the closure of borders on the part of Professor Collignon (T291.44, 292.11, 294.23) — carrying a wholly unfounded attack on his credit — should be rejected.

9. It is telling that, following the lengthy and self-defeating attempt to attack Professor Collignon's expertise, no such attack was made on Professor Blakely. Such an attack had been foreshadowed in the respondents' written opening (at [43]). It was abandoned after a tentative question was readily dismissed by Professor Blakely (T357.44-358.4). The evidence of Professor Blakely is a sophisticated and uncontradicted quantification of the risks about which the Court is required to make findings, undertaken by an expert whose qualifications to undertake that task were unchallenged.

Quantification of risks

10. Following from the previous point, there is a dispute between the parties as to whether the Court should attempt to quantify the risks about which it is to make findings and, if so, whether findings should be made of a quantitative kind, expressed numerically in terms of probabilities, or limited to findings of a qualitative kind, expressed in words such as "low" or "high". For a number of reasons, the Court should make findings of a quantitative kind, where the evidence permits this.

11. *First*, as explained further below, the Directions do not eliminate all chance of importation of COVID-19. Western Australia does not have a "hard border". Western Australia is exposed to a risk of COVID-19 importation by returning international travellers and travellers from other States and Territories who enter pursuant to exemptions. This is not a case in which removal of the Directions would expose Western Australia to a risk when it would otherwise be exposed to none.

12. Consistently with this, all of the experts accepted that the approach to COVID-19 — including that reflected by the Directions and other steps taken by Western Australia — is one of risk minimisation (T333.30-34 (Collignon). See also T76.32-38 (Robertson)). The fact that there are exemptions to the Directions reflects the fact that Western Australia tolerates and manages some risk of the reintroduction of COVID-19 into Western Australia (notwithstanding its potential consequences), having regard to countervailing considerations (T70.04-T72.32 (Robertson)).

13. It is therefore not plausible for the respondents to say that the Directions are necessary to guard against the risk of importation of a single case (cf T140-141.44-6, T169.22-24 (Lokuge); Lokuge report, **CB bk 2 Tab 35**, 453 [2.2.7], 469-470 [3.2.17]; Lokuge supplementary report, **CB bk 2 Tab 42**, 687 [16]). Western Australia is already exposed to that risk.

14. In order to decide whether the Directions are justified, it will be necessary for the High Court to consider the magnitude of any increased risk to which Western Australia would be exposed by removal of the Directions. Accepting that that risk is a function both of the probability of its occurrence and its possible impact if it occurs (see further paragraphs 26–28 below), the Court should make findings about both of those matters.

15. *Second*, it will be necessary for the High Court not only to consider any contribution the Directions make to reducing the risk faced by Western Australia ***relative to other interventions***, but also to consider the ***absolute magnitude*** of any such contribution. If the overall risk is low, the fact that a measure that is highly burdensome on interstate trade, commerce and intercourse makes an appreciably larger contribution to guarding against that risk than some other measure that is much less burdensome on interstate trade, commerce and intercourse will not justify the infringement of the freedom in s 92 of the Constitution (where either the absolute risk is very low, or the difference in the relative contribution of the two measures to the reduction of risk is slight).

16. *Third*, as Professor Blakely's report demonstrates, there is an accepted body of medical expertise and sophisticated modelling tools directed to the quantification of precisely the kinds of risks with which the Court is concerned. As Professor Blakely explained (T366.8-46), even for a stochastic event such as the transmission of COVID-19 from one person to another, probabilistic modelling is both useful and informative so as to provide estimates. The Wilson et al model was designed to model stochastic events (T366.12).

17. The mere fact that there may be uncertainty as to the inputs and outputs of such modelling is not a reason to reject the utility of Professor Blakely's evidence. As he explained, his methodology took the uncertainty into account. That is why the uncertainties to which he was directed in cross-examination did not cause him to be uncomfortable with his results (T380.2-385.26). Moreover, even if one adopts the upper limit of uncertainty he suggested — a 4-fold increase in the probability of an infected person from New South Wales boarding a plane to Western Australia (Joint Report, **CB bk 1 Tab 43,** [1.1]) — the resulting monthly probabilities of an infection in Western Australia are still very low. That is a highly significant fact for the justification of the Directions.

18. Nor, for the reasons in paragraph 7 above, is it an objection that Professor Blakely's figures reflect the position in New South Wales at present and that those figures may change materially if the circumstances in New South Wales change materially. If the facts change, the justification for the Directions might change. States may become entitled to take measures that they were not entitled to take before. The Court's task is not to predict the future, but to find the facts relevant to the justification of the Directions as at the date of the trial.

19. *Fourth*, the difficulties with confining any findings to a qualitative approach, expressed in terms such as "low" and "high", were exposed in the arid cross-examination of Professor Collignon (T290.19-292.19, 295.35-299.45) about the differences between terms such as "very low" and "minimal" (used in his report) and "extremely low" (used by him in the Joint Report). There is plainly no fixed distinction between these terms, even when used by the same person on different occasions.

20. Findings about the probability of an outbreak of COVID-19 in Western Australia expressed in general, qualitative and evaluative terms will not assist the High Court. To say that a risk is "material" or "not so small as to be irrelevant", or that a probability is "high", necessarily involves unstated assumptions and comparison. What threshold defines materiality? In comparison to what is a probability high? To make findings in these terms would carry the real risk that the purpose of the remittal may miscarry, one way or the other. On the one hand, these findings may be insufficiently precise to allow the High Court to resolve the contested legal issues. On the other hand, findings in these terms may in substance predetermine those contested legal issues without an opportunity for debate in the High Court. For instance, the resolution of those legal issues may require consideration by the High Court of what quantum of risk is "material" or "irrelevant". As Professor Blakely explained, the very purpose of epidemiological modelling is to attempt to provide quantification of particular risks so as to provide a concrete departure point for decision making on whether and how such risks ought to be addressed (T366:39-46. See also T387.4-8).

21. *Fifth*, there are particular difficulties with the qualitative approach supported by Associate Professor Lokuge, based on the "decision tree" in Annexure 3 to her first report (**CB bk 2 Tab 35**, 478). At a conceptual level, the apparently binary questions which it asks are inapt to deal with matters that are probabilistic and therefore involve a continuum. For example, the decision tree fails to account for the difference between a risk of 1 in 100 and 1 in 1,000,000 (T173.8-173.37). Further, in the bluntness of the model is illustrated by the fact that the "yes or no" answer to the question "are effective control measures in place" causes the output of the probability part of the analysis to shift from "minimal" to "high" (with the attendant imprecision in these words), notwithstanding that the effectiveness of most measures is a question of degree (T172.29-36; 174.34-39).

22. What is more, these apparently binary questions conceal evaluations which turn, ultimately, on an assessment of probability. Associate Professor Lokuge agreed under cross-examination that whether a measure is to be regarded as "effective" involves an evaluation (T174.34-39). It is evident Associate Professor Lokuge does not consider that this requires 100% effectiveness, because she regarded the Directions as effective to prevent interstate importation notwithstanding the many exemptions. (Although much of her report appeared to assume that the Directions guaranteed that no cases would enter Western Australia[2], she conceded in cross-examination that was not so: T165.6-11). This reflects a *sub silentio* assessment which must involve an assessment of probability, based on unstated assumptions and conclusions. As Professor Blakely said, it is preferable for such assumptions to be transparent (T385.21-26, T401.3-9). Further, Associate Professor Lokuge's report gave no consideration to whether a different version of the Direction, for example banning travel only from Victoria and New South Wales, would also have been an "effective intervention". If it is, this would have changed her risk assessment back to "minimal", and thus radically changed her assessment of risk (T174-176.41-36).

23. It may be accepted that not all of the findings that the Court is required to make will be able to be expressed quantitatively. Indeed, Professor Blakely considered the probability of importation of COVID-19 into Western Australia from an NCT jurisdiction to be so

[2] Eg **CB bk 2, Tab 35**, [2.3.9.1.4] ("complete border closure"); **CB bk 2 Tab 42**, [23] ("guaranteed to prevent entry of cases into WA").

small as not to be quantifiable (T389.29-34). That is itself a telling conclusion about the insignificance of that risk. It is properly described as negligible. But where quantitative findings can be made, they should be made.

Alternative measures

24. It appears that the respondents will submit that a measure posited as an alternative to the Directions must be rejected if there would be some residual risk even if the alternative measure were implemented. Any such submission would be unsound, for the same is true in relation to the Directions.

25. An example of this, which was the subject of significant attention during the hearing, is targeted restrictions on entry into Western Australia by people within a particular region of another State or Territory that has an elevated level of community transmission from an unknown source — a "hotspot". Both "border closures" and a "hotspot" approach are risk mitigation measures, rather than guarantees against infection. Any difference between them is a difference in the degree to which the probability of infection is reduced, in circumstances where Western Australia already tolerates non-trivial risks of the reintroduction of COVID-19 into Western Australia. The Court should not accept that the possibility that border closures will reduce risk more than a hotspot approach would support a finding that hotspots lack utility. To the contrary, as explained further below, the specification of hotspots, in combination with other measures, is an effective risk mitigation measure, which could substantially reduce the already low risk of importation of COVID-19 into Western Australia from New South Wales if the Directions were removed. The fact that there would still be a residual risk does not place such alternative measures in any different position to the Directions themselves.

The relevance of "impact"

26. As noted above, it may be accepted for present purposes that the risk posed by an event, here an outbreak of COVID-19 in Western Australia, is a function of both the ***probability*** of the event occurring and the possible ***impact*** if it does occur. Most of the evidence at the trial focused on the probability of an outbreak, rather than its impact. However, when considering the impact side of the analysis, two points are important.

27. *First*, the consequences of an outbreak of COVID-19 for Western Australia are the same whether the outbreak results from reintroduction of COVID-19 from a returned international traveller, from a traveller who is allowed into Western Australia under an exemption, or from a person who would be allowed to enter if the Directions were amended or revoked (T170.45-47; T171.1-6 (Lokuge)). As such, exemptions in the Directions, and other relaxations of the common measures that increase the risk of the uncontrolled spread of COVID-19 if it is reintroduced, demonstrate that Western Australia has considerable tolerance for that risk.

28. *Second*, and relatedly, there is no basis upon which the Court could find that any outbreak of COVID-19 ***will*** or is even ***likely to*** lead to severe consequences. The experts agreed that it is ***possible*** that it may do so, but no expert made any attempt (whether qualitative or quantitative) to quantify that chance (Professor Blakely said that the impact of a person entering a State with COVID-19 cannot, currently, be quantified (T373.22-29 and Blakely Report at 3.4.3. See also generally T372.3). Importantly,

however, as explained below, there are systems in place in Western Australia that are designed to, and have on previous occasions, stopped an outbreak in Western Australia from spreading to more than a handful of people.

The precautionary principle

29. It appears that an aspect of the respondents' case is invocation of what is described as "the precautionary principle". Associate Professor Lokuge's first report (**CB bk 2 Tab 35,** [3.2.8]) appeared to suggest that this principle requires that all steps that can possibly be taken to address a risk must be taken. Plainly, that is an unrealistic approach. As Associate Professor Lokuge accepted, it is certainly does not govern the approach being taken in Western Australia: if it were, approximately 4,000 people per week would not be allowed to enter from other States and Territories pursuant to exemptions (T189-190.26-34), and the common measures would not have been relaxed. The Directions do not pursue, and cannot be justified by, any precautionary principle of this kind.

30. In cross-examination, Associate Professor Lokuge stated the principle in much looser terms: "we should act based on an understanding of what might occur because if we wait to have clear evidence of what might occur, it's too late" (T187.16-18). Stated in these terms, it says nothing more than one must recognise the possibly grave outcomes. But it does not mandate ignoring the probability of such outcomes, such as to require the taking of all possible steps to mitigate even very low risks.

PART III FINDINGS OF FACT

Ultimate facts

31. In substance, this Court is asked to make findings of the kind which would be suitable for inclusion in a special case or case stated. Those are the "ultimate facts", rather than the "evidentiary facts" which support those ultimate facts.[3] While the distinction between those two categories is not rigid, it provides a useful framework for the Court to approach its task. That being so, the Commonwealth has sought in these submissions to reduce the number of findings of fact that it seeks to the ultimate findings (those findings being supported by the evidentiary or subsidiary facts to which reference is made in the submissions in support of each of those ultimate findings).

32. A numbered list of the 9 ultimate findings of fact sought by the Commonwealth is annexed to these submissions.

The risk of an outbreak while the Directions remain in place

33. The ultimate finding that the Commonwealth seeks in respect of the risk of an outbreak of COVID-19 occurring in Western Australia while the Directions remain in place (**CB bk 1 Tab 16**, [2]) is as follows (**Ultimate Finding 1**):

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[3] See, by analogy, *Francis v Commissioner of Stamp Duties (NSW)* (1954) 91 CLR 368 at 400 (Fullagar J); *R v Rigby* (1956) 100 CLR 146 at 151–152 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ).

There is a non-trivial risk of both the importation of COVID-19 into Western Australia, and subsequent community transmission of COVID-19 within Western Australia, even if the Directions are retained, because of:

(a) the exemptions in the Directions, some of which do not impose any quarantine requirements in relation to persons entering Western Australia; and

(b) the risk that COVID-19 will spread in the event of any failure in quarantine arrangements for returning international travellers and others.

34. The Court should make that finding for the following reasons.

35. *First*, the number of people from interstate who enter Western Australia as "exempt travellers" under one of the 18 categories of exemption in the Directions averages 3,290 each week.[4] Dr Robertson and Associate Professor Lokuge were each asked to assume that number of arrivals (which is identical to 470 people per day),[5] and each confirmed that they considered that the assumptions they had made were reasonable (T32.39-42; 34.1-4; 75.42-76.1; 163.44-164.7). Dr Robertson specifically indicated that he believed it to be correct that about 3,290 people were entering Western Australia each week from interstate, notwithstanding the Directions (T76.3-7).

36. *Second*, of the 18 categories of "exempt traveller", only three are subject to an automatic quarantine requirement: see para 27(k), (l) and (q) (T75.22-28 (Robertson)). There is no evidence as to when, if ever, quarantine requirements were imposed on other exempt travellers on a case-by-case basis as a "specified term or condition" (as per the chapeau to para 27 of the Directions). Dr Robertson accepted that people who are not required to quarantine upon entry into Western Australia are permitted to enter the community immediately (T75.35-40). Even following the amendments to the Directions as a result of the increase in the prevalence of COVID-19 in Victoria and New South Wales,[6] Western Australia continues to allow some people from Victoria and New South Wales (being those who fall within exemptions (a) to (g)) to enter Western Australia without imposing quarantine requirement upon them. So much was accepted by Dr Robertson (T80.10-16). Arrivals from these jurisdictions, and particularly from Victoria, plainly create a real risk of importation of COVID-19, being a risk that exists irrespective of the Directions.

37. Contrary to the impression sought to be conveyed by Dr Robertson (T77.27-29, T79.40, T80.25, T120.46-121.10), not all of the categories are ones in relation to which Western Australia has no choice but to permit entry without quarantine. In particular, Victorian and New South Wales transport, freight and logistics workers, including truck drivers, are not required to quarantine upon entry into Western Australia. Such persons fall within para 27(g) of the Directions and are not excluded from entering Western Australia so long as they take the steps referred to in para 5(e)(i) (as amended). None of those steps requires them to quarantine. In his oral evidence, Dr Robertson confirmed that "a truck driver who has come from Victoria can drive into Western Australia **[and]** must take the steps in (A) to (E) but, nevertheless, can come in" (T80.37-40; see also T78.12-30).

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4 That number having been reached by multiplying 470 arrivals by 7 days per week.

5 **CB bk 2 Tab 34**, Question 3 (CB 424); **Tab 35**, Question 3 (CB 465).

6 Being the amendments made by introducing the new para 5(e) to the *Quarantine (Closing the Border) Amendment Directions (No 2)* (**Amendment Directions (No 2)**) (**CB bk 3 vol 2 Tab 124**) and the *Quarantine (Closing the Border) Amendment Directions (No 3)* (**Amendment Directions (No 3)** (**CB bk 3 vol2 Tab 125**).

Consistently with this, in his expert report, Dr Robertson gave truck drivers as an example of "categories of people who just come in and leave immediately, who are not required to quarantine", and who therefore "pose probably the greatest risk" in respect of the introduction and subsequent community transmission of COVID-19.[7] Dr Robertson at one point appeared to say, in answer to a question from the Court, that amendments had been made to the Directions to limit this risk (T133.5-13). The Commonwealth has been unable to locate any such amendments.

38. Dr Robertson accepted that the effect of the exemptions was that, even with the Directions in place, there is an "inherent risk" that a person who is an "exempt traveller" will bring COVID-19 into Western Australia (T76.16-30; see also T50.10-T51.5). He recognised the same risk in his expert report, noting that the risk in respect of the interstate border controls "comes from people who have exemptions, particularly to the quarantine requirements".[8] Associate Professor Lokuge likewise recognised that the fact that up to 4,000 people a week were entering Western Australia from interstate and overseas created a risk of the reintroduction of COVID-19 into Western Australia (T163.26-38; see also T190.25-28).

39. *Third*, turning to international arrivals, Western Australia continues to accept international arrivals, capped at 525 people per week (Draft Supplementary Special Case (**SSC**), **CB bk 3, vol 1 Tab 45**, [130]; T82.4–8 (Robertson)). There are, at present, an average of 1,600 people undertaking hotel quarantine in Western Australia, constituted by international arrivals and some arrivals from Victoria (T82.10–22 (Robertson)). The rates of infection amongst international arrivals are vastly greater than those amongst arrivals from other States and Territories T57.4-10, T61.23-25 (Robertson); T282.19-23, 284.36-46, 349.23-26 (Collignon)).

40. *Fourth*, as Dr Robertson accepted in his oral evidence, there is an "inherent risk ... that needs to be managed that the virus might escape from ... hotel quarantine" (T82.37-41). Associate Professor Lokuge's evidence concerning quarantine failures in Victoria was to similar effect: Lokuge Supplementary Report, **CB bk 2 Tab 42**, [10]–[11], [20]; T161.29-162.24 (Lokuge), as was Professor Collignon's (T282.19-24). The risk is illustrated by the fact that three hotel quarantine workers in Western Australia have been infected with COVID-19. However, that incident also illustrates that a single case does not necessarily result in an outbreak of uncontrolled transmission, since Western Australia rapidly detected those cases and applied measures such as case identification, contact tracing and isolation and/or quarantine. There was no further spread of the virus from those three cases (SSC, **CB bk 3, vol 1 Tab 45**, [23]; T83.13-27 (Robertson)).

41. It follows from the above that, at present, Western Australia has accepted a risk of the importation of COVID-19 from interstate and international arrivals. That risk is at least non-trivial, and may be higher. In an attachment to his expert report, Dr Robertson referred to the "inherent risk of the spread of COVID-19 in permitting exempt travellers into the State, particularly when travellers from interstate are granted an exemption for work, medical treatment or compassionate reasons and are not required to quarantine".[9]

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7 **CB Bk 2 Tab 34**, [3.3.1] (CB 425).

8 **CB bk 2 Tab 34**, Annex 3 p 2 (CB 436) and [3.3.1] (CB 425).

9 **CB bk 2 Tab 34**, Annex 3 p 2 (CB 436).

Dr Robertson went on to say that: "[i]n the absence of quarantine, there is an unacceptable risk of transmission of infection from people who may be positive cases, but with minimal or no symptoms".[10] When coupled with his acknowledgments that many categories of "exempt traveller" are not necessarily required to quarantine (even if they have been in Victoria or New South Wales in the preceding 14 days), Dr Robertson's acceptance that there is an "unacceptable risk of transmission" must be understood to translate to at least a non-trivial risk of importation. Similarly, in her oral evidence, Associate Professor Lokuge accepted that, having regard to the number of "exempt travellers" under the Directions and international arrivals, the risk that COVID-19 might be introduced into Western Australia was "non-trivial" (T164.34-38). She later accepted that the Directions do not provide any "guarantee" that there would not be new cases of COVID-19 imported into Western Australia (T165.13-17), and that it would not be accurate to describe the Directions as involving a "complete closure of the border" (T165.11). As such, the parts of her report that use terminology of that kind[11] are not relevant to the validity of the Directions.

The risk of an outbreak if the Directions are revoked

42. The second issue (Issue 4 in the List of Issues, **CB bk 1 tab 16**) is the risk of an outbreak of COVID-19 occurring in Western Australia if people from the following places are permitted to travel to Western Australia and no other changes are made to reduce the risk of the spread of COVID-19 from new arrivals:

    42.1. any or all of Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory;

    42.2. New South Wales; and

    42.3. Victoria.

<u>The NCT jurisdictions</u>

43. The Court should find (**Ultimate Finding 2**):

> If persons from any jurisdiction that has had no reported cases of community transmission from an unknown source in the past 28 days were permitted to travel to Western Australia, the risk of an outbreak of COVID-19 occurring in Western Australia as a result of such a person arriving in Western Australia would be extremely low or negligible.

44. There was no dispute between the expert witnesses that, as of 27 July 2020, there had been no recorded cases of community transmission from an unknown source in the preceding 28 days in Queensland, South Australia, Tasmania, the Northern Territory and the ACT (the "no community transmission from unknown source jurisdictions" or "**NCT jurisdictions**"). In particular, Dr Robertson accepted that, at the time of his

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10 CB bk 2 Tab 34, Annex 3 p 2 (CB 436).

11 Eg **CB bk 2 Tab 35**, [2.3.9.1.4]; **CB bk 2 Tab 42**, [23] (CB 689).

evidence, each of those jurisdictions met the medical definition of elimination (T86.4-9).[12]

45. On 29 July 2020, it was reported that two people had returned to Queensland from Victoria and tested positive [**Ex 10**]. It is currently too early to say whether this will lead to community transmission from an unknown source. Consistently with paragraph 7 above, the Court should resolve the matter on the basis of the current evidence. That said, even if Queensland does experience low levels of community transmission with an unknown source, the result would simply be that it will be in a similar category to New South Wales (albeit that, if the level of community transmission from unknown sources is lower in Queensland than the level that Professor Blakely used as the basis for his calculations with respect to New South Wales in Exhibit 7, then the risk posed by travellers from Queensland to Western Australia will be even lower than that posed by travellers from New South Wales).

46. The risk of a person arriving in Western Australia from one of the NCT jurisdictions while infected with COVID-19 is extremely low, as is the risk of an outbreak of COVID-19 occurring in Western Australia as a result of the arrival of such a person. That conclusion is supported by the evidence of all of the expert witnesses.

47. In the Joint Report (**CB bk 1 Tab 43,** [1.1]), all of the expert witnesses agreed that "given the existence of a strong surveillance/testing regime, if there have been no cases of community transmission (being where the source of infection is unknown) for 28 days in the state of origin then that is as low risk a situation as can reasonably be hoped for", and that all States and Territories currently have strong surveillance/testing regimes [**CB bk 2 Tab 43, 699**]. Further, in that report (at [1.1]), Professor Collignon and Associate Professor Senanayake each described the risk that a person arriving in Western Australia from the NCT jurisdictions would have COVID-19 as "extremely low" [**CB bk 2 Tab 43, 699**.[13]

48. In her oral evidence, Associate Professor Lokuge described the risk that a person arriving in Western Australia from the NCT jurisdictions would have COVID-19 as being "as low as you can go" (T172.47, 148.1). She also accepted that, as long as Western Australia banned people arriving from jurisdictions that had not had reported cases of community transmission in the past 28 days, applying her decision tree analysis, the risk would be "minimal" because, using the decision tree analysis, there would be no route of introduction of COVID-19 into Western Australia (T176.9-36).

49. In his oral evidence, Professor Blakely said that the risk that a person arriving in Western Australia from the NCT jurisdictions would be infected with COVID-19 was so low that he would not be able to quantify it (T389.33). This is consistent with [3.2] and [3.3.3] of Professor Blakely's Report [**CB bk 2 Tab 40: 606, 608**],, as well as the conclusions expressed in that report [**CB bk 2 Tab 40: 601, 611**].

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12 In respect of the period before the trial commenced, see also [3.1.1] of the Robertson Report [**CB bk 2 Tab 34**, 424]; [3.1.1] and [3.4.1] of the Lokuge Report [**CB bk 2 Tab 35**, 465, 472]; Professor Collignon's comments on [3.3.4] of the Robertson Report [**CB bk 2 Tab 39**, 589]; Associate Professor Senanayake's comments on [3.2.7] of the Lokuge Report [**CB bk 2 Tab 37**, 505]; and National Notifiable Diseases Surveillance System (NDSS) data [**CB bk 3 Tab 47**, 811-813].

13 See also T88:32-39 (Senanayake) ("extremely low risk to zero risk"); T296.44, 297.44 (Collignon).

50. Dr Robertson used the phrase "less than 1%" in his report to describe the risk of a person arriving in Western Australia from a State or Territory other than Victoria having COVID-19 (at [3.3.4] **[CB bk 2 Tab 34, 425]**). However, he agreed in cross-examination that he meant "very considerably less than" 1 per cent (T103.46-47, 104.1-4). Associate Professor Lokuge confirmed that Dr Robertson must have meant "much, much less than one per cent" (T139.25, 140.23-24).

51. The Court should also find (**Ultimate Finding 3**) that:

> There is no public health reason for Western Australia to prevent persons from any jurisdiction that has had no reported cases of community transmission from an unknown source in the past 28 days from travelling to Western Australia.

52. A finding in these terms is consistent with the proposition agreed to by all of the expert witnesses in the Joint Report (**CB bk 2 Tab 43,** [1.1]), referred to in paragraph 47 above. It is also supported by the evidence of Associate Professor Lokuge that all of the expert witnesses agreed that there was no public health reason for Western Australia to close its borders to the NCT jurisdictions (T175.39-42). Similarly, Professor Blakely said that there was no public health reason not to allow travel between Western Australia and the NCT jurisdictions, provided that the other jurisdictions had a strong surveillance and testing system — which he added was the case across Australia — and that the other jurisdictions had border controls that Western Australia trusted, or Western Australia checked carefully at its own borders for people seeking to enter from jurisdictions with higher rates of community transmission via a third jurisdiction (T89.7-11).

53. The only public health reasons that any expert witness advanced for Western Australia to close its borders to the NCT jurisdictions were that:

    53.1. it may be possible for people to enter Western Australia from jurisdictions with higher community transmission by "border hopping" via one of the NCT jurisdictions (T85.28-39 (Robertson));

    53.2. Western Australia would become dependent on the decisions of other jurisdictions about opening their borders (T85.30-34 (Robertson); T89.1-3, T187.4-6, T188.24-28 (Lokuge)); and

    53.3. some of the NCT jurisdictions have adopted an approach of identifying hotspots, rather than closing their borders to entire States or Territories (T88:1-8 (Robertson)).

54. For the reasons given below, none of those matters should prevent the Court from making a finding in the terms sought in paragraph 51 above.

55. ***Border hopping***. The possibility that a person would seek to enter Western Australia from a jurisdiction with a higher level of community transmission via a third jurisdiction does not provide a public health reason for Western Australia to close its borders to NCT jurisdictions.

56. *First*, Dr Robertson was the only expert who identified the possibility of "border hopping" as a concern. It is telling that it was not raised by any of the other expert witnesses as a

public health reason for Western Australia to close its borders to NCT jurisdictions. That is consistent with the fact that, while it may be accepted that it is possible that a small number of people may try to enter Western Australia from a jurisdiction with a higher level of community transmission via a third jurisdiction (T123.14-21 (Robertson)), there is no evidence as to the number of people who may attempt this, such as to have any material effect on the overall risk (having regard to the thousands of people who can enter Western Australia each week pursuant to exemptions or as returning international travellers). Dr Robertson gave evidence that he was aware of only four cases where this had occurred since the Directions were introduced (nearly four months ago), and that in none of those four cases was the person infectious (T123.14-21).[14]

57. *Second*, each of the NCT jurisdictions has measures in place to prevent people entering from jurisdictions with higher levels of community transmission. In particular:

    57.1. each of those jurisdictions has currently closed its borders to Victoria: it is not currently possible for a person from Victoria to enter Queensland (SSC [96] [**CB bk 3 Tab 45**, 796]), South Australia (SSC [106] [**CB bk 3 Tab 45**, 798]), Tasmania (SSC [101] [**CB bk 3 Tab 45**, 797]) or the ACT (SSC [123] [**CB bk 3 Tab 45**, 802]; a person from Victoria who enters the Northern Territory is required to quarantine for 14 days (SSC [112]-[113] [**CB bk 3 Tab 45**, 800]; and

    57.2. apart from the ACT, each of those jurisdictions has currently closed its borders to arrivals from some or all of New South Wales: a person from New South Wales who enters South Australia (SSC [106] [**CB bk 3 Tab 45**, 798*] or Tasmania (SSC [100] [**CB bk 3 Tab 45**, 796] is required to quarantine for 14 days; a person from New South Wales who enters the Northern Territory is required to quarantine for 14 days if the person has been in the greater Sydney area in the past 14 days (SSC [112]-[113] [**CB bk 3 Tab 45**, 800]); and a person cannot enter Queensland if they have been in hotspots specified by Queensland (SSC [96]-[97] [**CB bk 3 Tab 45**, 796]).

58. The success of those measures is demonstrated by the fact that each of the NCT jurisdictions has had no recorded cases of community transmission in the past 28 days. Further, as Dr Robertson acknowledged, all of the NCT jurisdictions (other than Western Australia) are doing the best they can to avoid reintroduction of COVID-19 into those jurisdictions (T89.46-47). There is no reason to suppose that those States and Territories would not adequately enforce their own border restrictions.

59. *Third*, as Professor Blakely pointed out in his evidence, Western Australia can take steps at its own border to check that a person arriving from a NCT jurisdiction has not been in a jurisdiction with higher levels of community transmission in the past 14 days (T89.7-11). For that reason, it is not correct to say that the outer border of a "travel bubble" dictates the risk for the population within the bubble, regardless of whether there are jurisdictional boundaries for States or other regions within the bubble. Even if it opens its borders to the NCT jurisdictions, there are steps that Western Australia can take to prevent people from "border hopping". One such step is demonstrated by the 9 July

[14] Dr Robertson's speculation that there may have been more people who attempted to do this does not provide a sound basis for the Court to make any finding about the number of people who may attempt to circumvent border closures.

amendments to the Directions, which impose an obligation on aircraft operators to screen passengers (**CB bk 3 Tab 124, 1792**).

60. *Fourth*, as discussed in paragraphs 69 to 71 below, even if all people from New South Wales were permitted to travel to Western Australia, the risk of a person arriving in Western Australia from New South Wales having COVID-19 is already very small. If Western Australia opened its borders to the NCT jurisdictions, but not New South Wales, the risk that an infectious person would travel to Western Australia from New South Wales by "border hopping" is a product of (1) the already extremely small number of people who would attempt to border hop and (2) the already very small risk that a person arriving in Western Australia from New South Wales would have COVID-19. The result is a risk so small as to be insignificant.

61. *Fifth*, areas with higher levels of community transmission, such as metropolitan Melbourne, are subject to "stay-at-home" directions which prevent people from leaving those areas: see cl 5 *Stay at Home Directions (Restricted Areas) (No 4)* (Vic), which supersedes *Stay at Home Directions (Restricted Areas) (No 3)* (Vic) (**CB bk 3 vol 3 Tab 197,** 2361**]**. It is not generally possible for a person from metropolitan Melbourne to travel to a third jurisdiction, let alone to Western Australia. Again, that substantially reduces the risk.

62. Once all of those matters are taken into account, the probability that a person from a jurisdiction with higher levels of community transmission will enter Western Australia via a third jurisdiction while having COVID-19 is so small that it cannot provide a public health reason for Western Australia closing its borders to the NCT jurisdictions.

63. ***Reliance on other jurisdictions***. It can be accepted that, if Western Australia were to open its borders to some other jurisdictions, it would to an extent be affected by the decisions of those other jurisdictions about opening their borders. However, this does not in itself provide a public health reason for Western Australia to continue to close its borders to NCT jurisdictions. That is so for two reasons.

64. *First*, Dr Robertson's evidence was that, if there were a change in the border arrangements of other jurisdictions, Western Australia would be able to react quickly, and make changes to its own border arrangements if necessary (T133.15-29). He did not identify any practical impediment to Western Australia changing its border arrangements at short notice. Accordingly, if Western Australia considered that another jurisdiction with which it had opened borders had failed to respond to changing circumstances in a way that created a significant risk of reintroduction of COVID-19 into Western Australia, it could respond by changing its border arrangements (provided that response was justifiable for the purposes of s 92 of the Constitution).

65. *Second*, as noted above, Dr Robertson acknowledged that all of the NCT jurisdictions other than Western Australia are doing the best they can to avoid reintroduction of COVID-19 (T89.46-47). There is no reason to suppose that any jurisdiction forming part of a "travel bubble" would make a decision to open its borders to a jurisdiction with high levels of community transmission.

66. ***Hotspots***. For the reasons given in paragraphs 91 to 97below, the fact that a NCT jurisdiction relies on hotspots as part of its border arrangements does not provide a public health reason for Western Australia to close its borders to that jurisdiction.

67. Dr Robertson agreed that, to the extent that there was a risk of reintroduction of COVID-19 from people arriving in Western Australia from the NCT jurisdictions, that risk could be reduced by taking measures such as the measures found in the 9 July amendments to the Directions, including requiring mask wearing and testing of new arrivals (T90.1-22). However, while that was possible, he agreed that the risk on public health grounds of people travelling to Western Australia from NCT jurisdictions was already so small that Western Australia would not choose to impose a requirement to wear masks on people arriving from those jurisdictions (T90.45-47, 91.1-4). That evidence emphasises that, while Western Australia ***could*** impose such a requirement if it wished to reduce the risk even further (T91.11-18), the risk is so small for all of the NCT jurisdictions (whether or not they utilise hotspots to reduce the risk of reintroduction of COVID-19 from higher risk jurisdictions) that it would not warrant such a step. That underlines the absence of any public health reason to prevent travel to Western Australia from any of the NCT jurisdictions at any time when they remain NCT jurisdictions.

68. In any event, even if the fact that a NCT jurisdiction relies on hotspots as part of its border arrangements did provide a public health reason for Western Australia to close its borders to that jurisdiction (which is denied), the only NCT jurisdictions that adopt a hotspot approach are Queensland and the Northern Territory. Dr Robertson ultimately accepted that there was no public health reason not to allow travel between Western Australia and each of the NCT jurisdictions other than Queensland and the Northern Territory (T87.41-46, 88.1-8). He said that he would exclude Queensland and the Northern Territory on the basis that those jurisdictions used a hotspot model (T88.1-8). At the very least, it should be accepted that there is no public health reason for Western Australia to close its borders to the NCT jurisdictions other than Queensland and the Northern Territory.

<u>New South Wales</u>

69. The Court should find (**Ultimate Finding 4**) that:

> If people from New South Wales were permitted to travel to Western Australia (assuming there would be approximately 35,000 such travellers per month (being half of pre-COVID-19 levels), and 1 case of community transmission per day in New South Wales from an unknown source — which is roughly equivalent to the situation in New South Wales as at 23 July 2020), the best estimate is that:
>
> (a) there is a 4% chance that 1 infected passenger would arrive in Western Australia from New South Wales per month; and
>
> (b) each month there is a 3.62% chance that such a passenger would cause an outbreak of COVID-19 in Western Australia.[15]

70. These findings are supported by the updated calculations for New South Wales provided by Professor Blakely during the course of the trial **[Ex 7]**.

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15 This equates to a best estimate that, on average, it would take 2.3 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

71. To attempt to put that in concrete terms, those figures indicate that if each month there are 175 flights from New South Wales to Western Australia (the number needed to carry 35,000 passengers assuming 200 passengers per plane) the best estimate is that there is a 4% chance (or 1 in 25 chance) that there will be ***one*** passenger infected with COVID-19 on one of those flights, and a slightly lower chance that such a passenger would cause an outbreak: compare T109.45-110.10.

72. The probability of travellers from a jurisdiction that has low levels of community transmission of COVID-19 from an unknown source causing an outbreak in Western Australia is affected by: (i) the number of travellers from that jurisdiction who seek to enter Western Australia; and (ii) the prevalence of such community transmission from time to time. Both of those factual matters are capable of changing over time. That does not, however, impede a calculation of risk at a particular point in time (which will change materially only if there is a material change in the facts). Changes in the number of travellers change the probability of an outbreak in a linear way (and can be scaled up or down as the number of travellers change): T337.35-42. As to the prevalence of community transmission, findings are sought based on the number of cases of community transmission from an unknown source (4 cases) together with those that were under investigation, which were conservatively assumed all to be from an unknown source (9 cases) in the 28 days before 23 July 2020.[16]

73. Professor Blakely acknowledged that the figures provided in his calculations are subject to a degree of uncertainty. His evidence was that the uncertainty ranged from one quarter of the stated figure to four times the stated figure: Joint Report (**CB bk 2 Tab 43,** [1.1]). That degree of uncertainty should not prevent the Court from making findings in the terms identified in paragraph 69 above. It is a feature of all modelling that it will be attended by a degree of uncertainty. The findings sought are appropriately framed as representing the "best estimate" available at the present point in time. No other expert has provided a quantitative estimate that contradicts or differs from Professor Blakely's. And, for the reasons given in paragraphs 10–23 above, the Court should make quantitative findings where the evidence permits it.

74. Further, although Professor Blakely was questioned extensively about the assumptions on which he relied in making these calculations, and accepted that several of the assumptions could arguably be adjusted, his evidence was ultimately that, taking those adjustments into account, he did not consider that it was necessary to alter any of the figures that he had calculated for New South Wales or Victoria: T404.26-37, see also 380.12-24..

<u>Victoria</u>

75. The Court should find (**Ultimate Finding 5**) that:

> If people from Victoria (including from locations subject to "stay-at-home" directions) were permitted to travel to Western Australia (assuming there would be approximately 44,000 such travellers per month (being half of pre-COVID-19 levels), and 316 cases of

[16] Commonwealth Supplementary Bundle, Tab 5, NNDSS table. See also Exhibit 7, Updated data for NSW, page 2, where Professor Blakely explained that, for the purpose of calculating the updated figures for New South Wales, he had conservatively assumed that all cases under investigation were going to be found to be community transmission with no known contact.

community transmission per day in Victoria from an unknown source — which is roughly equivalent to the situation in Victoria as at 27 July 2020), the best estimate is that:

(a) each month, more than 21 infected passengers would arrive in Western Australia from Victoria; and

(b) each month there is close to a 100% chance that there would be an outbreak of COVID-19 in Western Australia.

76. These findings are, again, supported by the updated calculations for Victoria provided by Professor Blakely during the course of the trial [**Ex 7**].

77. As Professor Blakely explained in his evidence (T366.37-46), these findings indicate one of the ways in which a quantitative assessment can be of assistance even where it is attended by a degree of uncertainty. They demonstrate that, even taking into account that uncertainty, the risk associated with Western Australia opening its borders to Victoria would be high. Further, they demonstrate, in a way that purely qualitative assessments of risk cannot, how much higher the risk presented by travellers from Victoria is than any risk posed by travellers from New South Wales.

Findings sought by the respondents and Queensland

78. The Court should not make findings in the nature of those sought in [24]-[25] and [27] of the respondents' findings of fact document filed on 28 June 2020 (**CB bk 1 Tab 5**), or [24]-[25] and [27] of Queensland's findings of fact document filed on 7 July 2020 (**CB bk 1 Tab 14**).

79. The findings of fact sought by the respondents and Queensland in those paragraphs obscure major differences in risk that exist between travellers from different jurisdictions. As the evidence referred to above demonstrates, the likelihood that a person carrying COVID-19 will arrive in Western Australia varies significantly depending on which State or Territory the person is travelling from. If a person arrives in Western Australia from a State or Territory other than Victoria or New South Wales, the likelihood that the person will be carrying COVID-19 is extremely low (see Ultimate Finding 2). If the person is travelling from New South Wales, the risk is higher, but still very low or minimal (see Ultimate Finding 4). The risk is considerably higher for travellers from Victoria, in light of the current outbreak of COVID-19 within Victoria (see Ultimate Finding 5).

80. Consistently with the above, entry prohibitions for ***every jurisdiction except Western Australia*** distinguish between travellers based on the place from which they have travelled (or the places where they have been in the 14 days prior to travel).[17]

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17 *Public Health (COVID-19 Border Control) Order 2020* (NSW) cl 5 (**CB bk 3 vol 3 Tab 184,** 2239); *Public Health Direction – Border Restrictions (No. 9)* (Qld) Pt 2 (as was true of *Public Health Direction – Border Restrictions (No. 8)* (Qld) (**CB bk 3 vol 2 Tab 149,** 1950)); *Emergency Management (Cross Border Travel No 10) (COVID-19) Direction 2020* (SA) ss 5, 6 and 7 (as was true of *Emergency Management (Cross Border Travel No 10) (COVID-19) Direction 2020* (SA) (**CB bk 3 vol 2 Tab 166,** 2106)); *Directions in Relation to Persons Arriving in Tasmania from Affected Regions and Premises* (Tas) (as was true of the earlier iteration of this direction made 17 July 2020 (**CB bk 3 vol 2 Tab 157,** 2038)); *Public Health (COVID-19 Interstate Travellers) Emergency Direction 2020* (ACT) cl 1 (**CB bk 3 vol 3 Tab 189,** 2266); *Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No 5)* (ACT) (**CB bk 3 vol 3 Tab 188,** 2261); *COVID-19 Directions (No. 45) 2020 – Directions for Territory Border Restrictions* (NT) dir 13(b) (**CB bk 3 vol 3 Tab 182,** 2223).

81. The differences between the risk posed by travellers from different jurisdictions means that it would be misleading to make findings in terms that fail to distinguish between jurisdictions. Indeed, it would be obviously illogical to find (as Respondent Finding [27] implies (**CB bk 1 Tab 5**, 88)) that the existence of community transmission in Victoria means that there is a "high" probability of importation of COVID-19 into Western Australia if travellers were permitted to enter from, for example, South Australia or Tasmania. As noted above, all of the experts (including Dr Robertson) accepted that this was not the case.

Practicable measures to reduce the risk

82. The third issue is whether there are practicable measures available to Western Australia to reduce an increased risk of an outbreak of COVID-19 occurring in Western Australia as a result of the arrival of travellers from particular jurisdictions (issues 5, 6 and 7 in the list of issues in dispute filed on 24 July 2020).

NCT jurisdictions

83. The Court should find (**Ultimate Finding 6**):

> If Western Australia wished to do so, it would be reasonably practicable for it to adopt measures (including a requirement for all travellers to wear masks on the plane) to reduce the risk presented by persons arriving from any jurisdiction that has had no reported cases of community transmission from an unknown source in the past 28 days, but the risk posed by such persons is so small that no such measures would be warranted.

84. While it would be practicable to reduce the risk posed by travellers from NCT jurisdictions, Dr Robertson agreed that the risk on public health grounds of people travelling to Western Australia from NCT jurisdictions was already so small that Western Australia would not choose to do so (T90.45-47, 91.1-4).

New South Wales

85. The Court should find (**Ultimate Finding 7**):

> If Western Australia wished to do so, it would be reasonably practicable for it to reduce the risk presented by persons arriving from New South Wales by adopting any or all of the following measures, which would have the effect on the risk identified in Ultimate Finding 4 that is set out below:
>
> (a) symptom screening on departure and arrival and a requirement for all travellers to wear masks on the plane — the best estimate is that, each month, there would then be, on average, a 1.74% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales;[18]
>
> (b) the measures in (a), plus testing of arrivals on days 3 and 12 after arrival in Western Australia and contact tracing between tests for arrivals who test positive or become symptomatic — the best estimate is that, each month, there would then

[18] This equates to a best estimate that, on average, it would take 4.8 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

be, on average, a 1.13% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales;[19]

(c) the measures in (a) and (b), plus a requirement for all new arrivals to wear masks for the first 14 days after arrival in Western Australia — the best estimate is that, each month, there would then be, on average, a 0.26% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales;[20]

(d) the measures in (a), plus a mandatory 14 day quarantine for all new arrivals in Western Australia — the best estimate is that, each month, there would then be, on average, a 0.18% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales.[21]

86. That finding is supported by the updated calculations for New South Wales provided by Professor Blakely during the course of the trial [**Ex 7**]. For the reasons given in paragraphs 70–74 above in relation to Professor Blakely's other calculations, the Court should make findings in terms of the probabilities identified by Professor Blakely.

87. The evidence clearly demonstrates that the measures identified above are all recognised and practicable means of reducing the risk of infection. This was accepted by Dr Robertson (T91.14, 105.16-23). It is also demonstrated by the fact that almost all of the measures have each already been implemented either by Western Australia or another jurisdiction. For example:

87.1. Western Australia introduced a requirement for certain new arrivals to wear masks in its 9 July amendments to the Directions (**CB bk 3 vol 2 Tab 124,** 1792).

87.2. Western Australia introduced a requirement for certain new arrivals to be tested (SSC [126]-[127] [**CB bk 2 Tab 45,** 803]).

87.3. Dr Robertson accepted that, if there were isolated cases of reintroduction in Western Australia, then Western Australia would also use contact tracing and quarantining measures in response to those cases. He noted that Western Australia "maintain[s] the infrastructure to do exactly that" (T84.22-27). He also accepted that New South Wales had recently made good progress in managing community transmission through contact tracing and quarantining measures (T84.14-20).

87.4. Western Australia currently maintains hotel quarantine arrangements for international arrivals and certain categories of travellers allowed to enter under exemptions to the Directions (T82.10-22 (Robertson); SSC [130]-[137] [**CB bk 2 Tab 45,** 804-805]

88. Dr Robertson also accepted that each of these measures, or a slight variant of them, had been implemented in Western Australia (T105.8-14). Because of the clear evidence that these measures are available to Western Australia and are practicable steps for

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19 This equates to a best estimate that, on average, it would take 7.4 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

20 This equates to a best estimate that, on average, it would take 32.2 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

21 This equates to a best estimate that, on average, it would take 46.7 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

Western Australia to take, the Court should not make the finding sought by Queensland in [45A] of its findings of fact document filed on 7 July 2020.

89. The evidence also demonstrates that each of the measures referred to above would be effective to reduce the probability that a person arriving in Western Australia from New South Wales would cause an outbreak:

89.1. As noted above, Dr Robertson accepted that all of the measures identified above were recognised means of reducing the risk of infection (T105.19).

89.2. Associate Professor Lokuge accepted that a robust surveillance system, including upstream and downstream contact tracing, would be an effective tool to manage the risk of occasional reintroduction of the virus into a jurisdiction where it had been eliminated or numbers were very low (T165.19-24, T166.6-14), and that Western Australia has such a system (T165.26-30, T166.19). She also accepted that, outside the recent Victorian experience, hotel quarantining in Australia has largely been very effective (T144.4-8).

89.3. Professor Collignon's evidence also supported the effectiveness of the measures identified above.[22]

90. Further, the effectiveness of the measures identified above is demonstrated by the calculations conducted by Professor Blakely (which were based on the Wilson et al model). Those calculations show that the implementation of the measures for new arrivals would be expected to reduce the risk of an outbreak of COVID-19 occurring in Western Australia as a result of a person arriving from New South Wales. Professor Blakely noted in his oral evidence that the effect of a requirement for new arrivals to wear masks was particularly noticeable (T383.9-15).

Hotspots

91. The Court should find (**Ultimate Finding 8**):

> For each of the combinations of measures identified in Ultimate Finding 7, it would be reasonably practicable for Western Australia to reduce the probability that a person arriving from New South Wales would cause an outbreak of COVID-19 in Western Australia by banning people who had been present in geographical area within New South Wales (a **hotspot**) identified by the Western Australian Government. The specification of such a hotspot would reduce any pre-existing risk in proportion to the number of cases of community transmission in New South Wales that are located within the hotspot.

92. The evidence of the expert witnesses demonstrated that, although an approach to border closures that relied on identifying hotspots in New South Wales would not ***eliminate*** the risk of infected people travelling from New South Wales to Western Australia, it would be effective to reduce (and perhaps dramatically reduce) the number of infected people arriving in that State, and the risk of an outbreak occurring in that

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22 Collignon Report at [22]-[23] and [41]-[44] (**CB bk 2 Tab 38**); Professor Collignon's comments on [4.1.1] of the Robertson Report (**CB bk 2 Tab 39,** 590); Professor Collignon's comments on [2.2.6], [2.3.3]-[2.3.5], [2.3.7], [2.3.9.1.6] and [2.3.9.2.2] of the Lokuge Report (**CB bk 2 Tab 39,** 591-593).

State as a result of a person arriving from new South Wales — particularly when used in combination with the measures identified in Ultimate Finding 7 above.

93. For example, Dr Robertson accepted that a ban on travellers who had been in greater Sydney in the past 14 days would significantly reduce the risk of an infected traveller from New South Wales arriving in Western Australia (T113.17-20). Indeed, he accepted that a ban on travellers who had been in the greater Melbourne area in the past 14 days would significantly reduce the number of infected travellers arriving in Western Australia (T113.10).

94. Several witnesses gave evidence that there can be a lag time in identifying an area where infection has taken hold (T120.16-26 (Robertson), T179.24-30 (Lokuge), T223.11-32 (Senanayake)). However, while this was said to reduce the effectiveness of an approach that relied on hotspots, no witness denied that banning travellers from identified hotspots would reduce the risk of infected persons arriving in Western Australia. Further, Dr Robertson acknowledged that this limitation of hotspots could be addressed, to some extent, by making the hotspot larger than the particular area in which cases of community transmission have been identified (for example, defining the hotspot as greater Sydney, as the Northern Territory (and now Queensland) has done, rather than identifying only particular local government areas within greater Sydney) (T120.25-38). No witness suggested this, or anything else, made reliance on hotspots impracticable.

95. While it is true that there can be a lag in identifying an area where infection has taken hold, it is also important to recognise that, during the first week or two after a case is introduced into an area, any outbreak is likely to remain small. The evidence demonstrated that, when a cluster of cases of COVID-19 develops, the number of cases in the cluster can be expected to double over a period of five to six days (T234.4-7 (Senanayake); T234.4-7 (Senanayake); T350.23-24 (Collignon); T406.31-35 (Blakely)). When figures are very low in the early stages of an outbreak, even accounting for exponential growth in the first week or two, the figures will be quite small for the few initial periods of replication (T233.42-47, 234.1-2 (Senanayake)). The result of this is that there will be several cycles each of 4-6 days in length where a hotspot is visible, but the number of cases is still small (T234.15-19 (Senanayake)). Another feature of COVID-19 is that outbreaks tend to emerge in clusters (T234.26-27 (Senanayake)), which are geographically identifiable (T234.29-32 (Senanayake)). It follows that, although a hotspot might not be effective in capturing every case of community transmission within a State, it will potentially be effective in capturing a large number of cases identified by reference to a geographic cluster in an early stage (T234.34-43 (Senanayake)). This is particularly so where a cluster appears in a part of a State that is geographically separate from other areas. In such a case, it may be sufficient to ban travellers from a particular area (for example, Cairns) rather than the whole State — acknowledging that it will be necessary to keep the situation under investigation (T116.1-15 (Robertson)).

96. Both Associate Professor Senanayake and Professor Blakely gave evidence that the extent to which banning travellers who have been in identified hotspots in the past 14 days will reduce the risk of an infected person arriving in Western Australia from a particular jurisdiction is ***proportionate*** to the extent to which the geographical area of

the hotspot includes the cases of community transmission in that jurisdiction. Thus, if a hotspot covers 90% of the cases of the cases of community transmission in the jurisdiction, then the risk is reduced by 90%: T235.11-27 (Senanayake); T235.29-33 (Blakely), see also 392.19–26 (Blakely). That evidence provides a clear basis in the evidence for the Court to make the finding identified in Ultimate Finding 8. Further, if a 90% reduction in risk is achieved, that is a dramatic reduction in risk, notwithstanding that some cases are not captured. Particularly in situations where the initial risk is small (as is the case at present with travellers from New South Wales), any risk that remains after a hotspot prevents travel by the overwhelming majority of infected cases will be negligible.

97. A significant focus of the respondents' cross-examination was directed to establishing that an approach to border closures that identified hotspots, rather than closing borders to entire States or Territories, would be less effective than the Directions in preventing the spread of COVID-19, or would fail to eliminate all risks. In a similar vein, Associate Professor Lokuge gave evidence that a hotspot approach was not the "optimal" form of border measures (T188.33-38). However, neither of those propositions is likely to be of assistance to the High Court. Nor should the fact that hotspots may not ***completely eliminate*** the risk preclude the Court from finding, consistently with the evidence, that the specification of hotspots, in combination with other measures, would be an effective measure to reduce the risk of an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales if the Directions were removed. Indeed, the relative contribution to risk reduction of border closure (with exemptions) against a hotspot would depend on the size of the hotspot and the existence of exemptions, and therefore cannot be determined in the abstract: T394.8-395.40.

Findings sought by the respondents and Queensland

98. The Court should not make findings of fact sought by the respondents in [43]-[47] of their findings of fact document (**CB bk 1 Tab 5**). Nor should it make the findings sought by Queensland in [44]-[46] of its document (**CB bk 1 Tab 14**).

99. Respondent's Findings at [43]-[44] (**CB bk 1 Tab 5**), and Queensland's Finding at [44], fail to reflect the fact that Western Australia is not the only area of Australia that has had no known community transmission within the last 28 days. Both findings are expressed at such a high level of generality that they obscure the true position, and will not be of assistance to the High Court (see similarly paragraphs 79–81 above).

100. Respondent's Findings at [45]-[47], and Queensland's Findings at [45] and [46], again ignore that Western Australia is not the only area of Australia that has had no known community transmission within the last 28 days. Further, they are contrary to the fact that there are reasonably practicable measures available to Western Australia that would reduce the risk of an outbreak caused by travellers arriving in Western Australia from New South Wales (see Ultimate Finding 7) and the fact that an approach of banning

travellers from identified hotspots in New South Wales would reduce that risk further still (see Ultimate Finding 8).

Possible impact of a single case of COVID-19

101. As explained in paragraphs 26–28 above, much of the focus of the Commonwealth's evidence is upon the probability of an outbreak, rather than its impact. The impact is the same regardless of whether it arises from the chance of an outbreak that Western Australia already tolerates or from any increased chance that results from the removal of the Directions. Any difference as to risk — a function of probability and potential impact — results from any difference in probability, not any difference in impact, resulting from removal of the Directions.

102. The Court should find (**Ultimate Finding 9**):

> It is possible that a single case of COVID-19 may lead to severe consequences. However, it will not necessarily do so. That is because, amongst other things, Western Australia maintains surveillance, testing and response systems that are capable of detecting and responding to outbreaks.

103. That finding is supported by the evidence of all of the expert witnesses, and especially the evidence of Dr Robertson.

104. In their Joint Report, all of the experts agreed that the importation of a single case of COVID-19 into Western Australia ***may***, but will ***not necessarily***, lead to uncontrolled community transmission.[23] Professor Blakely helpfully summarised the factors that would determine whether an incursion would cause a large outbreak as follows: (1) "chance"; (2) the "[d]egree of physical distancing, limited group size, and other societal changes in place in the destination state or territory"; (3) "[w]hether a superspreader is one of the initially affected people, and asymptomatic (overlaps with chance)"; (4) "[t]he adequacy of surveillance systems, contact tracing and testing"; and (5) "[t]he rapidity of the destination state response, e.g. rapid testing through to rapid zonal lockdowns".[24]

105. In respect of the second factor above, the evidence indicates that Western Australia has relaxed its limits on group gatherings and social distancing requirements,[25] and that several experts consider that relaxation to be imprudent.[26] However, there is nothing to suggest that those measures could not be reintroduced swiftly, if Western Australia considered it necessary to do so.[27]

106. Of the other measures that are within Western Australia's control, the evidence indicates that Western Australia has robust surveillance, testing and response systems that are capable of detecting and responding to outbreaks.

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23 **CB bk 2 Tab 43**, [2] (each expert) (CB 701-702).

24 **CB bk 2 Tab 43**, [2] (Blakely) (CB 701).

25 **CB bk 2 Tab 43**, [2] (Lokuge) (CB 701); **Tab 35**, Lokuge Report [2.3.10.5] (CB 461).

26 See, eg, **CB bk 2 Tab 43**, [2] (Lokuge) (CB 701); **Tab 42**, Lokuge Supplementary Report [16] (CB 687); **Tab 38**, Collignon Report [48] and [50] (CB 538-540); **Tab 35**, Lokuge Report [2.3.10.5] and [4.3.4]-[4.3.5] (CB 461, 474).

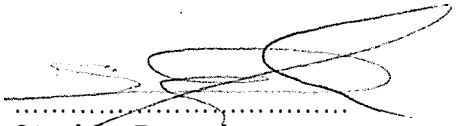
27 See, eg, **CB bk 2 Tab 34**, Lokuge Report [3.2.21] and [4.3.6] (CB 471, 475).

107. *First*, in their Joint Report, the experts agreed that all States and Territories have strong surveillance and testing systems.[28] In their oral evidence, both Dr Robertson and Associate Professor Lokuge accepted that Western Australia had such systems in place (T83.39-43; T165.19-30). That remains the case, even if some sub-groups of the population are less likely than others to make use of those testing systems.[29]

108. *Second*, the evidence indicates that Western Australia would deploy those surveillance and testing systems, and its response systems, in the event of an outbreak. In his oral evidence, Dr Robertson explained that the measures available to Western Australia to stop the spread of COVID-19 include "case identification, contact tracing, the public health measures, isolation, quarantine ... and depending on the outbreak ... further measures ... at a whole of government level" (T83.25-27). Dr Robertson accepted that if isolated cases of COVID-19 were imported into Western Australia, Western Australia would respond to that importation through the use of those measures (T84.22-27). Dr Robertson also accepted that if Western Australia was able to detect cases early, it had a good prospect of controlling any outbreak through contact tracing, isolation and quarantine measures (T83.29-37). Furthermore, Associate Professor Lokuge's academic work explains the capacity for contract tracing (if robustly implemented) to control an outbreak even if COVID-19 is reintroduced into a society that is relaxing restrictions (which she accepted includes Western Australia).[30]

109. *Third*, the evidence indicates that Western Australia has successfully controlled outbreaks of COVID-19 over time. As explained in paragraph 40 above, through the application of Western Australia's surveillance, testing and response systems, Western Australia identified that three hotel quarantine workers had been infected with COVID-19, and averted the further spread of disease (T83.13-25).

Dated: 31 July 2020



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28 Although they noted that this matter is "subject to change over time": **CB bk 2 Tab 43**, [1.1] (agreed response) (CB 699). See also T88.32-34 (Senanayake); T89.7-11 (Blakely).

29 See, eg, **CB bk 2 Tab 43**, [2] (Robertson) and Lokuge) (CB 701-702).

30 Commonwealth Supplementary Bundle, Tab 4; see also T166.6-10.

Annexure – Ultimate facts

1. There is a non-trivial risk of both the importation of COVID-19 into Western Australia, and subsequent community transmission of COVID-19 within Western Australia, even if the Directions are retained, because of:

   (a) the exemptions in the Directions, some of which do not impose any quarantine requirements in relation to persons entering Western Australia; and

   (b) the risk that COVID-19 will spread in the event of any failure in quarantine arrangements for returning international travellers and others.

2. If persons from any jurisdiction that has had no reported cases of community transmission from an unknown source in the past 28 days were permitted to travel to Western Australia, the risk of an outbreak of COVID-19 occurring in Western Australia as a result of such a person arriving in Western Australia would be extremely low or negligible.

3. There is no public health reason for Western Australia to prevent persons from any jurisdiction that has had no reported cases of community transmission from an unknown source in the past 28 days from travelling to Western Australia.

4. If people from New South Wales were permitted to travel to Western Australia (assuming there would be approximately 35,000 such travellers per month (being half of pre-COVID-19 levels), and 1 case of community transmission per day in New South Wales from an unknown source — which is roughly equivalent to the situation in New South Wales as at 23 July 2020), the best estimate is that:

   (a) there is a 4% chance that 1 infected passenger would arrive in Western Australia from New South Wales per month; and

   (b) each month there is a 3.62% chance that such a passenger would cause an outbreak of COVID-19 in Western Australia.[31]

5. If people from Victoria (including from locations subject to "stay-at-home" directions) were permitted to travel to Western Australia (assuming there would be approximately 44,000 such travellers per month (being half of pre-COVID-19 levels), and 316 cases of community transmission per day in Victoria from an unknown source — which is roughly equivalent to the situation in Victoria as at 27 July 2020), the best estimate is that:

   (a) each month, more than 21 infected passengers would arrive in Western Australia from Victoria; and

   (b) each month there is close to a 100% chance that there would be an outbreak of COVID-19 in Western Australia.

6. If Western Australia wished to do so, it would be reasonably practicable for it to adopt measures (including a requirement for all travellers to wear masks on the plane) to reduce the risk presented by persons arriving from any jurisdiction that has had no reported cases of community transmission from an unknown source in the past 28 days, but the risk posed by such persons is so small that no such measures would be warranted.

7. If Western Australia wished to do so, it would be reasonably practicable for it to reduce the risk presented by persons arriving from New South Wales by adopting any or all of the

[31] This equates to a best estimate that, on average, it would take 2.3 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

following measures, which would have the effect on the risk identified in Ultimate Finding 4 that is set out below:

(a) symptom screening on departure and arrival and a requirement for all travellers to wear masks on the plane — the best estimate is that, each month, there would then be, on average, a 1.74% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales;[32]

(b) the measures in (a), plus testing of arrivals on days 3 and 12 after arrival in Western Australia and contact tracing between tests for arrivals who test positive or become symptomatic — the best estimate is that, each month, there would then be, on average, a 1.13% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales;[33]

(c) the measures in (a) and (b), plus a requirement for all new arrivals to wear masks for the first 14 days after arrival in Western Australia — the best estimate is that, each month, there would then be, on average, a 0.26% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales;[34]

(d) the measures in (a), plus a mandatory 14 day quarantine for all new arrivals in Western Australia — the best estimate is that, each month, there would then be, on average, a 0.18% chance of an outbreak of COVID-19 in Western Australia from a person arriving from New South Wales.[35]

8. For each of the combinations of measures identified in Ultimate Finding 7, it would be reasonably practicable for Western Australia to reduce the probability that a person arriving from New South Wales would cause an outbreak of COVID-19 in Western Australia by banning people who had been present in geographical area within New South Wales (a **hotspot**) identified by the Western Australian Government. The specification of such a hotspot would reduce any pre-existing risk in proportion to the number of cases of community transmission in New South Wales that are located within the hotspot.

9. It is possible that a single case of COVID-19 may lead to severe consequences. However, it will not necessarily do so. That is because, amongst other things, Western Australia maintains surveillance, testing and response systems that are capable of detecting and responding to outbreaks.

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32 This equates to a best estimate that, on average, it would take 4.8 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

33 This equates to a best estimate that, on average, it would take 7.4 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

34 This equates to a best estimate that, on average, it would take 32.2 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.

35 This equates to a best estimate that, on average, it would take 46.7 years until there was an outbreak of COVID-19 in Western Australia as a result of a person arriving from New South Wales.