HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. M104 of 2020

B E T W E E N:

JULIAN KINGSFORD GERNER
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

AND

THE STATE OF VICTORIA
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL OF THE STATE OF WESTERN AUSTRALIA (INTERVENING)

Date of Document: 30 October 2020

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Parts I, II and III: Certification and Intervention

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

2. The Attorney-General for the State of Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

Part IV: Argument

Summary

3. The plaintiffs contend that the Commonwealth *Constitution* provides for an Implied Freedom of Movement.[1] The alleged freedom involves movement without "arbitrary restriction":

10 (a) by people in and of Australia, and by members of the Australian body politic;

(b) within the State where those people reside from time to time; and

(c) for any reason, including for the purposes of personal, recreational, commercial and political endeavour.

4. The plaintiffs have never defined what it is suggested might constitute an "arbitrary restriction" or a legitimate "non-arbitrary restriction". The only reference in the plaintiffs' submissions to this exception[2] is to what was said by Barton J in ***R v Smithers; Ex Parte Benson*** (***Smithers***).[3] That was in the context of saying that it was an "arbitrary classification" to make conviction of an offence in another State which carried a penalty of imprisonment for one year or longer the basis for a further offence of crossing the 20 border and entering New South Wales. That was not in the context of any exception to any implied freedom of intrastate movement.

5. The plaintiffs suggest that the Implied Freedom of Movement may be implied from four matters:[4]

(a) in consequence of federation and a natural consequence of the covering clauses for the Commonwealth *Constitution*;

(b) from the system of responsible and representative government enshrined in sections 7 and 24 of the *Constitution*;

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1 Amended Statement of Claim, [23].
2 Plaintiffs' Submissions (**PS**), [39].
3 (1912) 16 CLR 99 at 109.
4 Amended Statement of Claim, [23] (particulars).

(c) as an aspect of the implied freedom of political communication;

(d) as an adjunct to the right of absolutely free intercourse among the States guaranteed by section 92 of the *Constitution*.

6. Western Australia supports the defendant in demurring to the existence of any such implied freedom.

Western Australian Context

7. It is important to refer to the significance of legislative power to restrict intrastate movements in relation to Western Australia. A schedule explaining recent intrastate movement restrictions in respect of COVID-19 is attached to these submissions. If the plaintiffs' argument for the Implied Freedom of Movement were accepted, the validity of instruments imposed by Western Australia and the Commonwealth to protect vulnerable Aboriginal communities from the spread of COVID-19 and to prevent cases of COVID-19 from being spread between regions of the State would be called into question.

No Necessity for any Implication

8. The starting point in addressing the plaintiffs' arguments concerns the process of implication of a constitutional freedom.

9. In ***Australian Capital Television Pty Ltd v The Commonwealth***[5](***ACTV***) Mason CJ stated that, "where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure."[6] Justice Edelman has also said that a "constitutional implication is narrowly tailored" so that the "concrete implication is confined to that which is truly necessary to achieve the more abstract constitutional purpose."[7]

10. It is not sufficient that the implication be merely reasonable.[8] Further, the task is to interpret the *Constitution* and reveal or uncover implications that are already present, and

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5 (1992) 177 CLR 106, 135 (Mason CJ).

6 Approved in ***Theophanous v Herald & Weekly Times Ltd*** (1994) 182 CLR 104, 149-150 (Brennan J); ***McGinty v Western Australia*** (1996) 186 CLR 140, 168-169 (Brennan CJ), 231 (McHugh J); ***Kruger v Commonwealth*** (1997) 190 CLR 1, 152 (Gummow J); ***Re Residential Tenancies Tribunal of New South Wales and Henderson & Anor; Ex parte Defence Housing Authority*** (1997) 190 CLR 410, 503 (Kirby J); ***Burns v Corbett*** (2018) 265 CLR 304 at [94] (Gageler J) and [175] (Gordon J); ***McCloy v New South Wales*** (2015) 257 CLR 178 at [318] (Gordon J).

7 ***Re Gallagher*** [2018] HCA 17; (2018) 263 CLR 460 at [58] (Edelman J).

8 ***APLA Ltd v Legal Services Commissioner (NSW)*** (2005) 224 CLR 322 at [389] (Hayne J); [469]-[470] (Callinan J).

not to "make" implications.[9]

11. The plaintiffs themselves appear to acknowledge the existence of legislative power to restrict some intrastate movements, based upon the possibility of non-arbitrary restriction (whatever that might mean), but they fail to provide any conceptual basis for limiting that legislative power. Obviously some form of restriction must exist. For example, an imprisoned mass murderer or sex offender cannot rely upon the Implied Freedom of Movement to move from incarceration in one State to freedom in another State.

12. The fact that the plaintiffs start by acknowledging the need for an exception to the Implied Freedom of Movement is a powerful indication against any necessity for implying a general freedom of movement. That point is compounded by the absence of any principled basis advanced for an exception to the purported Implied Freedom of Movement. In reality, there is no principled basis which can be formulated. That is because there is plenary legislative power to restrict intrastate movements, and no need for any exception to the Implied Freedom of Movement.

13. The plaintiffs rely upon what was said by Gaudron J in ***ACTV*** to explain the absence of any express constitutional freedom of movement and the necessity for the implication of the Implied Freedom of Movement. They say three things:[10]

    (a) the Implied Freedom of Movement is, to use Gaudron J's words, "so obvious that detailed specification is unnecessary"[11];

    (b) the implication is logically and practically necessary for the constitutionally prescribed system of representative and responsible government; and

    (c) the implication is necessary for the uniform application of Commonwealth laws to the Australian people resident in every part of the Commonwealth.

14. None of these three matters supports the implication for which the plaintiffs contend:

    (a) the statement of Gaudron J was not about any implied freedom of movement. Justice Gaudron exemplified her statement by reference to the ***Boilermakers*** doctrine of separation of powers[12] and the ***Melbourne Corporation*** doctrine;[13]

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9 ***Victoria v Commonwealth* (*Payroll Tax Case*)** (1971) 122 CLR 353 at 401-402 (Windeyer J).
10 PS [24].
11 (1992) 177 CLR 106 at 209.
12 ***R v Kirby; Ex parte Boilermakers' Society of Australia*** (1956) 94 CLR 254.
13 ***Melbourne Corporation v The Commonwealth*** (1947) 74 CLR 31.

(b) there is no explanation why a constitutionally prescribed system of representative and responsible government requires a general freedom of movement for any or all purposes. That is a logical non-sequitur; and

(c) equally, it is a non-sequitur to say that the uniform application of laws to all Australians throughout the Commonwealth requires people subject to those laws to be able to move around the Commonwealth for any or all purposes.

15. These points show that there is no proper basis advanced for saying that an implied freedom of movement for any purpose is logically and practically necessary.

16. In any event, as developed below, applying the concept of necessity described above, Western Australia submits that:

(a) there is no necessity to imply a general freedom of intrastate movement for any or all purposes, based upon the creation of an Australian State as a consequence of federation, or the system of responsible and representative government;

(b) there is no necessity to imply a general freedom of intrastate movement for any or all purposes, as a result of the legislative powers of the Commonwealth, States and Territories being limited by an implied freedom of political communication; and

(c) there is no necessity to imply a general freedom of intrastate movement for any or all purposes, given the already existing limit imposed by the express freedom of interstate intercourse.

Federation does not necessarily imply freedom of movement

17. The plaintiffs rely upon the fact of federation, and the creation of one Australian State populated by Australian citizens and governed by a representative and responsible government, as necessarily supporting the Implied Freedom of Movement.

18. There are three strands to the plaintiffs' arguments:

(a) the existence of a federal scheme distributing legislative powers between the States and the Commonwealth, with a High Court and a guarantee in section 117 of the *Constitution* that residents of one State shall not be subject to any disability or discrimination which would be equally applicable to him or her if

that person was a resident of another State;[14]

(b) the existence of various legislative powers which are predicated upon the Implied Freedom of Movement;[15] and

(c) obiter dicta from four High Court decisions[16] which the plaintiffs have interpreted as supporting the Implied Freedom of Movement based upon federation.[17]

19. None of these matters are compelling or necessarily support the Implied Freedom of Movement.

20. First, the existence of a federal scheme with distributed legislative powers, an apex Court, and uniform laws which do not discriminate, does not logically imply anything about a general freedom of movement within the federation. No case suggests that these matters demonstrate the Implied Freedom of Movement.

21. Secondly, the enumeration of particular legislative powers which are conferred upon the Commonwealth does not say anything about the existence of the Implied Freedom of Movement, let alone necessarily and logically imply it.

22. Thirdly, the obiter dicta from the four High Court decisions referred to by the plaintiffs do not establish an implied freedom of movement for any purpose.

23. The first case upon which the plaintiffs rely heavily[18] is ***Smithers***,[19] and the US Supreme Court cases cited therein (including ***Crandall v Nevada*** (***Crandall***)[20]). These are relied upon to advance a proposition that this Court has previously "confirmed"[21] an implied freedom of movement.

24. ***Smithers*** concerned a New South Wales law which made it an offence for an interstate resident to enter that State, where that person had been imprisoned within the previous three years for an offence carrying the death penalty or a term of imprisonment of one year or longer. Benson was convicted and sentenced to imprisonment for 12 months in

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14 PS [25]-[30].
15 PS [31]-[36].
16 ***R v Smithers; Ex parte Benson*** (1912) 16 CLR 99; ***Pioneer Express Pty Ltd v Hotchkiss*** (1958) 101 CLR 536; ***McGraw Hinds (Aust) Pty Ltd v Smith*** (1979) 144 CLR 633; ***Australian Capital Television Pty Ltd v The Commonwealth*** (1992) 177 CLR 106.
17 PS [37]-[47].
18 PS [37-[41].
19 (1912) 16 CLR 99.
20 (1867) 73 US 35.
21 PS [37].

Victoria, for having insufficient lawful means of support. He then left Victoria in the month he was released and travelled to New South Wales to seek employment there. He was convicted of a further offence against the New South Wales law. However, the High Court (consisting of four justices only) unanimously held this law to be invalid.

25. ***Smithers*** was obviously a case about cross-border movements between States. It therefore did not decide anything binding about the existence of the Implied Freedom of Movement within States.

26. In effect, Griffith CJ, Barton J and Higgins J held that the New South Wales law was invalid, as it was not proportionate to the aim of protecting the public safety of the population of New South Wales. Chief Justice Griffith reached this conclusion without relying upon section 92, but instead by referring to an implication about interstate passage derived from the fact of federation.[22] Justice Barton considered that the words of section 92 did not carry the implication much further.[23] He also specifically observed that, "I must by no means be thought to say, and it is quite unnecessary to decide, either that the fact of federation or that the language of sec. 92 destroys the right of individual States to take any precautionary measure in respect of the intrusion from outside the State of persons who are or may be dangerous to its domestic order, its health, or its morals."[24]

27. After referring to a power of a State to make laws to promote public order, safety or morals, Griffith CJ said that he did not think that, "the exclusion of an inhabitant of another State for such a reason can be justified on any such ground of necessity as I have referred to".[25] Justice Barton said there was no necessity for defensive precautions of the type contained in the New South Wales law.[26] Justice Higgins expressly left open the extent of a State's powers to make laws protecting its borders from ex-criminals, but considered the New South Wales law in this case was "pointed directly at" the act of coming into New South Wales.[27] Justice Isaacs gave a wide operation of section 92, as absolute and without discernible limitation.[28]

28. Nothing in this case supports an implication of an implied freedom of movement within States for any purpose at all.

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22 (1912) 16 CLR 99, 109.
23 (1912) 16 CLR 99, 109-110. See also ***Tasmania v Victoria*** (1935) 52 CLR 157, 168-169 (Gavan Duffy CJ, Evatt and McTiernan JJ), 173 (Rich J).
24 (1912) 16 CLR 99, 110.
25 (1912) 16 CLR 99, 109.
26 (1912) 16 CLR 99, 110, 111.
27 (1912) 16 CLR 99, 118, 119.
28 (1912) 16 CLR 99, 113-114, 117.

29. The facts of ***Crandall*** are also instructive. That case concerned the imposition of a departure tax on each person leaving the State of Nevada. The case concerned "free" movement through the United States in the sense that interstate movement could not be taxed and the Supreme Court in that case decided that the arbitrary charge by Nevada upon such movement was constitutionally impermissible. Nothing in ***Crandall*** supports the Implied Freedom of Movement contended for by the plaintiffs.

30. The plaintiffs also rely[29] upon ***Pioneer Express Pty Ltd v Hotchkiss***.[30] That case concerns two different concepts to the present case. The focus of the High Court decision was on the extent to which section 92 of the *Constitution* afforded a defence to a transport company and driver each charged with driving (or operating) a public transport service without the appropriate licences. The journey in question involved taking passengers from Sydney to Melbourne, via Canberra. The decision concerned the application of section 92 of the *Constitution* in circumstances where part of the journey (between Sydney and Canberra) was not an inter-state journey. The Court held that section 92 of the *Constitution* was not applicable so as to invalidate the State law in so far as it applied to the journey between Sydney and Canberra only.[31]

31. The decision also considered the extent to which the States could legislate so as to prevent or control access to the capital city of Australia. Whilst Dixon CJ and Taylor J were supportive of a general implication to the effect of protecting the citizens of Australia (or the capital city) from State legislation preventing or controlling access to the capital city, neither considered that such an implication invalidated the State law in question.[32] Menzies J held that any implication that there may be protecting the individual's right of access to the governments of the federal system would not invalidate the law in question.[33] His Honour held that in the face of section 92 of the *Constitution*, it would be wrong to infer that there is a necessary implication that trade, commerce and intercourse between the Australian Capital Territory and the rest of Australia shall also be absolutely free.[34] Nothing in the case provides support for the broad wide ranging implied freedom of movement now proposed.

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29 PS [42]-[43].
30 (1958) 101 CLR 536.
31 ***Pioneer Express Pty Ltd v Hotchkiss*** (1958) 101 CLR 536 at 549-550 (Dixon CJ); 552 (McTiernan J); 553 (Fullagar J – in relation to charges against the company appellant only); 564 (Menzies J); 559 (Taylor J).
32 ***Pioneer Express Pty Ltd v Hotchkiss*** (1958) 101 CLR 536 at 549-550 (Dixon CJ); 560 (Taylor J).
33 ***Pioneer Express Pty Ltd v Hotchkiss*** (1958) 101 CLR 536 at 566 (Menzies J).
34 ***Pioneer Express Pty Ltd v Hotchkiss*** (1958) 101 CLR 536 at 566 (Menzies J).

32. The plaintiffs refer to[35] the approach of Murphy J in ***McGraw Hinds (Aust) Pty Ltd v Smith.***[36] However, this approach was not followed by the other members of the Court. His Honour based the implication of freedom of movement and communication on the nature of Australian society.[37] This reasoning has now been overtaken by the decisions of the court concerning the implied freedom of political communication discussed below.

33. Lastly, the plaintiffs refer to[38] the comments of Gaudron J and McHugh J in ***ACTV***. The relevant comments of Gaudron J have been analysed above, and they concern the ***Boilermakers*** doctrine and the ***Melbourne Corporation*** doctrine. McHugh J made the comment[39] relied upon by the plaintiffs[40] based upon the observations of Griffiths CJ and Barton J in ***Smithers*** and based also upon ***Crandall***. These decisions have been explained above.

Implied Freedom of Movement not a necessary incident of Implied Freedom of Political Communication

34. The plaintiffs' second argument depends substantially[41] upon the earlier implied freedom of political communication decisions in ***ACTV***[42] and ***Kruger v Commonwealth*** (***Kruger***).[43] The plaintiffs also appear to draw support[44] from the decisions of ***Nationwide News Pty Ltd v Wills***,[45] ***Theophanous v Herald & Weekly Times Ltd***,[46] and ***Stephens v West Australian Newspapers Ltd***.[47]

35. These decisions were delivered prior to the 1997 decision of ***Lange v Australian Broadcasting Corporation*** (***Lange***),[48] where the High Court unanimously outlined that the basis for the implied freedom political communication is the text and structure of the *Constitution*, as opposed to the concept of representative government at large.[49] The reasoning of the High Court in ***Lange*** limits those aspects of the earlier decisions based

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35 PS [44].
36 ***McGraw Hinds (Aust) Pty Ltd v Smith*** (1979) 144 CLR 633.
37 ***McGraw Hinds (Aust) Pty Ltd v Smith*** (1979) 144 CLR 633 at 670.
38 PS [45]-[46].
39 ***Australian Capital Television v Commonwealth*** (1992) 177 CLR 106, 232.
40 PS [46].
41 PS [52]-[58].
42 ***Australian Capital Television v Commonwealth*** (1992) 177 CLR 106
43 ***Kruger v Commonwealth*** (1997) 190 CLR 1.
44 PS footnote 72.
45 (1992) 177 CLR 1 at 69-70, 72.
46 (1994) 182 CLR 104.
47 (1994) 182 CLR 211.
48 ***Lange v Australian Broadcasting Corporation v Commonwealth*** (1997) 189 CLR 520.
49 ***Lange v Australian Broadcasting Corporation v Commonwealth*** (1997) 189 CLR 520 at 566-7.

on broader notions than the text of the *Constitution*.

36. No majority support for the Implied Freedom of Movement is contained in any decision of the High Court. Further, no individual reasons for decision support an implication of the width contended for in the present case.

37. In ***ACTV***, Mason CJ does not go so far as to refer to a freestanding freedom of movement. Rather, in the context of considering the implied freedom of communication, Mason CJ refers to the importance of freedom of communication to the system of representative government.[50]

38. Likewise, Gaudron J does not go so far as to confirm the existence of a freestanding freedom of movement. The precise words of her Honour are instructive:[51]

> "The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally. But, so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse." (emphasis added)

39. Further, whilst her Honour cites references in support of the notion that there may be freedom of association and freedom of speech generally, none are cited in relation to a freedom of movement.

40. The decision of ***Kruger*** is also emphasised by the plaintiffs. ***Kruger*** was heard in February 1996, and delivered shortly after ***Lange*** (which was heard in March 1997 and delivered in July 1997). However, ***Kruger*** does not support the implication of the Implied Freedom of Movement as contended for by the plaintiffs.

41. The ***Kruger*** decision must be considered in the context of the case.

42. First, the case was pleaded on the basis that the Court should find that an implied freedom of movement invalidated the law in question, which was in oral argument developed into a point which addressed a freedom of movement for political purposes.[52]

43. Secondly, that argument was only one of a suite of arguments. All sought to establish

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50 ***Australian Capital Television v Commonwealth*** (1992) 177 CLR 106 at 138-139.
51 ***Australian Capital Television v Commonwealth*** (1992) 177 CLR 106 at 212.
52 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at p 88-90 (Toohey J).

implied constitutional freedoms, and then declare invalid the Northern Territory Ordinance which had permitted the removal of Aboriginal children from their families on the basis of one or more of those implied freedoms.

44. Third, reliance on ***Kruger*** and ***ACTV*** in establishing an implied freedom of movement must be taken in context that both of those cases were decided when the implied freedom of political communication was nascent and developing. The bounds of the freedom were not wholly defined. The plaintiffs' resort to the case law of more than 20 years ago is indicative of the difficulties with the argument they are making.

45. Turning to the individual judgments, Brennan CJ held that no freestanding freedom of movement had to date been held to be implied in the *Constitution*, and no textual or structural foundation for the implication had been demonstrated in the case.[53] Further, his Honour found that even if such a freedom was implied, it would not have invalidated any of the provisions in question. [54]

46. Similarly, Dawson J held that held that even if there was something found in the *Constitution* to support the implication of a freedom of movement (either as part of the implied freedom of communication or some other implied freedom of movement and association), such an implied freedom would not limit the powers conferred by section 122.[55] In making reference to, "such other rights to freedom of movement and association as may be suggested", Dawson J expressly referred to the decision of ***Smithers***.[56] However, His Honour went on to distinguish that case, and ***Pioneer Express Pty Ltd v Hotchkiss***, on the basis that each concerned the requirements of section 92 of the *Constitution*.[57] Dawson J also referred to Gaudron J's reasoning in ***ACTV***.[58] However, His Honour questioned the correctness of this reasoning, noting that it appeared, "to be based on the nature of our society, which to [my] mind cannot legitimately be used as a source of constitutional implications" following the decision in ***Lange***.[59]

47. Contrary to the plaintiffs' submission,[60] Toohey J did not conclude that section 122 of the *Constitution* is restricted by a "freedom of movement and association implied in the

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53 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 45 (Brennan CJ).
54 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 45 (Brennan CJ).
55 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 69-70 (Dawson J).
56 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 69 (Dawson J).
57 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 69 (Dawson J).
58 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 69 (Dawson J).
59 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 69 (Dawson J).
60 PS [54].

Constitution". When the entirety of his Honour's reasoning on this issue is reviewed, his Honour is clearly considering a freedom of movement or association forming part of the implied freedom of political communication. His Honour did not go on to consider a freestanding implied freedom of movement for any purpose. [61]

48. McHugh J supported an implied freedom of movement and association, but only in the context of and as part of the implied freedom of political communication.[62] However, His Honour held that such an implied freedom did not apply to the plaintiffs who, being residents of the Northern Territory, were not (at the relevant time) members of the constitutionally prescribed system of government.[63]

10 49. Whilst Gaudron J recognised the implication of a freedom of movement and association in the *Constitution*, again it was only in the context of, and as an aspect of, the implied freedom of political communication.[64]

50. Finally, Gummow J did not support the existence of an implied "freedom of association". In so doing, his Honour noted the difficulty in identifying the precise rights which were stated to be the subject of the implied freedom.[65] Gummow J also, like Dawson J, considered (and distinguished) previous decisions which might form the basis of an implied freedom of association. In particular, Gummow J held that the decision of ***Lange*** called into question the width of the conclusion of Gaudron J in ***ACTV*** (and several other early freedom of political communication decisions).[66]

20 51. Accordingly, ***Kruger*** does not support the Implied Freedom of Movement as advanced by the plaintiffs.

52. Justice Gaudron in ***Levy v Victoria*** [67] reiterated the notion that, to the extent her Honour identified an implied freedom of movement within the *Constitution*, that freedom was an "aspect"[68] of the implied freedom of political communication, and a "subsidiary"[69] of that implied freedom. In other words, the need to physically move will sometimes be a practical necessity in service of the implied freedom of political communication, but it

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61 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 88-93 (Toohey J).
62 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 142 (McHugh J).
63 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 156-157 (Gummow J).
64 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 115-116 (Gaudron J).
65 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 156-157 (Gummow J).
66 ***Kruger v Commonwealth*** (1997) 190 CLR 1 at 156-157 (Gummow J).
67 (1997) 189 CLR 579.
68 ***Levy v Victoria*** (1997) 189 CLR 579 at 117 (Gaudron J).
69 ***Levy v Victoria*** (1997) 189 CLR 579 at 117 (Gaudron J).

does not constitute a separate implied freedom of movement which can be identified as having being infringed in the course of political communication.

53. The plaintiffs' references[70] to ***Unions NSW v News South Wales***[71] do not advance that proposition that the Implied Freedom of Movement exists.

54. This Court has also held that there is no freestanding implied "right of association".[72] A freedom of association to some degree may, at best, be a corollary of the freedom of communication formulated in ***Lange***. The position in relation to a freestanding implied freedom of movement is no different.

Implied Freedom of Movement not a necessary aspect of Freedom of Interstate Trade, Commerce and Intercourse

55. The plaintiffs have not identified any authorities which support the existence of a freestanding freedom of intrastate movement based on the existence of section 92 of the *Constitution*.

56. Even if it is accepted that the freedom of interstate intercourse, and freedom of trade and commerce, contained in section 92 have an aspect of intrastate intercourse implied into them, this is not sufficient to found a separate freedom of intrastate movement. Rather, it will be a factual question in each case as to whether a law containing some form of limitation on intrastate intercourse or trade and commerce also burdens interstate intercourse or trade and commerce for the purposes of section 92 of the *Constitution.*

57. The freedom of interstate intercourse in section 92 of the *Constitution* is a freedom from arbitrary restraint upon crossing State borders, and is not an imperative to cross the border. It would be a strange result if an express freedom from legislative interference contained an implied freedom that was more wide ranging than the express provision itself.

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70 PS [59].

71 (2019) 264 CLR 595.

72 ***Mulholland v Australian Electoral Commission*** (2004) 220 CLR 181 at 234 [148] (Gummow and Hayne JJ with whom Heydon J agreed at 306 [364]); ***Wainohu v New South Wales*** (2011) 243 CLR 181 at 230 [112] per Gummow, Hayne, Crennan and Bell JJ (with whom French CJ and Kiefel J agreed at 220 [72]), at 251 [186] per Heydon J; ***Tajjour v New South Wales*** (2014) 254 CLR 508 [2014] HCA 35; at 566 [95] per Hayne J at 605-606 [242]-[245] per Keane J.

Part V: Time for Oral Argument

58. Western Australia estimates that up to 15 minutes will be required for oral submissions.

Dated: 30 October 2020

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SCHEDULE OF DIRECTIONS AFFECTING INTRASTATE MOVEMENTS IN WESTERN AUSTRALIA AS A RESULT OF COVID-19 PANDEMIC

Restrictions upon movement in Western Australia during the COVID-19 outbreak

1. The COVID-19 pandemic illustrates the importance of both the State and Commonwealth Parliaments being able to control intrastate movements.

2. At the State level in Western Australia, intrastate movements were restricted to prevent infection occurring in vulnerable Aboriginal communities:

   (a) the *Emergency Management Act 2005* (WA) (**EM Act**) provides wide-ranging powers to declare[73] and manage emergencies within the State of Western Australia. "Emergency" is broadly defined in s 3 as "the occurrence or imminent occurrence or a hazard which is of such a nature or magnitude that it requires a significant and coordinated response."

   (b) on 15 March 2020, the Minister for Emergency Services declared a state of emergency with effect from 12 a.m. on 16 March 2020 in respect of the pandemic caused by COVID-19 pursuant to section 56 of the EM Act. The state of emergency continues in effect and applies to Western Australia.

   (c) sections 67 and 72A of the EM Act empowered the Police Commissioner as State Emergency Coordinator[74] to issue the *Remote Aboriginal Communities Directions* on 18 March 2020, restricting travel to and from certain remote Aboriginal communities within Western Australia.

   (d) on 20 March 2020 the State Emergency Coordinator revoked the *Remote Aboriginal Communities Directions* and made the *Remote Aboriginal Communities Directions (No 2)* which also restricted travel to and from certain remote Aboriginal communities within Western Australia.

   (e) further, on 2 April 2020 the State Emergency Coordinator issued the *Prohibition on Travel Between Local Government Districts in the Kimberley Directions 2020*, which restricted non-essential travel between local government areas in the Kimberley region in the north of Western Australia, which is home to many vulnerable remote Aboriginal communities.

   (f) on 5 April 2020 the State Emergency Coordinator made the *Goldfields-Esperance (Local Government District Travel Restrictions) Directions 2020*

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73 EM Act s 56.
74 EM Act s 10.

which restricted non-essential travel between local government areas in the Goldfields-Esperance region in the south-east of Western Australia, which is home to vulnerable remote Aboriginal communities.

(g) on 4 June 2020 the State Emergency Coordinator revoked the *Remote Aboriginal Communities Directions (No 2)* and made the *Remote Aboriginal Communities Directions (No 3)* (**Remote Communities Directions**) which remain current and in force, and continue to restrict travel to certain remote and vulnerable Aboriginal communities within Western Australia.

(h) since the making of the Remote Communities Directions, a number of variations have been made following the application by some remote Aboriginal communities to exclude their communities wholly or partially from the operation of the Remote Communities Directions to allow travel in and out by non-residents and for non-essential purposes.

(i) the Remote Communities Directions apply wholly to 256 remote Aboriginal communities,[75] and partly to 7 further communities.[76]

3. Clause 1 of the Remote Communities Directions states:

> *The purpose of these directions is to:*
>
> *(a) limit the spread of COVID-19 to protect vulnerable Aboriginal people in Remote Aboriginal Communities; and*
>
> *(b) facilitate the movement of persons into and out of a **Remote Aboriginal Community** in certain specified circumstances whilst still limiting the spread of COVID-19.*

4. Clause 5 provides that a person may enter a Remote Aboriginal Community[77] only if he or she does not have any symptoms of COVID-19[78] (unless a resident of the community and in specified circumstances),[79] has no reason to suspect he or she may be infected with COVID-19,[80] is otherwise not prohibited from entering due to any other written law[81] and is normally resident or employed in the Remote Aboriginal Community[82] or visiting for cultural or family purposes,[83] or comes under one of several narrow other exceptions

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75 Remote Communities Directions, Schedule 1.
76 Remote Communities Directions, Schedule 1.
77 Defined in clause 13 as meaning each of the communities listed in Schedule 1 of the Remote Communities Directions as varied from time to time.
78 Remote Communities Directions, clause 5(a)(i).
79 Remote Communities Directions, clause 5(a)(i)(A)-(D).
80 Remote Communities Directions, clause 5(a)(ii)-(vi).
81 Remote Communities Directions, clause 5(a)(vii).
82 Remote Communities Directions, clause 5(b)(i).
83 Remote Communities Directions, clause 5(b)(ii).

including to access or provide medical, education, supply of goods and other essential services.[84]

5. Breaches of the Remote Communities Directions are punishable by a fine of up to $50,000 for individuals and $250,000 for bodies corporate.

6. At a Commonwealth level, similar powers were exercised to protect indigenous communities:

(a) in exercise of the power under s 477(1) of the *Biosecurity Act 2015* (Cth) the Commonwealth Health Minister made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (**Commonwealth Remote Communities Determination**) on 26 March 2020.

(b) a significant portion of the north and east of Western Australia,[85] defined by local government areas, geographical coordinates, and the boundaries of adjoining pastoral leases, was within the designated Commonwealth biosecurity area.[86]

(c) clause 5 of the Commonwealth Remote Communities Determination prevented the entry of persons to designated areas except in specific circumstances,[87] or the person showed no symptoms of and had not been exposed to COVID-19, [88] had been in Australia for the past 14 days,[89] and met certain other criteria allowing entry for permitted and essential purposes.[90]

(d) On 3 June 2020 the Commonwealth Health Minister made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No 4) Determination 2020*, which removed the designated biosecurity area from Western Australian with effect from 5 June 2020.

(e) The Commonwealth Remote Communities Determination was wholly repealed on 10 July 2020.[91]

7. The State of Western Australia also set up regional zones to prevent the spread of COVID-

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84 Remote Communities Directions, clause 5(b)(iii)-(viii).
85 Along with parts of the Northern Territory, Queensland and South Australia.
86 Commonwealth Remote Communities Determination, Schedule 1, clause 2.
87 Commonwealth Remote Communities Determination, clause 5(1)(a)-(bb).
88 Commonwealth Remote Communities Determination, clause 5(1)(c)(i)&(ii).
89 Commonwealth Remote Communities Determination, clause 5(1)(c)(iii).
90 Commonwealth Remote Communities Determination, clauses 5(1)(c)(iv)-(vi) and clauses 5(2)-(7).
91 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Repeal Determination 2020*.

19 throughout the State. The regional restrictions serve a particular purpose in the Western Australian context. The land area of the State is vast, and regional centres would struggle to cope with any outbreak of COVID-19. The relevant restrictions were as follows:

(a) on 31 March 2020 the State Emergency Coordinator made the *Prohibition on Regional Travel Directions 2020*, which restricted non-essential travel between Western Australian regions.

(b) on 17 May 2020 the State Emergency Coordinator made the *Prohibition on Regional Travel Directions (No 2)* which permitted greater non-essential travel within Western Australia and revoked all three previous regional travel directions.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. M104 of 2020

B E T W E E N:

JULIAN KINGSFORD GERNER
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

AND

THE STATE OF VICTORIA
Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL OF THE STATE OF WESTERN AUSTRALIA

Pursuant to paragraph 3 of Practice Direction No. 1 of 2020, Western Australia 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			
	Commonwealth Constitution		s 92
Statutes			
	Biosecurity Act 2015 (Cth)	9 April 2020	
	Emergency Management Act 2005 (WA)	4 April 2020	
	Judiciary Act 1903 (Cth)	6 September 2018	
Statutory instruments			
	Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 (Cth)	26 March 2020	

	Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No 4) Determination 2020 (Cth)	3 June 2020	
	Goldfields-Esperance (Local Government District Travel Restrictions) Directions 2020 (WA)	5 April 2020	
	Prohibition on Regional Travel Directions 2020 (WA)	31 March 2020	
	Prohibition on Regional Travel Directions (No 2) (WA)	17 May 2020	
	Prohibition on Travel Between Local Government Districts in the Kimberley Directions 2020 (WA)	2 April 2020	
	Remote Aboriginal Communities Directions (WA)	18 March 2020	
	Remote Aboriginal Communities Directions (No 2) (WA)	20 March 2020	
	Remote Aboriginal Communities Directions (No 3) (WA)	4 June 2020	