HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. **M104/2020**

BETWEEN:

JULIAN KINGSFORD GERNER
First Plaintiff

and

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

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

Document No: 11040607

PART I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for Queensland ('Queensland') intervenes in this proceeding in support of the defendant pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. The plaintiffs contend that it should now be recognised that the Constitution implies a 'freedom of movement'. The asserted freedom is said to be freestanding, and to extend to movement for personal, recreational, commercial and political reasons: that is, 'for any reason'.[1]

5. Queensland submits that there is implied in the Constitution no such freedom:

   (a) An implied freedom of movement is not logically or practically required by the federal scheme manifested in the text and structure of the Constitution.[2] To the extent freedom of movement is a requirement of federation, it is protected by the express terms of s 92.

   (b) Nor is a freedom of movement logically or practically necessary to preserve the integrity of the constitutionally prescribed system of representative and responsible government.[3] A restriction on movement may burden the implied freedom of political communication. *Levy v Victoria*[4] and *Brown v Tasmania*[5] are examples.

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1 Plaintiffs' submissions ('PS'), [69].
2 PS, [9(a)].
3 PS, [9(b)].
4 (1997) 189 CLR 579.
5 (2017) 261 CLR 328.

However, the principles of representative and responsible government, which give rise to the need for the implied freedom of political communication, deny the existence of a freedom of movement 'for any reason'.[6]

(c) Reasoning which takes as its starting point 'the nature of Australian society'[7] does not advance the plaintiffs' case, because that concept 'cannot legitimately be used as a source of constitutional implications'.[8]

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4. The question of law arising by way of the defendant's demurrer should be therefore answered 'no'.

STATEMENT OF ARGUMENT

5. As the plaintiffs recognise,[9] an implication said to arise from the structure of the Constitution must be shown to be 'logically or practically necessary for the preservation of the integrity of that structure'.[10] The plaintiffs' submissions attempt to draw on two aspects of the constitutional structure: federalism, and representative and responsible government.

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6. Far from being 'so obvious [a constitutional doctrine] that detailed specification [of what it entails] is unnecessary',[11] a freestanding freedom of movement 'for any reason' is not only unnecessary for the preservation of the federal scheme, its recognition would tend to undermine the constitutional system of representative and responsible government.

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6 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ) ('*ACTV*'); *McCloy v New South Wales* (2015) 257 CLR 178, 224-8 [107]-[119] (Gageler J) ('*McCloy*').

7 PS [44], citing *McGraw Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670 (Murphy J).

8 *Kruger v Commonwealth* (1997) 190 CLR 1, 69 (Dawson J), 152, 156-7 (Gummow J) ('*Kruger*'). See also *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104, 193-4 (Dawson J); *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ).

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9 PS [23].

10 *ACTV* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 168-9 (Brennan CJ). See also *Burns v Corbett* (2018) 265 CLR 304, 355 [94] (Gageler J), 383 [175], 388-9 [188] (Gordon J); *McCloy* (2015) 257 CLR 178, 222 [100] (Gageler J). There is some overlap between 'text' and 'structure' as 'structure' can refer to implications arising from the general internal structuring of the Constitution itself, or to particular institutions or systems created by the Constitution – see Jeremy Kirk, 'Constitutional Implications (1): Nature, Legitimacy, Classifications, Examples' (2000) 24(3) *Melbourne University Law Review* 645, 665.

11 PS [24], citing *ACTV* (1992) 177 CLR 106, 209 (Gaudron J).

Federalism

7. The plaintiffs' argument from federalism has several strands, none of which confront the consequences for that argument of the express terms of ss 92 and 117. Nor are the strands brought together in a way which demonstrates (let alone makes obvious[12]) any textual or structural necessity for a freedom of movement 'for any reason'.

10 8. In addition, several of the strands of the plaintiffs' argument are misconceived.

9. *First*, the plaintiffs appear to suggest that the Constitution protects freedom of movement as an implied 'federal privilege or immunity' arising from the concept of 'the people of the Commonwealth'.[13] The plaintiffs gain nothing from invoking the concept of 'federal privileges and immunities', borrowed from the 14th Amendment to the United States Constitution. The understanding of that clause adopted since the 20 *Slaughter-House Cases*[14] has not led to the recognition of a freedom of *intrastate* travel in the United States.[15] In any event, as the plaintiffs accept,[16] the question remains whether the implication is logically or practically necessary for the preservation of the

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12 PS [24].

13 See PS [20]-[22], and especially the heading 'Implication of federal privileges and immunities'.

14 83 US 36 (1873).

15 *Lutz v City of York,* 899 F 2d 255 (3rd Cir, 1990), 264 (Becker J, for the Court). The question of whether 30 there is a right of intrastate travel (whatever its source) in the United States has not been decided by the Supreme Court: *Memorial Hospital v Maricopa County*, 415 US 250 (1974); *United States v Baroni,* 909 F 3d 550, 587 [31] (3rd Cir, 2018) (*Baroni* was 'reversed and remanded' by the Supreme Court, but that Court did not consider the question of intrastate travel: *Kelly v United States*, 140 S Ct 1565 (2020)). A series of challenges to COVID-19 related restrictions on freedom of intrastate movement in the United States have recently reiterated the point, that a right to intrastate travel has not been recognised by the Supreme Court: *Best Supplement Guide LLC v Newsom* (ED Cal, No 2:20-cv-00965-JAM-CKD, 22 May 2020) slip op 5 (Mendez J); *Six v Newsom* (CD Cal, No 8:20-cv-00877-JLS-DFM, 22 May 2020) slip op 4-5 (Staton J); *Lewis v Walz* (D Minn, Civil No. 20-1212 (DWF/HB), 30 September 2020) slip op 3-4 (Frank J); *Village of Orland Park v Pritzker* (ND Ill, No. 20-cv-03528, 1 August 2020) slip op 10 (Wood J).

In *Lutz*, the Court of Appeals for the Third Circuit held that a right of intrastate movement 'exists, and grows out of substantive due process' in the 14th Amendment because 'the right to move freely about one's 40 neighbourhood or town, even by automobile, is indeed "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history"': at 256, 268. The Court rejected the idea that a right of intrastate travel was a requirement of federalism or corollary of interstate travel: 261-2. In 2019, the Court of Appeals for the Third Circuit relied on *Lutz* to hold a right to intrastate travel existed, but noted that 'the exact "contours" of the right remain elusive': *Owner Operator Independent Drivers Association, Inc v Pennsylvania Turnpike Commission*, 934 F 3d 283, 294 [22] (3rd Cir, 2019). In the Seventh, Eighth and Ninth circuits, the right remains unrecognised: *Nunez by Nunez v City of San Diego*, 114 F 3d 935, 944 n7 (9th Cir, 1997); *Doe v Miller*, 405 F 3d 700, 713 (8th Cir, 2005); *Hannemann v Southern Door County School District*, 673 F 3d 746, 756 (7th Cir, 2012).

16 PS [22].

integrity of the federal scheme manifested in the text and structure of the Australian Constitution.

10. Consequently, implications cannot be drawn from an analysis of the Convention Debates.[17] Yet even were such reasoning permissible, the plaintiffs' submissions would remain misconceived. The framers rejected the inclusion of a clause based on the 14th Amendment not 'because such freedoms were already encompassed',[18] but because the framers 'accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy'.[19] In *Nationwide News Pty Ltd v Wills*, Brennan J noted that an amendment based substantially on the 14th Amendment had been rejected at the 1898 Constitution Convention, and continued:[20]

> As Sir Owen Dixon observed[21]:
>
> > The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of 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.

11. Of the concepts contained within the 14th Amendment, and the related Art IV, s 2 of the United States Constitution, the framers adopted so much as suited local purposes by including s 117. The privileges and immunities clause of the 14th Amendment provides 'No State shall make or enforce any law which shall abridge the privileges or

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17 In *Cole v Whitfield* (1988) 165 CLR 360, the Court turned to the Convention Debates as an aid in interpreting the text of s 92, not to 'uncovering [an] implication[]': cf PS [11], fn 10.

18 PS [12]-[13].

19 *ACTV* (1992) 177 CLR 106, 136 (Mason CJ), 182 esp fn 8, 186 (Dawson J). See also *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24 (Barwick CJ); *Kruger* (1997) 190 CLR 1, 65 (Dawson J); *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 8 February 1898, 667 (Mr Trenwith): 'When we have created a Commonwealth, we shall have a Commonwealth citizenship, and when aliens are naturalized, they will be naturalized as citizens of the Commonwealth. But if a state desires to make some restrictions with reference to some class within its territory, and there is no objection to it on the part of the Commonwealth, it seems unwise that we should put here a bar. If there turns out to be an objection on the part of the Commonwealth, beyond doubt the Federal Parliament will legislate on the subject, and then the state law, if it conflicts with the federal law, will have no effect'. Mr Isaacs endorsed those comments (at 667, 670).

20 (1992) 177 CLR 1, 43-4. See also *ACTV* (1992) 177 CLR 106, 136 (Mason CJ).

21 'Two Constitutions Compared', reprinted in *Jesting Pilate* (1965), p. 102; see also W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) pp. 328-9.

immunities of citizens of the United States', whereas Art IV, s 2 says 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States'.

12. Section 117 is often described as inspired by Art IV, s 2,[22] although in *Street v Queensland Bar Association*, Brennan J considered it had 'more conceptual affinity to the 14th Amendment',[23] and Toohey J said it was modeled on both clauses.[24] Dawson J observed that the purpose of s 117, like that of Art IV, s 2 'is a federal one, both provisions being designed to ensure that persons from one State are treated in another as citizens of the one nation, not as foreigners'.[25] Similarly, Toohey J noted that Quick and Garran had described s 117 as representing 'the modest outcome of an attempt on the part of the Convention of 1898 to … establish a status capable of being designated 'Federal citizenship'.'[26] Any implication of broader 'federal privileges and immunities' attaching to 'the people of the Commonwealth' is precluded by s 117.[27] Even if a broader implication based on federal citizenship were to be made, the US cases do not support the proposition that the concept of federalism or federal citizenship require freedom of intrastate movement.[28]

13. Insofar as the plaintiffs' submissions regarding the 14th Amendment relate to the due process clause, the submission must be rejected, because the due process requirements of the 14th Amendment have no 'counterpart in the Australian Constitution'.[29] The

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22 *Davies and Jones v Western Australia* (1904) 2 CLR 29, 52-3 (O'Connor J); *Street v Queensland Bar Association* (1989) 168 CLR 461, 541 (Dawson J), 491 (Mason CJ).

23 *Street v Queensland Bar Association* (1989) 168 CLR 461, 514.

24 *Street v Queensland Bar Association* (1989) 168 CLR 461, 552.

25 *Street v Queensland Bar Association* (1989) 168 CLR 461, 541.

26 *Street v Queensland Bar Association* (1989) 168 CLR 461, 552, citing Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 955.

27 Cf *Kruger* (1997) 190 CLR 1, 65 (Dawson J).

28 In *Lutz*, the Court of Appeals for the Third Circuit held that the 'structural concerns of federalism' did not require, as a correlative of the right of interstate travel, a right of intrastate travel: 899 F 2d 255, 261-2 (3rd Cir, 1990). In *Wright v City of Jackson*, 506 F2d 900 (5th Cir, 1975), the Court of Appels for the Fifth Circuit held that to extend the principle in *Shapiro v Thompson*, 394 US 618 (1969) and *Dunn v Blumstein*, 405 US 330, 92 (1972) (recognising the right to interstate travel) to include intrastate travel would 'distort the principles of *Shapiro*': at 902.

29 *Brown v Tasmania* (2017) 261 CLR 328, 373 [148] (Kiefel CJ, Bell and Keane JJ) (albeit in relation to rejecting the due process doctrine that uncertainty of laws violates a constitutional safeguard). See also *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184, 195 (Dixon J).

submission is also inconsistent with, for example, the legislative power of the States to acquire property without compensation.[30] In *Durham Holdings Pty Ltd v New South Wales*,[31] the applicant sought to establish that the right to receive 'just' or 'properly adequate' compensation was such a 'deeply rooted right' that it operated as a restraint upon the legislative power of New South Wales.[32] The applicant relied on 'statements respecting the common law in decisions respecting the powers of several of the States of the United States before the inclusion in those written State Constitutions of guarantees respecting the taking of property'.[33] The majority rejected that argument, holding that the applicant sought to introduce into the constitutional text a limitation not found there, and applying the orthodox test, found that the limitation for which the applicant contended was 'not, as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate'.[34]

14. *Second,* while McHugh J held in *Hwang v Commonwealth* that the 'the people of the Commonwealth' was a concept 'critical to the operation of the *Constitution*',[35] that does not advance the plaintiff's argument. It is apparent that McHugh J considered the phrase 'people of the Commonwealth' a synonym for citizenship,[36] rather than a reference to persons 'domiciled within the territorial limits of the Commonwealth' as the plaintiffs' submissions contend.[37] The significance of McHugh J's reasons was to confirm the existence of the Commonwealth's legislative power with respect to citizenship, which might be exercised to 'confer or deny rights, privileges, immunities or duties' attaching to citizenship.[38] As his Honour noted, State legislative power might be exercised similarly,[39] subject to s 109.

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30 See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 408 [7] fn 68 (Gaudron, McHugh, Gummow and Hayne JJ) and the authorities there cited ('*Durham Holdings*').

31 (2001) 205 CLR 399.

32 *Durham Holdings* (2001) 205 CLR 399, 409-10 [12] (Gaudron, McHugh, Gummow and Hayne JJ).

33 *Durham Holdings* (2001) 205 CLR 399, 410 [13] (Gaudron, McHugh, Gummow and Hayne JJ).

34 *Durham Holdings* (2001) 205 CLR 399, 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ) (footnotes omitted).

35 (2005) 80 ALJR 125, 130 [17] (McHugh J) ('*Hwang*').

36 *Hwang* (2005) 80 ALJR 125, 130 [14] (McHugh J).

37 PS [21].

38 *Hwang* (2005) 80 ALJR 125, 130 [13] (McHugh J).

39 *Hwang* (2005) 80 ALJR 125, 130 [13] (McHugh J).

15. *Third*, the submission that the framers 'relied upon a pre-existing freedom of movement when adopting express provisions of the *Constitution*' must be rejected.[40] The principle of the common law was then, as it is now, that anybody is free to do anything which is not forbidden by law.[41] The framers' assumption that members of the new parliament, and others, would be free to travel within Australia, does not suggest the existence of a limitation on colonial legislative power.[42] 'The actual limitations upon the legislative capacity of the Victorian Parliament were before federation few and practically unimportant'.[43] Freedom of movement was not one of them. Further, the 'theory that colonial legislation must respect the fundamental principles of English law' was 'abolish[ed]' with the enactment of the *Colonial Laws Validity Act 1865* (Imp).[44]

16. *Fourth*, the plaintiffs submit that freedom of movement is logically and practically required 'for the uniform application of Commonwealth laws to the Australian people resident in every part of the Commonwealth.'[45] In apparent support of that submission, reference is made to ss 106, 107 and 109,[46] covering clauses 5 and 6,[47] ss 24 and 34,[48] and the 'one common law [which] applies where it has not been superseded by statute'.[49] It is not explained how these features of the Constitution require the 'uniform

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40 PS [14], [18], [60]. The plaintiffs do not appear to submit that freedom of movement is a right which restrains legislative power because it is 'deeply rooted in our democratic system of government and the common law': *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 10. That question was explored by Dawson J (albeit in dissent) in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, who rejected the existence of such rights (at 71-6). See also Brennan CJ (at 66). If such rights do exist (cf *Momcilovic v The Queen* (2011) 245 CLR 1, 216 [562] (Crennan and Kiefel JJ), they will not constitute a limit on State legislative power unless 'as a matter of logical or practical necessity [they are] implicit in the federal structure within which State Parliaments legislate': *Durham Holdings* (2001) 205 CLR 399, 410 [14].

41 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (the Court), citing *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109, 283.

42 Even if it did, such an assumption would stand outside the Constitution and be incapable of giving rise to an implication: *ACTV* (1992) 177 CLR 106, 135 (Mason CJ).

43 Sir Owen Dixon, 'The Law and the Constitution' (paper delivered in Melbourne on 14 March 1935) in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019), 176.

44 Sir Owen Dixon, 'The Law and the Constitution' (paper delivered in Melbourne on 14 March 1935) in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019), 177.

45 PS [24].

46 PS [25]-[26] and fn 33.

47 PS [26].

48 PS [27].

49 PS [28].

application of laws' or why such a requirement of uniformity, if it did exist, would, in turn, logically or practically require an implied freedom of movement 'for any reason'. In any event, the premises of the submission cannot be accepted:

(a) Although Commonwealth laws may 'establish uniformity throughout Australia'[50] in relation to a particular subject-matter, there is 'no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.'[51] Sections 51(ii) and 99, for example, undermine the suggestion that, in the exercise of other powers mentioned in s 51, the Commonwealth might not discriminate against, or give a preference to, one State or part thereof over another.[52] Again, the plaintiffs' proposition is inconsistent with the principle of responsible government upon which Australian federalism is built.[53] As was observed in *Engineers*:[54]

> When the people of Australia, to use the words of the Constitution itself, 'united in a Federal Commonwealth', they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.

(b) Nor is it the case that s 24 'embodies the notion of representative government directly chosen by the people of the Commonwealth without regard to their status as residents of any State',[55] given the second paragraph of s 24, and its final

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50 *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 112 (Latham CJ).

51 *Leeth v Commonwealth* (1992) 174 CLR 455, 467-8 (Mason CJ, Dawson and McHugh JJ). The submission is also difficult to reconcile with the rejection, in *Kruger*, of a requirement of 'legal equality' under Commonwealth laws: *Kruger* (1997) 190 CLR 1, 44-5 (Brennan CJ), 63 (Dawson J), 141-2 (McHugh J), 153-4 (Gummow J). Non-uniform application of Commonwealth laws was apparent in, for example, determinations made under s 477(1) of the *Biosecurity Act 2015* (Cth) which restricted entry into remote communities in some States but not others. See, for example, the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth), as in force prior to its repeal on 10 July 2020, which restricted entry into certain remote communities in South Australia.

52 Subject, of course, to the principle derived from *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

53 *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J).

54 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151-2 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers*').

55 PS [27].

sentence, which requires that 'notwithstanding anything in this section, five members at least shall be chosen in each Original State'. Section 122 also denies the proposition that members of the House of Representatives are directly chosen by the people without regard to the place of residence of those people within the Commonwealth.

(c) While there is 'one common law' throughout Australia, it is subject to alteration by statute, including by State statutes.

17. *Fifth*, the plaintiffs' submission that the freedom is 'necessarily implied by the express provisions of the Constitution' is similarly misconceived:[56]

(a) The 'qualified freedom' for which the plaintiffs contend does not appear to be a restriction on State legislative power alone. Yet, as regards Commonwealth power, it can hardly be supposed that the powers conferred by ss 51 and 52 (some of which obviously contemplate restrictions on movement[57]) carry with them a necessary implication that the legislative power they confer be restricted. So to reason is not only illogical but contrary to basal principle.[58]

(b) As regards State legislative power, the submission that the 'efficacy' of certain powers in s 51 would be 'undermined' if freedom of movement were curtailed by legislation which was not reasonably appropriate and adapted to a legitimate end, ignores the fact that 'the conferrals of power in s 51 are concurrent with the State legislative power referred to in s 107.'[59] Where State legislation is perceived by the Commonwealth Parliament as having an adverse effect on a subject-matter within Commonwealth legislative competence, it may enact a law to reverse the situation, 'which will be given paramountcy over the State law through the operation of s 109.'[60] Where there is a need to protect the Commonwealth's 'real control' of a

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56 PS [31]-[36].

57 For example, s 51(ix), concerning 'quarantine'.

58 *Engineers* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

59 *Spence v Queensland* (2019) 93 ALJR 643, 662 [46] (Kiefel CJ, Bell, Gageler and Keane JJ).

60 *Spence v Queensland* (2019) 93 ALJR 643, 662 [49] (Kiefel CJ, Bell, Gageler and Keane JJ).

subject-matter by making a legislative power exclusive, the Constitution makes express provision.[61]

(c) The plaintiff also invokes the need to be free to attend Chapter III courts.[62] 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, would engage the principle identified in *Kable v Director of Public Prosecutions (NSW)*.[63] No further implication is necessary.

18. *Sixth*, it is wrong to say that an 'implied Freedom of Movement was confirmed by Griffith CJ, Barton, Isaacs and Higgins JJ in *R v Smithers; Ex parte Benson*.'[64] Justices Isaacs and Higgins applied s 92 of the Constitution, eschewing any implication based on *Crandall v Nevada*.[65] Justice Higgins commented that 'The cases which have arisen under the United States Constitution tend rather to perplex than to assist us … It is our duty meekly to ascertain the meaning and application of the words used in our own Constitution'.[66] In any event, in *Crandall v Nevada*, the United States Supreme Court recognised a right to travel insofar as the travel is necessary for the transaction of business between the national government and its citizenry. It has not been extended into a generalised right of free movement throughout the United States.[67]

19. Finally, to the extent that the federal scheme necessitates freedom of movement, it is protected by the express terms of s 92. As this Court recognised in *Cole v Whitfield*, the purpose of s 92 is 'clear enough'. Relevantly, it is 'to deny to the Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and

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61 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 631-2 (Mason J), discussing the effect of s 90.

62 PS [36].

63 (1996) 189 CLR 51; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593 [39] (French CJ, Kiefel and Bell JJ). It appears to be accepted that a similar limitation applies to Commonwealth legislative power: *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

64 (1912) 16 CLR 99; PS [37].

65 73 US 35 (1867).

66 (1912) 16 CLR 99, 118.

67 *United States v Wheeler*, 254 US 281, 299 (1920). See also *Lutz*, 899 F 2d 255, 264-5 (3rd Cir, 1990) and the authorities cited at fn 15, above.

communications across State boundaries'.[68] The express inclusion of s 92 leaves no room for the conclusion that an implied freedom of movement 'for any reason' is necessary for the preservation of the integrity of the federal structure.

Representative and responsible government

20. In *Lange v Australian Broadcasting Corporation*, this Court held that '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates'.[69] As was recently emphasised in *Clubb v Edwards*, proscription of other kinds of communication does not 'involve an interference with the implied freedom'.[70] The implied freedom is distinctly *not* a freedom to communicate 'for any reason': 'as a matter of necessity [it] does not go beyond freedom of political communication'.[71]

21. The implied freedom is limited in this way because it exists only to 'protect[] the exercise by the people of the Commonwealth of a free and informed choice as electors'.[72] In our constitutional system, that choice is the means by which any 'misuse' of legislative and executive power is controlled.[73] 'The great underlying principle [of the Constitution] is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.[74] The principle of responsible government[75] 'is part of the fabric on which the written words of the Constitution are superimposed'.[76]

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68 (1988) 165 CLR 360, 391 (the Court).

69 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 (the Court).

70 *Clubb v Edwards* (2019) 93 ALJR 448, 465 [29]-[31] (Kiefel CJ, Bell and Keane JJ).

71 *McCloy* (2015) 257 CLR 178, 228 [119] (Gageler J).

72 *Clubb v Edwards* (2019) 93 ALJR 448, 465 [29]-[31] (Kiefel CJ, Bell and Keane JJ).

73 *McCloy* (2015) 257 CLR 178, 230 [122] (Gageler J). See also *Engineers* (1920) 28 CLR 129, 151-2 (Knox CJ, Isaacs, Rich and Starke JJ).

74 *ACTV* (1992) 177 CLR 106, 136 (Mason CJ), citing Moore, *The Constitution of the Commonwealth of Australia* (1902); *McCloy* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110] (Gageler J), 258 [219] (Nettle J), 284 [318] (Gordon J).

75 See Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) 17, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 704.

76 *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J), cited in *ACTV* (1992) 177 CLR 106, 135 (Mason CJ) and *McCloy* (2015) 257 CLR 178, 224 [106] (Gageler J), 279 [301] (Gordon J).

22. In *ACTV*, Mason CJ observed that against that background:[77]

> 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 its citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

23. Yet, as Gageler J explained in *McCloy*, because electoral choice is the 'ordinary constitutional means' of control of legislative or executive power, communications relating to that choice are 'peculiarly susceptible to being restricted or distorted' through the exercise of legislative or executive power.[78] That is how the necessity for the implied freedom arises: it controls legislative and executive power, paradoxically, in order to protect electoral choice as the constitutional means for controlling legislative and executive power. The freedom is necessary because, as Mason CJ commented in *ACTV*, 'absent freedom of communication, there would be scant prospect of the exercise of that [political] power', embodied in the 'great underlying principle.'[79]

24. In that context, it cannot be accepted a freedom of movement 'for the purpose of pursuing personal, recreational, commercial, and political endeavour or for any reason, free from arbitrary restriction of movement' arises 'as an aspect of the freedom of political communication'.[80] The submission is inconsistent with the basis upon which the necessity for the implied freedom of political communication has been recognised. That necessity 'defines [the] scope and content' of the implied freedom,[81] and limits the role of the judiciary to safeguarding electoral choice as the 'ordinary constitutional means' of preventing misuse of the exercise of legislative and executive power.[82] In other words, the reasons for the recognition of the implied freedom contradict the

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77 (1992) 177 CLR 106, 136.

78 *McCloy* (2015) 257 CLR 178, 227 [114].

79 *ACTV* (1992) 177 CLR 106, 139-40 (Mason CJ), cited with approval in *McCloy* (2015) 257 CLR 178, 202 [26]-[27] (French CJ, Kiefel, Bell and Keane JJ).

80 PS [2].

81 *McCloy* (2015) 257 CLR 178, 228 [118] (Gageler J). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (the Court); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 326 (Brennan J).

82 *McCloy* (2015) 257 CLR 178, 230 [115] (Gageler J).

suggestion that the constitutional system of representative and responsible government requires the protection of a freedom of movement 'for any reason'.

25. Nonetheless, there are ways in which representative and responsible government requires certain kinds of movement to be free from arbitrary restraint. First, a law which restricts freedom of movement may burden the implied freedom of political communication. That is both because 'actions as well as words can communicate ideas',[83] and because a restriction on movement may restrict opportunities to speak or protest.[84] Laws which would prevent the people from supporting or opposing the election of candidates for Parliament, from monitoring the performance of members of Parliament (for example, by attending Parliament), or from petitioning them[85] are likely to fall within that category. Second, a restriction on movement which represented a practical impediment to voting[86] is likely to burden the requirements of ss 7 and 24 of the Constitution, and require justification.[87] Third, to the extent it is not otherwise protected, the capacity to travel to the seat of government for purposes related to its status as such may be protected by an implication arising from 'the constitutional place of the Capital Territory in the federal system … and the provision in the Constitution relating to it'.[88]

26. Those observations do not advance the plaintiffs' case, but merely demonstrate that, where freedom of movement is necessary for the preservation of the integrity of the constitutional structure, it is already protected by express provisions or recognised implications.

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83 *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ).

84 *Brown v Tasmania* (2017) 261 CLR 328, 383 [182] (Gageler J).

85 Cf *Kruger* (1997) 190 CLR 1, 142 (McHugh J).

86 Cf *Kruger* (1997) 190 CLR 1, 142 (McHugh J).

87 At least in relation to federal elections: *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 12 [2] (French CJ), 61 [167] (Gummow and Bell J), 120-1 [384] (Crennan J); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 50 [33] (French CJ and Bell J), 60 [60] (Kiefel J), 67 [84] (Gageler J), 106-7 [244] (Nettle J).

88 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 550 (Dixon CJ).

Section 92

27. Similarly, it is possible that a law which restricts intrastate movement may, in a particular case, burden s 92. However, in Queensland's submission, that will be the result only if the practical effect of a restriction on intrastate movement is to impose a discriminatory burden on interstate intercourse.

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28. Queensland submits that, in the same way that the trade and commerce limb of s 92 is engaged only by discriminatory burdens, a burden on the intercourse limb requires discrimination, in form or effect, against interstate intercourse as compared to movement within the State.[89] This is so for three reasons. First, as a matter of text, s 92 'does not readily reveal any basis for treating one of the three elements of a composite expression … as connoting, let alone requiring, the application of some different test to be applied to the other elements'.[90] Second, because 'intercourse' in s 92 encompasses 'movement of essentially anything across State borders',[91] unless the intercourse limb turns on discrimination, it would entirely subsume the trade and commerce limb, and thereby undermine the restrictive effect of the decision in *Cole v Whitfield*.[92] Third, unless discrimination is required to engage the intercourse limb, general laws may be held invalid insofar as they burden interstate movement, with the odd outcome that interstate movement is privileged over intrastate movement.[93]

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29. Once it is accepted that s 92 is directed only to discriminatory burdens on interstate intercourse, it is not possible to regard freedom of intrastate movement as 'an aspect or

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89 In line with the approach taken by Toohey J in *Cunliffe* (1994) 182 CLR 272, 384.

90 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 456-7 [402] (Hayne J).

91 Protectionism for the trade and commerce limb ought not be abandoned for the reasons given in Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law – Tributes to Professor Leslie Zines* (Federation Press, 2020) 253, 270 (emphasis omitted).

92 (1988) 165 CLR 360.

93 Ibid 279.

necessary incident' of a 'right to free intercourse among the States' protected by s 92.[94] So much has been recognised by the Supreme Court of the United States.[95]

The question of justification

30. If the Court were to recognise an implied freedom of movement, it would not be appropriate on the demurrer for it to 'apply the second limb in *Lange*', as urged by the plaintiffs.[96] Plainly, in those circumstances, the defendant should be afforded an opportunity to satisfy the Court of the facts necessary for the impugned laws to be held valid.[97] Further, the plaintiffs' submissions at [62]-[68] ignore the principles identified in *TCN Miller v Channel Nine Pty Ltd*[98] and *Wotton v Queensland.*[99]

PART V: Time estimate

31. It is estimated that 10 minutes will be required for presentation of Queensland's oral argument.

Dated 30 October 2020.

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94 Cf PS [61].

95 In *Bray v Alexandria Women's Health Clinic,* 506 US 263 (1993), a 'purely intrastate restriction' was held not to 'implicate the right of interstate travel', including the protection against barriers to interstate movement: 277 (Scalia J, delivering the opinion of the Court).

96 PS [62]-[68]. Justice Keane declined to include a question about validity in the demurrer proceedings – *Gerner v The State of Victoria* [2020] HCATrans 172 (20 October 2020), lines 78-89.

97 *Unions NSW v New South Wales* (2019) 264 CLR 595, 616 [45] (Kiefel CJ, Bell and Keane JJ), 622 [67] (Gageler J); *Australian Communist Part v Commonwealth* (1951) 83 CLR 1, 222 (Williams J).

98 (1986) 161 CLR 556, 611 (Brennan J).

99 (2012) 246 CLR 1, 14 [21]-[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Kruger* (1997) 190 CLR 1, 45 (Brennan CJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. **M104/2020**

BETWEEN:

JULIAN KINGSFORD GERNER
First Plaintiff

and

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General for the State of Queensland sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

Number	Description	Date in Force	Provision
Constitutional provisions			
1	*Commonwealth Constitution*		ss 24, 34, 51, 52, 92, 99, 106, 107, 109, 117, 122
Statutes			
2	*Biosecurity Act 2015* (Cth)	25 March 2020 (current version)	s 477(1)
	Judiciary Act 1903 (Cth)	25 August 2018 (current version)	s 78A
Statutory instruments			
6	*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth)	19 June 2020	