HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M104 of 2020

BETWEEN: **JULIAN KINGSFORD GERNER**
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

INTERVENER'S SUBMISSIONS
(NORTHERN TERRITORY OF AUSTRALIA)

Part I: Certification

1. These submissions are in a form which is suitable for publication on the internet.

Part II: Intervention

2. The Northern Territory of Australia (**Territory**) intervenes pursuant to s78A(1) of the *Judiciary Act 1903* (Cth). Leave of the Court is not required.

Part III: Argument

A SUMMARY

3. The Plaintiffs contend that there exists a stand-alone right to freedom of movement implied in the Constitution, being a freedom "to move within the State…from time to time, …for any reason, free from arbitrary restriction of movement" (**General Freedom of Movement**).[1]

4. Neither authority nor principle supports the drawing of a general implication in those broad terms.

[1] Amended Statement of Claim dated 20 October 2020 (**ASOC**), paragraph [23]. See also PS[3].

5. The Plaintiffs assert three alternative bases for the General Freedom of Movement, being:

(a) the Constitution's federal structure: PS[24]-[30], [37]-[47];
(b) the system of representative and responsible government and the implied freedom of political communication: PS[48]-[59]; and
(c) section 92 of the Constitution: PS[60]-[61].

6. Those matters do not provide a secure basis for the recognition of an implied freedom of movement "*for any reason*".

7. As to the first two bases, the General Freedom of Movement is not "logically or practically necessary" for the preservation of those constitutional structures. It would protect much movement with no relation to federal or political purposes.

8. As to the third matter, s92 protects *inter*state freedom of trade, commerce and intercourse. It does not confer individual rights to *intra*state travel from any part of the State to its border in order to engage in those activities. In any event, s92 cannot support the implication of the General Freedom of Movement, which is not limited to intrastate movement engaged in to facilitate interstate trade, commerce and intercourse.

9. The demurrer should be allowed on that basis. It is unnecessary for the Court to determine whether some other, more limited, freedom of movement is otherwise implied in the Constitution's text and structure.

B IMPLICATIONS MUST BE NECESSARY AND LIMITED

10. The implication of the General Freedom of Movement is inconsistent with the absence in the Australian Constitution of any bill of rights which guarantees general rights and freedoms. As Mason CJ explained in *Australian Capital Television Pty Ltd v Commonwealth*[2] (emphasis added):

> The adoption by the framers of the Constitution of the principle of responsible government was perhaps the major reason for their disinclination to incorporate in the Constitution *comprehensive guarantees* of individual rights. They refused to adopt a counterpart to the Fourteenth Amendment to the Constitution of the United States. Sir Owen Dixon said:
>
> > [they] were not prepared to place fetters upon legislative action, except and in so far as might be necessary for the purpose of

[2] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 144 per Brennan J at 135-6; [1992] HCA 45.

> distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.
>
> ...
>
> In light of this well recognized background, it is difficult, if not impossible, to establish a foundation for the implication of *general guarantees* of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

11. That does not preclude the recognition of implied freedoms which act as a restraint on legislative and executive power. But it does mean a rigorous criterion is applied to test any new implication.[3]

12. Because the ultimate foundation for the Constitution is the acceptance of its text and structure by the Australian people,[4] any implication must be "inherent" in that text and structure.[5] It must be "securely based".[6]

13. For structural implications, that has two related consequences. Both militate against the implication of the General Freedom of Movement.

14. First, an implication must *necessary,* in the sense that it is "logically or practically necessary" to give effect to the relevant structure established by the Constitution.[7] It cannot be drawn from an a priori assumption of what would be a desirable state of Constitutional affairs.[8] Similarly, it cannot pursue concepts and imperatives

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[3] *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [149] per Kirby J; [2007] HCA 29.

[4] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [83] per Kirby J; [2008] HCA 601.

[5] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 567 per curiam; [1997] HCA 25.

[6] *ACTV* (1992) 177 CLR 106 at 134-5 per Mason CJ; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [389] per Hayne J; [2005] HCA 44; *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [318] per Gordon J; [2015] HCA 34.

[7] *Burns v Corbett* (2018) 265 CLR 304 at [47] per Kiefel CJ, Bell and Keane JJ, [94] per Gageler J, [127] per Nettle J, [175] per Gordon J; [2018] HCA 15. See also *Spence v Queensland* (2019) 15 93 ALJR 643 at [298] per Edelman J and the authorities cited therein; [2019] HCA 15.

[8] *APLA* (2005) 224 CLR 322 at [389] per Hayne J.

extraneous to the Constitution's text and structure, such as notions of a free and democratic society.[9]

15. Secondly, any implication must be *limited*. It can extend only so far as is necessary to give effect to the textual and structural features which support it.[10]

C NO FREE-STANDING IMPLIED FREEDOM OF MOVEMENT

16. A "free-standing"[11] General Freedom of Movement is not necessary in the requisite sense and authority points positively against its existence.

17. In *Higgins v Commonwealth*[12], Finn J dismissed the notion of a free-standing and general implied freedom of movement. His Honour said at 534G-535A:

> The applicant, wisely, has not sought to assert an implied freedom of a *general and unlimited character*. The constitutional justification for such a freedom is distinctly lacking. It is inconceivable in my view that the Constitution implicitly puts at risk (subject to considerations of proportionality, etc) a significant range of routine Commonwealth and State laws merely because in particular ways, they limit either freedom of movement or else the making of choices within that freedom. I instance criminal laws authorising or requiring incarceration, curfew provisions, some forms of town planning and road traffic legislation, and statutes which exclude or regulate entry on real property, public transport etc

18. The passage in which that statement appears was cited with approval by Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF*.[13]

19. This Court has also dismissed the notion of a general freedom of movement. In *Buck v Bavone*[14], Murphy J identified an "almost absolute" freedom to move across State borders which arose, not from s92, but from a "fundamental implication of the Constitution." In *Miller v TCN Nine Pty Ltd*[15], his Honour suggested that freedom extended to movement "not only between the States and

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[9] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (***Theophanus***) at 144 per Brennan J, 193-4 per Dawson J and 198 per McHugh J; [1994] HCA 46. See also the authorities in paragraph [21] below.

[10] *Re Gallagher* (2018) 263 CLR 460 at [24] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ and the authorities cited therein; [2018] HCA 17. See also *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 168-9 per Brennan CJ, 182-3 per Dawson J, and 231 per McHugh J; [1996] HCA 48.

[11] ASOC, paragraph [23], particular (i).

[12] *Higgins v Commonwealth* (1998) 79 FCR 528; [1998] FCA 39.

[13] *AMS v AIF* (1999) 199 CLR 160 at [44]; [1999] HCA 26.

[14] *Buck v Bavone* (1996) 135 CLR 110 at 137; [1976] HCA 24.

[15] *Miller v TCN Nine Pty Ltd* (1986) 161 CLR 556 at 581-2; [1986] HCA 60.

the States and the Territories but in and between every part of the Commonwealth." However, that implication was dismissed by a majority of the Court.[16]

20. In *Kruger v Commonwealth* (***Kruger***)[17], the plaintiffs asserted "a constitutional right to, and immunity from legislative and executive restrictions on, freedom of movement for political, cultural and familial purposes." The Court did not recognise a freedom in those broad terms. Brennan CJ said that "[n]o such right has hitherto been held to be implied in the Constitution and *no textual or structural foundation for the implication has been demonstrated in this case*."[18] Toohey, Gaudron and McHugh JJ suggested a freedom of movement might exist, but not a general freedom.[19] Their Honours supported the existence of a freedom limited to movement for some federal or political purpose. It is implicit in the judgments of Dawson and McHugh JJ, who rejected the application of any freedom to self-governing territories without political franchise, that there could be no "free-standing" freedom independent of the system of representative government disclosed in the Constitution's text.[20]

21. Finally, the Court has rejected the idea that any general freedom of movement arises from abstract notions such as a "free" or "democratic" society (cf. PS[44]). Murphy J proposed a freedom on that basis in *McGraw Inds (Aust) Pty Ltd v Smith*.[21] But that could not survive the clarification in *Lange v Australian Broadcasting Corporation*[22] that constitutional implications are recognized "only to the extent that the text and structure of the Constitution" establish them. Relying on that restatement, Dawson J in *Kruger* dismissed the idea that "the nature of our society" could be the source of a constitutional implication of free

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[16] Ibid at 579 per Mason J, 615 per Brennan J, and 636 per Dawson J (Wilson J agreeing at 592). See also Gibbs CJ at 569 and Deane J at 626.

[17] *Kruger* (1997) 190 CLR 1 at 10 (NHM Forsyth QC in argument).

[18] Ibid at 45. The plaintiffs in that case raised the first two structural bases relied on by the Plaintiffs in these proceedings, but not s92 of the Constitution: at 10-11 (NHM Forsyth QC in argument).

[19] Ibid at 91-2 per Toohey J, 115-6 per Gaudron J and 142 per McHugh J.

[20] Ibid at 69-70 per Dawson J and 142 per McHugh J.

[21] *McGraw Inds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; [1979] HCA 19.

[22] *Lange* (1997) 189 CLR 520 at 567 per curiam.

movement.[23] Similarly, Gummow J said that, after *Lange* and *McGinty*, earlier decisions were not authority for any proposition of that width.[24]

22. The rejection of any "free-standing" freedom of movement coheres with the Court's rejection of any "free-standing" freedom of association.

23. Following the recognition of the implied freedom of political communication, it was suggested by some that the Constitution might require other implications, principally a freedom of movement and freedom of association.[25] However, the notion of a "free-standing" freedom of association was put to rest in *Mullholland v Australian Electoral Commission*.[26] Gummow and Hayne JJ said of the freedom of association asserted in that case:[27]

> There is no such "free-standing" right to be implied from the Constitution. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lane v Australian Broadcasting Corp* and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration later in these reasons of *Lange* and its application to the present case.

24. Heydon J agreed.[28] Gleeson CJ expressed a similar opinion.[29] Callinan J said such a freedom "[fell] short of being necessary."[30] Kirby J said the freedom was required for the same reasons as the implied freedom of political communication.[31] Only McHugh J left open the existence of a free-standing freedom of association, but with uncertainty as to its scope.[32]

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[23] *Kruger* (1997) 190 CLR 1 at 69. See also *ACTV* (1992) 177 CLR 106 at 186 per Dawson J; *Theophanous* (1994) 182 CLR 104 at 193 per Dawson J; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 362 per Dawson J (***Cunliffe***); [1994] HCA 44.

[24] *Kruger* (1997) 190 CLR 1 at 156.

[25] See the divergent views cited in *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at [46], fn 103 per French CJ; [2014] HCA 35.

[26] *Mullholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mullholland***); [2004] HCA 41.

[27] Ibid at [134].

[28] Ibid at [347].

[29] Ibid at [42].

[30] Ibid at [335].

[31] Ibid at [286] per Kirby J.

[32] Ibid at [114] per McHugh J.

25. Since *Mullholland*, the Court has confirmed by majority on two occasions that no "free-standing" freedom of association exists. In *Wainohou v New South Wales*[33], Gummow, Hayne and Bell JJ cited the passage from *Mullholland* set out above and said:

> Any freedom of association implied by the Constitution would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.[34]

26. French CJ and Kiefel J agreed.[35] Heydon J rejected the existence of any implied freedom of association.[36]

27. That position was confirmed in *Tajjour v New South Wales.*[37] Hayne J said the Court had decided "more than once" that no free-standing freedom of association is to be implied from the Constitution, citing the decisions in *Mullholland* and *Wainohou.*[38] Gageler J reached the same conclusion, citing the same passages.[39] Keane J said that association may be, and often is, an aspect of political communication, but rejected any suggestion that "the Constitution guarantees a right of association free from legislative intervention *separately from the implication to be derived from ss7, 24, 64 and 128 of the Constitution.*"[40] Crennan, Kiefel and Bell JJ did not need to consider the question. French CJ left the question strictly undecided, but noted that the Court had rejected the notion of a free-standing freedom in *Wainohou.*[41]

28. As a consequence, the Court has now, on several occasions, determined that there is no free-standing freedom of association separate from any implication to be derived from ss7, 24, 64 and 128 of the Constitution. The same result should obtain for any implied freedom of movement.

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[33] *Wainohou v New South Wales* (2011) 243 CLR 181 (***Wainohou***) at [1 12]; [2011] HCA 24.

[34] See also *South Australia v Totani* (2010) 242 CLR 1 at [92] per Gummow J; [2010] HCA 39.

[35] Ibid at [72].

[36] Ibid at [186] per Heydon J.

[37] *Tajjour* (2014) 254 CLR 508.

[38] Ibid at [95].

[39] Ibid at [143].

[40] Ibid at [242]. See also [243]-[244].

[41] Ibid at [46].

D THE FEDERAL STRUCTURE

29. The General Freedom of Movement is also not logically or practically necessary for the maintenance of the Constitution's federal structure. That is borne out by the cases referred to by the Plaintiffs.

30. No member of the Court in *R v Smithers; Ex parte Benson*[42] (***Smithers***) endorsed the implication of a general freedom of movement. The case concerned laws criminalising certain *inter*state (not *intra*state) movement. Insofar as a freedom was identified independent of s92, it was a limited freedom to access and transit through States for "federal purposes" and to cross State boundaries. Griffiths CJ adopted the view of Miller J in *Crandall v State of Nevada* (***Crandall***)[43] that federal officers had a right to free access to, and transit through, States for *federal purposes* and that citizens also had the "correlative rights" to go to the seat of government to interact with the federal government and to access its organs.[44] Similarly, Barton J said "the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of *access to the institutions, and of due participation in the activities of the nation*."[45]

31. Isaacs J based his decision on s92 and did not identify any implied freedom of movement.[46] Similarly, Higgins J considered s92 was sufficient to dispose of the proceeding.[47] His Honour left undecided the extent to which States could regulate matters "within their own borders".[48]

32. In the result, only Griffiths CJ and Barton J supported the existence of any implied freedom of movement. Both formulations of the freedom were essentially directed to movement for "federal purposes" and across State borders. Neither contemplated a freedom of movement within the borders of a State "for any reason" whatsoever.

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[42] *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (***Smithers***); [1912] HCA 96.

[43] *Crandall v Nevada* (1868) 6 Wall 35.

[44] *Smithers* (1912) 16 CLR 99 at 108-9.

[45] Ibid at 109-10.

[46] Ibid at 117.

[47] Ibid at 117.

[48] Ibid at 119.

33. A similar result obtained in *Pioneer Express Pty Ltd v Hotchkiss*[49] (***Pioneer Express***). That case concerned State motor vehicle licensing legislation which had the effect of preventing, without a licence, the transport of persons across State borders for reward. The Court focused attention on s92 of the Constitution.

34. However, as the bus route travelled through Canberra, three judges also considered whether the legislation offended an implied freedom to travel *to the seat of government*. Dixon CJ suggested the existence of a national government implied "an absence of State legislative power to forbid restrain or impede *access to [the capital]*".[50] However, the laws in question did not "invade" any such freedom and his Honour cast doubt on the place which the "very general" principles expounded in *Crandall* had in Australia's different constitutional system.[51] Taylor J said that "some such implication" was justifiable, but that the case did not present the occasion for considering that implication.[52] Menzies J was against any implied freedom.[53]

35. Therefore, as with *Smithers*, no member of the Court in *Pioneer Express* endorsed a general freedom of intrastate movement. Of the two members who supported some kind of freedom, both confined it to accessing the centre of the national government. Neither endorsed a freedom of movement within State borders "for any reason" whatsoever.

36. The relevant parts of *Smithers* and *Pioneer Express* have been cited on several occasions, but only for that *limited* proposition.[54] In *Theophanous v Herald & Weekly Times*[55], McHugh J said members of the Court in *Smithers* recognised that the people of the Commonwealth have an implied right of access through the States "*for federal purposes*". His Honour referred to that limited freedom for the purpose of rejecting, by analogy, "a *general* right of freedom of communication in

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[49] *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 (***Pioneer Express***).

[50] Ibid at 550.

[51] Ibid.

[52] Ibid at 560.

[53] Ibid at 566.

[54] See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (***Nationwide News***) at 73-4 per Brennan J; *ACTV* (1992) 177 CLR 106 at 213-4; *Kruger* (1997) 190 CLR 1 at 45, 68-70, 88-93, 116, 142-4, 156-7; *Higgins v Commonwealth* (1998) 79 FCR 528 at 534-6 per Finn J.

[55] *Theophanous* (1994) 182 CLR 104 at 206.

the Constitution…"[56] Similarly, in *Australian Capital Television Pty Ltd v Commonwealth*[57], McHugh J referred to *Smithers* for the limited proposition that "the people of the Commonwealth have an implied right of access through the States *for federal purposes* which the States cannot impede except on grounds of necessity."[58] In *AMS v AIF*[59], Gleeson CJ, McHugh and Gummow JJ endorsed the view that the existence of a national capital meant "an absence of State legislative power to restrain or impeded access to it." However, because the case involved movement between Perth and Darwin, that limited freedom had no bearing on "this case".

10 37. As such, *Smithers* and *Pioneer Express* are not consistent with the existence of the General Freedom of Movement. The most that may be drawn from those cases is recognition, by some judges from time to time, of a *limited* freedom of movement for *particular purposes*. The suggestion that there is a narrower freedom, for "federal purposes", points positively against the recognition of a *general* freedom of movement for *any reason* whatsoever.

38. In any event, if the limited freedom suggested in *Smithers* and *Pioneer Express* does exist, it is now better explained by reference to the implied freedom of communication on government and political matters. In *Kruger,* Gaudron J cast the freedoms suggested in *Smithers* and *Pioneer Express* as aspects of the freedom
20 of political communication,[60] as did Deane and Toohey JJ in *Nationwide News Pty Ltd*.[61] That coheres with the now settled position that an implied freedom of association, if it exists, would do so only as a corollary to the freedom of political communication.

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[56] Ibid.

[57] *ACTV* (1992) 177 CLR 106 at 213-4 per McHugh J.

[58] See also *Nationwide News* (1992) 177 CLR 1 at 73-4 per Deane and Toohey JJ.

[59] *AMS v AIF* (1999) 199 CLR 160 at [44] per Gleeson CJ, McHugh and Gummow JJ.

[60] *Kruger* (1997) 190 CLR 1 at 116 per Gaudron J. See also *Levy v Victoria* (1997) 189 CLR 579 (***Levy***) at 617-8 per Gaudron J; [1997] HCA 31.

[61] *Nationwide News* (1992) 177 CLR 1 at 73-4 and 76 per Deane and Toohey JJ. See also *ACTV* (1992) 177 CLR 106 at 213-4 per Gaudron J and *Theophanous* (1994) 182 CLR 104 at 166 per Deane J, describing the implications as "closely related", and 206 per McHugh J.

E IMPLIED FREEDOM OF POLITICAL COMMUNICATION

39. However, the General Freedom of Movement cannot be recognised as an aspect of the implied freedom of communication on government and political matters. To do so would be to tear the latter freedom from its structural moorings.

40. If an implied freedom of movement exists as a corollary to the implied freedom of political communication, it would have no greater scope than the latter freedom. It would derive its implication from the same source, so that its nature and extent would be governed by the same necessity which requires the implication of the latter freedom.[62] As with any implied freedom of association, "the same test of infringement and validity would apply."[63]

41. The freedom of communication on government and political matters arises by necessary implication from the system of representative and responsible government established by ss7, 24, 64 and 128 of the Constitution. As Gageler J explained in *Tajjour v New South Wales*:[64]

> The implication…proceeds on the understanding that the Constitution has as its purpose 'to enlarge the powers of self-government of the people of Australia', 'is for the advancement of representative government', and establishes the electoral processes for which it provides as the principal mechanism both for facilitating and for constraining the exercise of Commonwealth legislative and executive power. The implication is of a judicially enforceable constitutional limitation…which derives from, *and is limited to*, 'what is necessary for the effective operation of that system'.

42. What is necessary for the effective operation of that system is the capacity to exercise free choice in political matters.[65] That requirement is not founded on abstract notions of representative and responsible government,[66] but (principally[67]) on the text of ss7 and 24 of the Constitution which provide for the members of the House of Representatives and the Senate to be "directly *chosen* by

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[62] *APLA* (2005) 224 CLR 322 at [27] per Gleeson CJ and Heydon J; *Lange* (1997) 189 CLR 520 at 560 per curiam; *Cunliffe* (1994) 182 CLR 272 at 326 per Brennan J.

[63] *Wainohou* (2011) 243 CLR 181 at [112] per Gummow, Hayne and Bell JJ; *Levy* (1997) 189 CLR 579 at 618 per Gaudron J.

[64] *Tajjour v New South Wales* (2014) 254 CLR 508 at [140].

[65] *McCloy* (2015) 257 CLR 178 at [303] per Gordon J and the authorities cited therein.

[66] *Lange* (1997) 189 CLR 520 at 566-7 per curiam.

[67] See, eg, *Lange* (1997) 189 CLR 520 at 561, referring to implications derived from s128.

the people".[68] To be effectual, that choice must be a "true choice", formed "with an opportunity to gain an appreciation of the available alternatives".[69] That requires a free flow of political information within the federation, both between electors and representatives and between all persons, groups and other bodies in the community.[70]

43. The necessity of access to political information marks out the nature and extent of the implication.[71] As such, the implied freedom protects access to *that information* and, hence, the communication of *that information*.[72] Thus, there must be a "a close relationship" between the communication and the sections in Ch I, II and VIII from which the protection flows.[73]

44. The freedom is therefore "limited".[74] Unlike the First Amendment to the United State Constitution, it is not a general freedom of communication.[75] Of necessity, it protects only "political communication".[76] While the application of that phrase to particular communications may be imprecise, its content is functionally certain. "Political communication" is limited to "communication necessary for the effective operation of the system of representative and responsible government."[77]

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[68] *Lange* (1997) 189 CLR 520 at 559 per curiam.

[69] Ibid at 560, quoting from *ACTV* (1992) 177 CLR 106 at 187 per Dawson J.

[70] *Club v Edwards* (2019) 93 ALJR 448 at [356] per Gordon J; [2019] HCA 11.

[71] *APLA* (2005) 224 CLR 322 at [27] per Gleeson CJ and Heydon J and [68] per McHugh J; *Lange* (1997) 189 CLR 520 at 560 per curiam.

[72] *Nationwide News* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ.

[73] *APLA* (2005) 224 CLR 322 at [68] per McHugh J.

[74] *Theophanous* (1994) 182 CLR 104 at 121 and 125 per Mason CJ, Toohey and Gaudron JJ.

[75] *McCloy* (2015) 257 CLR 178 at [119]-[120] per Gageler J; *Theophanous* (1994) 182 CLR 104 at 125 per Mason CJ, Toohey and Gaudron JJ, 191 per Dawson J, and 205-6 per McHugh J; *APLA* (2005) 224 CLR 322 at [27]-[28] per Gleeson CJ and Heydon J, [66]-[67] per McHugh J, [216] per Gummow J, [380]-[381] per Hayne J.

[76] *McCloy v New South Wales* (2015) 257 CLR 178 at [119] per Gageler J and [303] per Gordon J; *Lange* (1997) 189 CLR 520 at 560 per curiam; *Nationwide News* (1992) 177 CLR 1 at 50-1 per Brennan J and 72-3 per Deane and Toohey JJ; *ACTV* (1992) 177 CLR 106 at 234 per McHugh J; *Cunliffe* (1994) 182 CLR 272 at 298 per Mason CJ.

[77] *Unions NSW v New South Wales (No. 2)* (2019) 264 CLR 595 at [163] per Edelman J and the authorities cited in fn 230; [2019] HCA 1.

45. As such, the freedom does not protect non-political communication. It does not protect commercial communication,[78] religious communication,[79] private communications between a doctor and patient,[80] and communication about matters which are not (but merely might become) topics of political debate.[81] Similarly, the implied freedom does not apply to communications about the conduct of courts and judges,[82] unless the communication is of a political nature.[83] The freedom may protect the movement of funds, but only so as to facilitate "discourse about matters of politics and government".[84] It may protect gestures (personal movement), but only if they are "capable of communicating a political or government message".[85]

46. For the same reasons, any freedom of movement implied from the system of representative and responsible government must be similarly limited. It must be functionally limited to movement "necessary for the effective operation of the system of representative and responsible government" established by ss7, 24, 64 and 128 of the Constitution. If such a freedom does exist, it may protect moving protests,[86] or movement to hand out political pamphlets.[87] But it could not protect movement "for any reason" whatsoever.

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[78] *APLA* (2005) 224 CLR 322 at [27]-[28] per Gleeson CJ and Heydon J, [66]-[67] per McHugh J, [216] per Gummow J and [380]-[381]; *Theophanous* (1994) 182 CLR 104 at 124-5 per Mason CJ, Toohey and Gaudron JJ; *Tajjour* (2014) 254 CLR 508 at [230] per Keane J.

[79] *Elzahed v Kaban* [2019] NSWSC 670 at [119] per Harrison J.

[80] *Clubb v Edwards* (2019) 93 ALJR 448 at [249] per Nettle J.

[81] *Cunliffe* (1994) 182 CLR 272 at 329 per Brennan J; *APLA* (2005) 224 CLR 322 at [219] per Gummow J and [380] per Hayne J; *Clubb v Edwards* (2019) 93 ALJR 448 at [29]-[30] per Kiefel CJ, Bell and Keane JJ and [363] per Gordon J; *Tajjour* (2014) 254 CLR 508 at [230] per Keane J.

[82] *Hogan v Hinch* (2011) 243 CLR 506 at [92]-[93] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 4. See also *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at [124]-[126] per Beazley P, [131] per McColl JA and [243] per Tobias AJA;[2013] NSWCA 315.

[83] *APLA* (2005) 224 CLR 322 at [65] per McHugh J. See also *Dowling v Prothonotary of the Supreme Court of New South Wales* (2018) 99 NSWLR 229 at [107]-[109] per McFarlan JA; [2018] NSWCA 340.

[84] *Unions NSW v New South Wales (No. 1)* (2013) 252 CLR 530 at [30] and [38] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2013] HCA 58. See also *McCloy* (2015) 257 CLR 178 at [24] per French CJ, Kiefel, Bell and Keane JJ and [314] per Gordon J.

[85] *Levy* (1997) 189 CLR 579 at 623 and 625 per McHugh J. See also at 594-5 per Brennan CJ, 613 per Toohey and Gummow JJ and 638 and 641 per Kirby J.

[86] Eg, *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382; [2014] FCAFC 56.

47. As such, the General Freedom of Movement cannot be recognised as a corollary of the implied freedom of political communication. It extends beyond what is necessary to give effect to the system of representative and responsible government established by ss7, 24, 64 and 128 of the Constitution. Just as there is no implied freedom of communication for "any reason" or to communicate on purely "social" and "commercial" matters, there can be no general freedom of movement for those purposes.

F FREEDOM OF INTERSTATE TRADE, COMMERCE AND INTERCOURSE

48. The freedom of interstate trade, commerce and intercourse in s92 of the Constitution also does not provide a separate basis for the General Freedom of Movement. In contrast to the general freedom contended for by the Plaintiffs, s92 operates in a "confined area".[88] It is concerned wholly with trade, commerce and intercourse *across State boundaries*;[89] whereas the General Freedom is concerned only with intrastate movement. Further, s92 does not assure to citizens an individual *right* to travel to the border of their State.[90] Accordingly, no such right could arise by implication.

49. In any event, s92 would not provide the textual basis for a general freedom of movement "for any reason". Any implied freedom would be necessarily limited to movement for the purpose of engaging in "trade, commerce and intercourse amongst the States".[91]

50. The overreach is demonstrated by the position of the Northern Territory. Section 92 guarantees no freedom of intercourse between the States and the Northern

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[87] Eg, *Attorney-General (South Australia) v Adelaide City Corporation* (2013) 249 CLR 1; [2013] HCA 3.

[88] *Betfair v Racing New South Wales* (2012) 249 CLR 217 at [36] per French CJ, Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 12.

[89] *Cole v Whitfield* (1988) 165 CLR 360 at 391 per curiam.

[90] Section 92 gives rise to no "individual rights": *Betfair v Racing New South Wales* (2012) 249 CLR 217 at [32] and [42] per French CJ, Gummow, Hayne, Crennan and Bell JJ, and [105] per Kiefel J; *Betfair v Western Australia* (2008) 234 CLR 418 at [26] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel J; [2008] HCA 11.

[91] *Lange* (1997) 189 CLR 520 at 560 per curiam.

Territory.[92] Nevertheless, the General Freedom of Movement would protect intrastate movement "for any reason", including for the purpose of travelling (say) from Perth to Darwin. That implication goes beyond the text of s92.

G RESOLUTION OF THE DEMURRER

51. For those reasons, none of the three bases relied on by the Plaintiffs supports the existence of the General Freedom of Movement. That is sufficient for the demurrer to be allowed. It is unnecessary for the Court to go further and determine whether some other, more limited, freedom of movement can be drawn from the Constitution on another basis. That is particularly where the pleadings are directed to the Plaintiffs' commercial dealings.[93] There is no pleading that the Plaintiffs have attempted or wish to undertake political, federal or interstate activities. The Court should decline to investigate and decide constitutional questions where there is lacking "a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties."[94]

Part V: Estimate

52. The Territory estimates that no more than 5 minutes will be required for oral submissions.

Dated 30 October 2020

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[92] That freedom is secured by Commonwealth legislation, not s92: *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at [9]-[12] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[93] ASOC, paragraphs [3](c), [4], [8](b)-(d).

[94] *Clubb v Edwards* (2019) 93 ALJR 448 at [332] per Edelman J and the authorities cited in fn 326.