HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M104 of 2020

BETWEEN:

JULIAN KINGSFORD GERNER
First Plaintiff

and

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

OUTLINE OF ORAL SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland, intervening

5 November 2020

PART I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II: Outline

United States cases on 'federal citizenship' and 'freedom of movement': QS [9]

2. The United States authorities relied upon by Gaudron J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 115, fn 457 **(JBA 6.28, 2366)** have not been interpreted, in the United States, as authority for the proposition that a general 'freedom of movement' is an 'incident of national citizenship'.

3. In *Lutz v City of York* 899 F.2d 255 (3rd Cir 1990) (**JBA 13.67**), the Court of Appeals for the Third Circuit noted that the Supreme Court of the United States has not decided that a right of intrastate travel exists (p 259; **JBA 13.67, 5268**). The Court of Appeals reviewed the relevant authorities (including *Crandall v Nevada*) and held that no right to intrastate travel arose from:

   (a) The privileges and immunities clause of Art IV (p 262-3; **JBA 13.67, 5268-9**);

   (b) The privileges and immunities clause of the 14th Amendment (p 263-4 **JBA 13.67, 5269-70**); or

   (c) 'Rights of national citizenship' (p 264-5 JBA 13.67, 5270).

4. The Court concluded that '[i]n light of these various case lines … no constitutional text other than Due Process Clauses could possibly create a right of localised intrastate movement' (p 267 **JBA 13.67 5271-2**).

5. The due process requirements of the 14th Amendment have no 'counterpart in the Australian Constitution': *Brown v Tasmania* (2017) 261 CLR 328, 373 [148] (Kiefel CJ, Bell and Keane JJ) (**JBA 5.18**, **1476**).

6. Further, to the extent the Constitution recognises a concept of 'federal citizenship', it does so expressly by s 117: cf QS [11]-[12]; *Street v Queensland Bar Association* (1989) 168 CLR 461, 514, 552, 541. No wider implication should be made.

Unites States cases – interstate travel and intrastate travel

7. A right to *inter*state travel is recognised in the United States by a line of cases including *Shapiro v Thompson* (1969) 394 US 618 (**JBA 14.73**). However, freedom of intrastate

travel has not been considered to arise as a necessary corollary of the freedom of interstate movement.

8. In *Wright v City of Jackson* 506 F.2d 900, 902 (5th Cir, 1975) (**JBA 15.79, 5989-90**), the Court of Appeals for the Fifth Circuit held that to extend the principles of *Shapiro* to *intra*state travel, would 'distort the principles' of, and the reasons for, that decision.

The scope of existing implications

9. At **Reply [7]**, the plaintiffs misstate the effect of Queensland's submissions:

   (a) Recognising that a 'law which had the effect of preventing a person from being heard in a Chapter III court, or preventing courts from operating in accordance with the open court principle' will engage the *Kable* principle (**Qld [17(c)]**) is not to any extent a concession that there is an implied freedom to move 'for federal purposes', entailing freedom to 'travel … to a Chapter III court'.

   (b) Similarly, a freedom to travel to the seat of government 'for purposes related to its status as such' (**Qld [25]**) is not an implied freedom 'to travel to the seat of government'.

Dated 5 November 2020.

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