HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Nov 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M104/2020
File Title:	Gerner & Anor v. The State of Victoria
Registry:	Melbourne
Document filed:	Other document-Plaintiffs' submissions on Justiciability
Filing party:	Plaintiffs
Date filed:	03 Nov 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

10

and

THE STATE OF VICTORIA
Defendant

PLAINTIFFS' SUBMISSIONS ON JUSTICIABILITY

PART I FORM OF SUBMISSIONS

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

20 ## PART II ARGUMENT

2 The defendant (**the State**) has represented that the current directions denying the residents of Victoria freedom of movement within the State may be revoked or the limitations reduced from 11.59pm on 8 November 2020. If that event happens,[1] the declaratory relief sought by the plaintiffs is and will remain directed to a "live legal question":[2] whether s 200(1)(b) and (d)[3] and/or the directions made thereunder on and

---

1 The public record confirms: (a) the State represented in August 2020 that "lockdown" would not extend beyond 13 September 2020; (b) the State represented that on 25 October 2020 it would announce when lockdown would cease; (c) on 25 October 2020, the State did not announce when lockdown would cease; (d) lockdown was then extended until 11.59pm on 27 October 2020; (e) the terms of undoing of lockdown on 27 October 2020 continued limitations on freedom of movement of Victorian residents.

2 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 152 [350]; [2016] HCA 1 (***Plaintiff M68***).

3 *Public Health and Wellbeing Act 2008* (Vic).

Brit Ibanez, Solicitor
42/264 George Street
Sydney NSW 2000
T: +61 419 208 276
E: brit.ibanez@hamiltonlocke.com.au
Ref: 12074

after 13 September 2020 were invalid because they impermissibly burdened an implied freedom of movement. A positive answer to that question has "foreseeable consequences" for the plaintiffs.[4]

3 The declarations sought will resolve the question as to the lawfulness of the State's conduct which has denied the first plaintiff's freedom of movement as well as denying the second plaintiff's ability to obtain custom at its place of business from Victorian residents whose freedom of movement has been curtailed. The declarations sought will determine whether the State's conduct in denying freedom of movement to the plaintiffs, and to Victorian residents whom might otherwise have purchased from the second plaintiff, was authorised by a valid State law.[5] It is not an inutile or hypothetical question.[6] The answer will determine whether the State is "at liberty to repeat [its] conduct if things change", and if it is proposed, once again, to make directions impermissibly restricting movement.[7]

4 The second plaintiff's business relies heavily on the freedom of Victorians, potential customers, to move freely within their State. Prior to the Lockdown Directions,[8] the first plaintiff was successfully engaged in the business of hospitality.[9] The answer to the question posed in this proceeding will enable him to determine whether it is viable for him (and the livelihood of his family) to continue in the hospitality industry and to continue to conduct the business of the second plaintiff.

5 In these circumstances, the declaratory relief claimed raises a question not "abstract or hypothetical" but rather one in respect of which the plaintiffs have a "real interest".[10] It is a question vital to the second plaintiff's ability to pursue its business during the usually more prosperous "summer" months. It is consequently vital to both the first plaintiff's material and mental wellbeing, as well as that of his family.

---

4 *Plaintiff M68* (2016) 257 CLR 42 at 152 [350]; see also 90 [112].
5 *Plaintiff M68* (2016) 257 CLR 42 at 65-66 [23].
6 *Plaintiff M68* (2016) 257 CLR 42 at 65-66 [23].
7 *Plaintiff M68* (2016) 257 CLR 42 at 65-66 [23]; see also at 76 [64], 123 [235]. See also *Wragg v New South Wales* (1953) 88 CLR 353 at 371; [1953] HCA 34.
8 Defined at ASOC [2] [**CB-5 to 6**].
9 ASOC [3]-[4] [**CB-6 to 7**].
10 *Plaintiff M68* (2016) 257 CLR 42 at 76 [64]. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; [1992] HCA 10; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 359 [103]; [2010] HCA 41, citing *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-356 [46]-[47]; [1999] HCA 9.

6 The plaintiffs, being "affected in [their] person" by the conduct, which they claim "to have been unconstitutional, [have] a sufficient interest to give [them] standing to seek such a declaration at the commencement of the proceeding".[11] They do "not lose that standing by reason of the change of circumstances which might occur" in Victoria.[12] The possible removal of the restraint on freedom of movement does not lessen the gravity of the questions before the Court, and upon which the parties have joined issue, and does not diminish the "direct or special interest in the subject matter of those proceedings",[13] nor does it disentitle the plaintiffs to have the question considered.[14]

7 In *Plaintiff M68*, the defendants claimed that the plaintiff lacked standing because the
10 proceedings concerned past conduct and would have no further consequences for the plaintiff beyond the making of the declaration sought.[15] This Court unanimously held that the plaintiff had standing with respect to the declaratory relief sought, notwithstanding that it related to past conduct. The State has not yet confirmed that will be the case here.

8 The plaintiffs challenge s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic). The law being administered by this Court is not the impugned law, s 200(1)(b) and (d), but the *constitutional law* which determines the validity or invalidity of the impugned law.[16] The practice of this Court is to allow the constitutional validity of statutes, including State laws, to be challenged by persons claiming declarations of
20 invalidity.[17] It is not necessary to show that the plaintiffs are at all times subject to Executive action under the impugned provisions.[18]

---

11 *Plaintiff M68* (2016) 257 CLR 42 at 90 [112]. See also *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570; [1945] HCA 15, quoted in *Croome v Tasmania* (1997) 191 CLR 119 at 126, 137; [1997] HCA 5. A concession made by the defendant to proceed (with the proceedings) may amount to a sufficient interest in the subject to assert that a purported law is invalid: *Croome* (1997) 191 CLR 119 at 127.

12 Ibid.

13 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 611 [44]; [2000] HCA 11; see also at 637 [122].

14 *Wragg* (1953) 88 CLR 353 at 392.

15 *Plaintiff M68* (2016) 257 CLR 42 at 65 [23].

16 *Croome* (1997) 191 CLR 119 at 126.

17 *Croome* (1997) 191 CLR 119 at 125-126, 136-137, quoting *Toowoomba Foundry* (1945) 71 CLR 545 at 570.

18 *Croome* (1997) 191 CLR 119 at 138.

9 If the State undertakes that all restrictions on freedom of movement within Victoria will be removed at 11.59 pm on 8 November 2020, the plaintiffs will not press for an urgent hearing of this proceeding, if that is convenient to the Court.

Dated: 3 November 2020

Bret Walker SC
(02) 8257 2527
maggie.dalton@stjames.net.au

Michael D Wyles QC
(03) 9225 8868
michaeldwyles@mac.com

Rodrigo Pintos-Lopez
(03) 9225 6556
rpintoslopez@vicbar.com.au

Stephanie C B Brenker
(03) 9225 7999
stephanie.brenker@vicbar.com.au

Counsel for the Plaintiffs