



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**

M104 of 2020

BETWEEN:

JULIAN KINGSFORD GERNER
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

PLAINTIFFS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of Propositions

2. The *Public Health and Wellbeing Act 2008* (Vic) (**Health Act**), s 200(1)(b) and (d), confers “emergency powers”, exercised by an authorised officer, including an unlimited and express power to restrict movement: **PS [7]**.
3. The *Stay Safe Directions (Melbourne) (No 2)*, read with the *Area Directions (No 9)*,¹ currently in force, prohibit movement of greater Melbourne residents beyond a 25km radius, and to regional Victoria, without having to demonstrate: (a) that the resident is infected with COVID-19 or is likely to be so infected; or (b) that the exercise of power to restrict movement must be reasonably necessary to eliminate or reduce serious risk to public health: cf Health Act, s 200(1)(a); **Supp DB 15-17, 183-198**. (Residents outside greater Melbourne also cannot travel into greater Melbourne).
- 30 4. State legislative competence is plenary. The Victorian Parliament can impose restrictions regarding public health but is at all times subject to the *Constitution*: covering cl 5, ss 106 and 107. That includes any constitutional implications: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572; *Tajjour v New South Wales* (2014) 254 CLR 508 at 557 [55].

¹ Both Directions made under Health Act, s 200(1)(b) and (d).

5. The text and structure of the *Constitution* reveals a plan for the unity, in one indissoluble Federal Commonwealth, of the “people of the Commonwealth”, and the practical measures necessary to build that union: *Constitution*, Preamble, covering cll 5 and 6, ss 7 and 24. The plan laid out in the *Constitution* is “for the development of a free and confident society”: *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61], 442 [385], cited in *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131].
6. Constitutional implications must be uncovered from the text and structure of the *Constitution*: *McGinty v Western Australia* (1996) 186 CLR 140 at 168; *Lange* (1997) 189 CLR 520 at 557-558. Implications must be “logically or practically necessary for the preservation of the integrity of [the constitutional] structure”: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135. More recently, see *Burns v Corbett* (2018) 265 CLR 304 at 355 [94], 383 [175].
7. Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the *Constitution* give effect to the purpose of self-government by providing for the fundamental features of representative government. The effect of those provisions is to ensure the Commonwealth Parliament will be representative of the people of the Commonwealth: *Lange* (1997) 189 CLR 520 at 557-558. The words “directly chosen by the people” in ss 7 and 24 require a “genuine choice”: *McGinty* (1996) 186 CLR 140 at 181.
8. The *Constitution* created the States, which owe their existence to the *Constitution*, ss 106 and 107, and subjected them to the Commonwealth: Ch V. Upon federation, the people of the colonies became united in one federal union. The *Constitution* provides for one system of jurisprudence to be applied across the Commonwealth: **PS [26], [28]**. It provides for uniform duties of customs, and the Commonwealth attained exclusive power to regulate customs, duties, excise and bounties: *Constitution*, ss 88, 90, 92, 98, 99.
9. Practical measures to build the federal union include constitutional provisions that rely on the movement of people and trade across the Commonwealth for their efficacy: *Constitution*, ss 90, 92, 98. See also **PS [31]-[36]**.
10. It has been accepted as an implication in the *Constitution* since December 1912 that the people in and of Australia are free to pass and repass through every part of the federation, including for “federal purposes”, such as travelling to the seat of government: *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108, 109, 119.
11. Griffith CJ’s reference to the “mere fact of federation” in *Smithers* is a reference to the text and structure of the *Constitution*: (1912) 16 CLR 99 at 109. That reference supported his Honour’s finding that the full extent of the colonies’ former power to regulate their internal affairs “after the federation [was] inconsistent with the elementary notion of a Commonwealth”: at 108. Barton J agreed that the *Constitution* “creat[ed] ... a federal union with one government

and one legislature in respect of national affairs [which] assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation”: at 109-110.

12. The constitutional implication that the people of the Commonwealth have freedom to move to and from the institutions of the nation was confirmed by Dixon CJ in *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 549-550 and adopted by Gummow J in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 156. **PS [42]-[43]**.
- 10 13. That the constitutional implication recognised in *Smithers* could extend to a broader freedom of movement for the people in and of Australia was recognised by Gaudron J in *Kruger* (1997) 190 CLR 1 at 114-121. **PS [55]-[56]**.
14. The plan laid out in the *Constitution* for the development of a free and confident society in a federal union does not confine that implication to the occasions on which it has previously been considered.
15. The text and structure of the *Constitution* give rise to the constitutional implication that the people in and of Australia have a freedom of movement within the States in which they reside and throughout the federal union.

Dated: 5 November 2020

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Bret Walker SC

Michael D Wyles QC

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Stephanie C B Brenker