HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Oct 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:	Form 27A - Appellant's submissions
Filing party:	Plaintiffs
Date filed:	23 Oct 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

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

20

Brit Ibanez, Solicitor
42/264 George Street
Sydney NSW 2000

T: +61 419 208 276
E: brit.ibanez@hamiltonlocke.com.au
Ref: 12074

PART I FORM OF SUBMISSIONS

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

PART II ISSUES IN THE DEMURRER

2 The issue is represented by the question of law arising by way of the defendant's demurrer for the opinion of the Full Court, as follows:

> Does the *Constitution* provide for an implied freedom for the people in and of Australia, members of the Australian body politic, to move within the State where they reside from time to time, for the purpose of pursuing personal, recreational, commercial, and political endeavour or for any reason, free from arbitrary restriction of movement?

3 The question might be more accurately put as follows: does the *Constitution* imply a qualified freedom[1] for the people in and of Australia to move within the State where they reside from time to time (**Freedom of Movement**)?

PART III SECTION 78B NOTICE

4 The plaintiffs have served notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) on the Commonwealth and all State and Territory Attorneys-General.

PART IV JUDGMENT BELOW

5 This proceeding is in the Court's original jurisdiction. There is no judgment below.

PART V FACTS

6 In March 2020, Novel Coronavirus 2019, commonly referred to as "COVID-19", was declared by the Commonwealth Governor-General to have brought about a human biosecurity emergency.[2] At that time, the Victorian Minister for Health declared a "state of emergency",[3] which continues to the present day.[4]

7 Section 200(1) of the *Public Health and Wellbeing Act 2008* (Vic) (**Health Act**) confers "emergency powers", which can be exercised by an authorised officer, including an

---

1 See *Unions NSW v New South Wales* (2019) 264 CLR 595 at 651-652 [155]; [2019] HCA 1.
2 ASOC [9] [**CB-9**].
3 ASOC [10(a)] [**CB-10**].
4 ASOC [10(c)] [**CB-10**].

unlimited power to "restrict the movement of any person or group of persons within the emergency area".[5]

8 The emergency powers in s 200(1)(b) and (d) are being used by the Victorian Chief Health Officer to issue directions restricting the ability of the Australian people living in Victoria to move within the State.[6] By way of example, those directions prohibit residents of Greater Melbourne travelling more than 25 km from their place of residence, prohibit workers from attending their place of work unless they carry a permit and deny families meeting together in their homes.[7]

PART VI ARGUMENT

10 9 The *Constitution* implies a Freedom of Movement which is:

(a) implied from the text and structure of the *Constitution* and is logically and practically necessary for the preservation of the constitutional structure;

(b) alternatively, to be implied from the system of representative and responsible government enshrined in the *Constitution* and as part of the implied freedom of political communication;

(c) alternatively, implied as an aspect of s 92 of the *Constitution*.

"Liberty of movement"

10 The interpretation of the *Constitution* is necessarily influenced by the fact that its provisions are framed in the language of the common law[8], known to the framers at the
20 time, and are to be read in light of the common law's history.[9]

---

5 Health Act, s 200(1)(b); ASOC [11] [**CB-10**].
6 [**CB-22**].
7 [**CB-14**]-[**CB-18**].
8 In this context, art 23 of *Blackstone's Commentaries* is instructive: "23. *In what does this personal liberty consist?* In the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law". See Devereaux et al, *The Most Material Parts of Blackstone's Commentaries, Reduced to Questions and Answers* (New York, 1875) at 19. See also Sir Owen Dixon in "The Law and the Constitution" (paper delivered in Melbourne on 14 March 1935), Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses by the RT Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019).
9 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564; [1997] HCA 25.

11 Freedom of movement within the proposed Commonwealth was considered during the Convention Debates[10]. Consideration was given to United States authorities such as *Corfield v Coryell*,[11] in which Washington J held that fundamental privileges and immunities included the "right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise [and] to claim the benefit of the writ of *habeas corpus*".

12 In the Convention Debates, Mr Isaacs quoted the following passage from the *Slaughterhouse Cases*, explaining that such "rights" were already guaranteed to certain members of the American people before the introduction of the 14th amendment in the US Constitution, and the purpose of that amendment was to extend those rights to former slaves following the end of the Civil War:[12]

> "The right of a citizen of this great country, protected by the implied guarantees of its Constitution, to come to the seat of government to assert any claim he may have upon the Government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions, free access to its sea ports through which all operations of foreign commerce are conducted, also to the sub-treasuries, land offices, and courts of justice of the several states. Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government for his life, liberty, and property when on the high seas, or within the jurisdiction of a foreign country; the right to peaceably assemble and petition for redress of grievances; the privilege of the writ of *habeas corpus*; the right to use the navigable waters of the United States, however they may penetrate the territory of the several states..."

13 During the Convention Debates, the House of Assembly of Tasmania proposed a clause, derived from the 14th amendment, which provided that a State shall not "deprive any person of life, liberty, or property without due process of law". That clause was not adopted by the framers because it was considered unnecessary; in effect, because such freedoms were already encompassed.[13]

---

10 The Convention Debates have been relied upon in interpreting the *Constitution* and uncovering the implications arising from its text and structure: see, eg, *Cole v Whitfield* (1988) 165 CLR 360; [1988] HCA 18.

11 (1823) 4 Wash CC 380, quoted in Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 959.

12 (1872) 83 US 36; 16 Wall 36, quoted in *Official Record of the Debates of the Australasian Federal Convention* (Melb), 8 February 1898 at 668.

13 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 8 February 1898 at 667-690.

14 The Convention Debates also reveal that the framers relied upon a pre-existing freedom of movement when adopting express provisions of the *Constitution*. For example, in the context of what became s 7, the framers took into consideration the geographical size of an electorate and the need for senate candidates to be able to travel to all localities "in order to obtain personal knowledge of their electorates".[14] When debating how long the term of House of Representatives membership should be, in the context of what became s 28, the Legislative Assembly of Western Australia argued that three years would be too short "considering the long distance which members will have to travel from their homes to get to the place of meeting".[15]

15 In the context of quarantine, the Hon R. E. O'Connor considered the following statement of US law to be "exactly applicable" to the proposed *Constitution*:[16]

> "By, parity of reason addressed to the protection of the public health, states may exercise their police powers to the extent of prohibiting both persons and animals, when labouring under contagious diseases, from entering their territory. They may pass any sanitary laws deemed necessary for this purpose, and enforce them by appropriate regulations. It is upon this reserved right of self-protection that quarantines are permitted to *interfere with the freedom of commerce and of human intercourse*. But this power is not without its limitations, and its exercise must be restricted to directly impending dangers to health, and not to those who are only contingent and remote. Hence, while diseased persons or diseased animals, and those presumedly so from contact with infected bodies or localities, may be prevented from entering a state, any general law of exclusion, measured by months, or operating in such a way as to become a barrier to commerce or travel, would be a regulation of commerce forbidden by the constitution. Such a statute being more than a quarantine regulation, transcends the legitimate powers of a state." (emphasis added)

16 In the context of what became s 98, "navigation" of rivers meant "something mankind requires, to use Wolseley's words, to enable them to fulfil their vocation in the world", similarly to railways and coaches.[17]

17 In the context of what became s 51(xix) and (xxvii), Mr Wise stated that "[t]he Commonwealth Parliament is to have no power to deal with the movement of population except paupers, lunatics, and aliens, and under section 52 it is to exercise full powers with regard to any or all of those three classes … if the Commonwealth Parliament

---

14 *Official Record of the Debates of the Australasian Federal Convention* (Syd), 13 September 1897 at 362, 376.
15 *Official Record of the Debates of the Australasian Federal Convention* (Syd), 13 September 1897 at 463.
16 *Official Record of the Debates of the Australasian Federal Convention* (Syd), 22 September 1897 at 1061.
17 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 21 January 1898 at 36.

undertakes to deal with the movement of population in regard to one or more of those three classes – paupers, aliens, and lunatics – the persons whose movements are fettered by the Federal Parliament shall have the right to look to the Federal Parliament for protection, and for the full security that the Federal Parliament can give".[18]

18 A pre-existing freedom of movement was also relied upon in the framers' discussions regarding "internal traffic" within the States in the context of trade and commerce.[19]

19 The framers did not include the term "citizen" in the *Constitution*.[20] However, they considered it necessary that the people of the Commonwealth have "universal citizenship" both with respect to the Commonwealth and the States, otherwise "[c]ommercial transactions, the right to make contracts, or to hold lands, and *travel, intercourse, and traffic* between the several states, would be seriously embarrassed and obstructed"[21] (emphasis added).

Implication of federal privileges and immunities

20 In 1901, after the Convention Debates and referenda throughout the then colonies, "the *people* of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and …. Western Australia … united in a Federal Commonwealth under the name of the Commonwealth of Australia" (emphasis added).[22] The "people agreed to be governed by a constitution enacted by a British statute"[23] in one sovereign nation.[24]

21 The concept of "the people of the Commonwealth" is critical to the structure of the *Constitution*.[25] The people of the Commonwealth are those people who are domiciled within the territorial limits of the Commonwealth. They do not lose their character as people of the Commonwealth by migrating from one State to another.

---

18 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 27 January 1898 at 230.
19 See *Official Record of the Debates of the Australasian Federal Convention* (Melb), 13 February 1898; *Official Record of the Debates of the Australasian Federal Convention* (Syd), 11 March 1898.
20 See generally, *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (2020) 94 ALJR 198; [2020] HCA 3.
21 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 8 February 1898 at 680.
22 *Constitution*, covering cl 3.
23 *McGinty v Western Australia* (1996) 186 CLR 140 at 230; [1996] HCA 48.
24 See *Constitution*, covering cll 3, 4, 5, 6 and 9.
25 *Hwang v The Commonwealth* (2005) 80 ALJR 125 at 130 [17]; [2005] HCA 66.

22 Their privileges and immunities, by virtue of being people of the Commonwealth[26], may be gathered from either the express provisions of the *Constitution* or as a necessary implication of the text and structure of the *Constitution*.[27]

23 Recently, this Court reiterated the approach to implication of terms in the *Constitution*[28], as adopted by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*.[29] Implication of a constitutional limitation on the ambit of legislative power must be "logically or practically necessary for the preservation of the integrity of [the constitutional] structure".[30] The constitutional structure is "the plan laid out in the *Constitution* for the development of a free and confident society".[31]

10 **The text: one federal system**

24 The text and structure of the *Constitution* imply the Freedom of Movement, which is "so obvious that detailed specification is unnecessary".[32] Freedom of Movement is logically and practically necessary for the constitutionally prescribed federal system and for the uniform application of Commonwealth laws to the Australian people resident in every part of the Commonwealth.

25 To achieve the goal of one federal system, the *Constitution* conferred on the new federal Parliament power to legislate on all matters perceived by the framers to be vital to the peace, order and good government of the nation. By the people's adoption and implementation of the *Constitution*, the colonies ceased to be. Each of the colonies was
20 constituted a State by operation of covering cl 6 and Ch V (in particular ss 106 and 107) of the *Constitution*.

26 The distribution of powers between the Commonwealth and the States is predicated upon the binding legislative power of the Commonwealth[33] vested in the federal Parliament under s 9. Covering cll 5 and 6 provide that all laws made by the federal

---

26 See Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 957-959.
27 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 958, quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 170; [1994] HCA 46.
28 See generally *Unions NSW* (2019) 264 CLR 595.
29 (1992) 177 CLR 106 at 135; [1992] HCA 45.
30 *Burns v Corbett* (2018) 265 CLR 304 at 355 [94], 383 [175]; [2018] HCA 15, quoting *Australian Capital Television* (1992) 177 CLR 106 at 135. See also *McGinty* (1996) 186 CLR 140 at 168-169: "The determinative question is whether denial of State legislative power to confer State judicial power with respect to a matter identified in s 75 or s 76 on a State tribunal that is not a State court meets that threshold".
31 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61]; [2007] HCA 33.
32 *Australian Capital Television* (1992) 177 CLR 106 at 209.
33 *Constitution*, s 109.

Parliament are binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.[34]

27 Section 24 provides that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth. It embodies the notion of a representative government directly chosen by the people of the Commonwealth without regard to their status as residents of any State. Similarly, pursuant to s 34, qualification for membership of the House of Representatives requires residency within the limits of the Commonwealth.

28 The *Constitution* creates this High Court at the apex of the system of justice. In Australia, "[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute".[35] That "one common law in Australia … is declared by [the High] Court as the final Court".[36] It operates in the federal system established by the *Constitution*. The *Constitution*, the federal, State and territorial laws, and the common law together constitute the law of this country and form "one system of jurisprudence".[37]

29 Such uniformity of application of laws is also evident in s 117, which provides that a resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a resident in such other State.[38]

30 It is this "federal scheme manifested in the text and structure of the *Constitution*"[39] which logically requires[40] freedom for the people to move within the Commonwealth.

---

34 *Burns* (2018) 265 CLR 304 at 337 [47], quoting *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 617-618 [19]-[20]; [2008] HCA 28.

35 *Lange* (1997) 189 CLR 520 at 563.

36 *Lange* (1997) 189 CLR 520 at 563.

37 *Lange* (1997) 189 CLR 520 at 564.

38 There are clear parallels between s 117 and the 14th amendment of the US Constitution, which provides "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Stevens J, writing for the majority in *Saenz v Roe* (1999) 526 US 489 observed that the right to travel encompasses "three different components", including the right of new state citizens to have the same rights and benefits as other state citizens found in the 14th amendment. A state law that discriminates between newly-arrived state citizens and other state citizens is subject to the strict scrutiny test, such that it is unconstitutional "unless shown to be necessary to promote a compelling governmental interest": *Saenz* (1999) 526 US 489 at 502 referring to *Baldwin v Fish and Game Commission of Montana* (1978) 436 US 371 at 390-391; and *Vlandis v Kline* (1973) 412 US 441 at 445.

39 *MZXOT* (2008) 233 CLR 601 at 618.

40 *Australian Capital Television* (1992) 177 CLR 106 at 135.

31 The Freedom of Movement is also necessarily implied by the express provisions of the *Constitution*.

32 The powers conferred on the federal Parliament by s 51 are predicated upon a freedom to move within and between States. The efficacy of those powers would be undermined if movement of the people of the Commonwealth could be curtailed other than by legislation in accordance with the principles identified in *Lange v Australian Broadcasting Corporation*.[41] Not in any exhaustive manner, and by way of illustration:

Section 51(i) – trade and commerce: The efficacy of the commerce power depends on freedom of the Australian people to move as they see fit. Commerce extends to the
10 movement and personal intercourse of individuals engaged in commerce, including passengers.[42] Goods and passengers, subjects of Federal commerce, having once started on their passage, remain subject to Federal control and entitled to Federal protection until the end of the transit, and "until they are lost and intermingled in the general mass of property and people of the State in which they arrive".[43]

Section 51(ii) – taxation: involves the people of the Commonwealth paying tax on what they earn as employees, or in consequence of their investments, or in consequence of owning their own property, all of which involve those people moving between a place of work and home, between customers, between potential customers, to and from suppliers, *et cetera*;

20 Section 51(vi) – defence: contemplates people of the Commonwealth being free to move to a military office where he or she can join and serve;

Section 51(ix) – quarantine: embraces the Commonwealth regulating a person's otherwise free movement for the limited purpose of quarantine;

Section 51(xx) – trading corporations: imports freedom of movement of the employees of same or potential employees of same between homes and workplace and between workplace and home;

Section 51(xxi) and (xxii) – marriage, divorce and custody of children: embraces and is predicated upon the freedom to move from one person to another, from one domestic

---

41 See also *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39; *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34; *Unions NSW* (2019) 264 CLR 595. See further at paragraph 62 below.

42 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 518.

43 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 519-520.

arrangement to another, to move children, *et cetera*. The efficacy of this power is undermined if a State can limit the movement of people with the effect of keeping them in the same residence as the person they wish to leave or from whom they wish to separate;

33 Section 52 concerns: (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; and (ii) matters relating to any department of the public service the control of which is transferred to the Commonwealth Executive. These matters require freedom of the people to travel to the seat of government of the Commonwealth and to all places for public purposes which the Commonwealth may acquire.

34 Section 92 provides for inter-State freedom of personal intercourse, which necessarily implies a freedom to move to the State border or other point of departure.

35 Section 98 provides that the trade and commerce power extends to navigation and shipping, and to railways the property of any State. The power relies upon freedom to travel using those means.

36 We also refer to Ch III and the need for people to be free to attend Ch III courts, including this Court, to have their controversies quelled.

Text and constitutional structure give rise to implication

37 An implied Freedom of Movement was confirmed by Griffith CJ, Barton, Isaacs and Higgins JJ, contemporaries of the Convention Debates and referenda, in *R v Smithers; Ex parte Benson*[44] (***Smithers***). This Court considered the validity of s 3 of the *Influx of Criminals Prevention Act 1903* (NSW) that excluded any person from outside New South Wales from entering that State if they had been convicted of certain offences on the basis that the law was contrary to s 92 of the *Constitution*.

38 Chief Justice Griffith stated that the former power of the States to exclude persons whom they thought might be undesirable was "cut down to some extent by the mere fact of Federation, entirely irrespective of the provisions of secs. 92 and 117".[45] That former power was inconsistent with the elementary notion of a Commonwealth. The Chief Justice cited *Crandall v State of Nevada* (***Crandall***)[46] wherein Miller J stated that

---

44 (1912) 16 CLR 99; [1912] HCA 96.
45 *Smithers* (1912) 16 CLR 99 at 109.
46 (1867) 73 US 35.

citizens had correlative rights including to come to the seat of government to assert any claim, transact any business with government, and rights of free access to its seaports, and to its courts of justice in the several States and that "this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it".[47]

39 Justice Barton agreed with the Chief Justice, stating that *Crandall* applied equally to the Commonwealth *Constitution*. His Honour agreed the reasoning in that case showed that the "creation of the federal union with one government one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and participation in the activities of the nation" which he labelled a "new right".[48] His Honour stated that the New South Wales' law imposed an "arbitrary classification".

40 Justice Higgins approved another passage from *Crandall*, which states in full that, "[f]or all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States".[49]

41 Justice Isaacs considered the scope of the word "intercourse" in s 92 and reasoned that to "limit it to commercial intercourse would make the right of personal freedom to pass a State line depend on the fact of whether the individual was engaged in trade or commerce, and if that were to be given a restricted signification, the people of the Commonwealth would have to rest their right to cross a state line, not on their personality or the common citizenship, but on the sordid fact of some inter-State business transaction".[50] That proposition is consistent with the notion, considered below, that the right to personal intercourse under s 92 is an articulation of the personal freedom to move across a State line, which Isaacs J described as providing for an

---

47 *Crandall* (1867) 73 US 35 at 44, quoted in *R v Smithers* (1912) 16 CLR 99 at 108. See also Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 958, quoted in *Theophanous* (1994) 182 CLR 104 at 170.

48 *Smithers* (1912) 16 CLR 99 at 109-110. Subject to the right of individual States to take precautionary measures in respect of persons who may be dangerous to its "domestic water, itself, or its morals": at 110-111.

49 *Smithers* (1912) 16 CLR 99 at 119. See *Crandall* (1867) 73 US 35 at 48-49, quoting *Passenger Cases* (1849) 48 US 283; 7 How. 283 at 492. The *Passenger Cases* is cited in *Official Record of the Debates of the Australasian Federal Convention* (Melb), 22 February 1898 at 1319.

50 *Smithers* (1912) 16 CLR 99 at 113; see also at 118.

"absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians".[51]

42 Freedom of Movement within the Commonwealth found form in later decisions of this Court in the context of the freedom to attend the federal capital. In *Pioneer Express Pty Ltd v Hotchkiss*[52], Dixon CJ identified an implication protecting the citizens of Australia "from attempts on the part of State legislatures to prevent or control access to the Capital Territory and communications and intercourse with it on the part of persons within the States, to hamper or restrain the full use of the federal capital for the purposes for which it was called into existence".[53] This implication provided for a "most complete immunity from State interference with all that is involved in its existence as the centre of national government, and certainly that means an absence of State legislative power to forbid restrain or impede access to it".[54]

43 Justice Taylor considered the submission that "the statutory provisions cannot stand because they are repugnant to the right of citizens of the Commonwealth freely to travel to and from on journeys between the Australian Capital Territory and the State of New South Wales … [is] implicit in the constitutional instrument and is the only view reconcilable with the Federal structure of the Commonwealth".[55] His Honour stated that "I have no doubt that some such implication is clearly justifiable".[56]

44 In *McGraw Hinds (Aust) Pty Ltd v Smith*[57], Murphy J referred to other constitutional sources of implications at least as important as responsible government, arising from the nature of Australian society. His Honour reasoned that "society professes to be a democratic society – a union of free people, joined in one Commonwealth with subsidiary political divisions of States and Territories. … from the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication … indispensable to any free society".[58]

---

51 *Smithers* (1912) 16 CLR 99 at 117.

52 (1958) 101 CLR 536; [1958] HCA 45.

53 *Hotchkiss* (1958) 101 CLR 536 at 550. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 156; [1997] HCA 27.

54 *Hotchkiss* (1958) 101 CLR 536 at 549-550. Justice McTiernan agreed with Dixon CJ and was negative on an implied s 92 covering territories: at 552. Justice Fullagar agreed entirely with Dixon CJ and had nothing to add: at 553.

55 *Hotchkiss* (1958) 101 CLR 536 at 560.

56 *Hotchkiss* (1958) 101 CLR 536 at 560; cf at 566 per Menzies J.

57 (1979) 144 CLR 633; [1979] HCA 19.

58 See *McGraw Hinds* (1979) 144 CLR 633 at 670, referring also to *Buck v Bavone* (1976) 135 CLR 110; [1976] HCA 24; *Ansett Transport (Operations) Pty Ltd v The Commonwealth* (1979) 139 CLR 54 at

45 Justice Gaudron considered freedom of movement was obviously implied in the *Constitution*[59], and noted in *Australian Capital Television* that "constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the Constitution or because what they entail is taken to be so obvious that detailed specification is unnecessary".[60]

46 Justice McHugh in *Australian Capital Television* was more explicit, stating that "members of this Court have recognized that the people of the Commonwealth have an implied right of access through the States for federal purposes which the States cannot impede except on grounds of necessity".[61]

10 47 The State of Victoria's denial of movement for more than 100 days raises, as a justiciable controversy, the Freedom of Movement implied by the *Constitution*.

Implied freedom of political communication

48 Freedom of Movement is essential to the system of representative and responsible government enshrined within the *Constitution*, the implied freedom of political communication and the legislative power of the Commonwealth.[62] To date, the implication of a Freedom of Movement as an aspect of the freedom of political communication has not been determined. Such an implication as an aspect of freedom of political communication is consistent with a "free and confident society". Freedom of Movement in this context has been contemplated by members of this Court as an
20 implication of the constitutional structure.

49 Notwithstanding modern means of communication[63], the Australian people are free to meet in person to discuss political matters and participate in the political process.[64] Participation cannot be achieved by individuals without freedom of movement. That participation includes community involvement in sporting, cultural, religious and community activities, where the represented communicate, exchange ideas and experiences and evaluate potential and actual representatives. That participation

---

87-88; [1977] HCA 71; *Crandall* (1867) 73 US 35; and *Smithers* (1912) 16 CLR 99. Murphy J reiterated his position in *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 311-312; [1980] HCA 40.

59 See *Kruger* (1997) 190 CLR 1 at 115-16, discussed from paragraph 55 below; *Levy v Victoria* (1997) 189 CLR 579 at 617-618; [1997] HCA 31.

60 (1992) 177 CLR 106 at 209-210.

61 *Australian Capital Television* (1992) 177 CLR 106 at 232.

62 See *Constitution*, s 1.

63 *Kruger* (1997) 190 CLR 1 at 115-116.

64 See *Australian Capital Television* (1992) 177 CLR 106 at 160, 174, 212.

includes not only the capacity of citizens to communicate with their representatives and potential representatives, but also the act of voting for, or supporting or opposing the election of, candidates, monitoring the performance of and petitioning federal Ministers and parliamentarians and voting in referenda.[65]

50 Participation in representative government extends to those persons wishing to represent, or representing, an electorate needing to see in person a circumstance, place or persons for the purpose of representation, for example, to travel to and witness the effects of a drought in the person's original electorate. It also extends to moving to physically cast a ballot. In *McGinty v Western Australia*[66], Gummow J stated that it is "hardly to be expected that the Constitution was framed so as to present an impermanent or incomplete statement of the incidents of responsible government on the footing that the Parliament which would make changes and remedy deficiencies perceived from time to time would be composed other than by the representatives of electors who had been free of legislative impediment in informing themselves, by moving in and among the represented and in receiving in person from the represented and other representatives or potential representatives, information and comment upon matters of political interest".

51 It cannot be pretended that the system of representative and responsible government enshrined in the *Constitution* can be exhaustively stated to define bright-line parameters which exclude freedom of represented and representatives to move within the Commonwealth. Nor can the freedom of the Australian people to move within those parameters be denied as a logical and necessary implication of the constitutional structure.

52 In *Australian Capital Television*[67], Mason CJ said one reason why freedom of political communication was indispensable to a system of representative and responsible government was that "[o]nly by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives". His Honour reasoned that the "efficacy of representative government depends also upon free

---

65 See *Australian Capital Television* (1992) 177 CLR 106 at 142. Similarly, Deane and Toohey JJ, as noted by Edelman J in *Unions NSW* (2019) 264 CLR 595 at 661 [181], said that the implied freedom extends not merely to communications by candidates and political parties but also to "communications from the represented to the representatives and between the represented": (1992) 177 CLR 106 at 174.

66 (1996) 186 CLR 140 at 286.

67 (1992) 177 CLR 106 at 138, quoted in *Unions NSW* (2019) 264 CLR 595 at 661 [181]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17]; [2013] HCA 58.

communication on such matters between all persons, groups and other bodies in the community". Public participation in political discussion, held Mason CJ, is a central element of the political process.[68]

53 Justice Gaudron considered the elements of a representative parliamentary democracy[69], stating that 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". Free elections, her Honour reasoned, are an indispensable feature of a society that necessarily entails, at the very least, freedom of political discourse "not limited to communication between candidates and electors, but extends to communication between the members of society generally".[70]

54 In *Kruger v The Commonwealth* (***Kruger***)[71], the question of an implied freedom of movement and association came before the Court. Toohey J referred to a number of earlier decisions[72], including *Smithers*, and concluded that s 122 of the *Constitution* is restricted by a freedom of movement and association implied in the *Constitution*.[73]

55 Justice Gaudron considered that the cases concerning implied constitutional freedom of political communication did not confine the freedom to political communications and discussions; rather "the Constitution mandates whatever is necessary for the maintenance of the democratic processes for which it provides".[74] Her Honour agreed with the fundamental elements of the system of government as described by Mason CJ in *Australian Capital Television*[75], being that in the exercise of legislative and executive powers, elected representatives are of necessity accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[76]

---

68 *Australian Capital Territory* (1992) 177 CLR 106 at 139.
69 *Australian Capital Territory* (1992) 177 CLR 106 at 210-211.
70 *Australian Capital Territory* (1992) 177 CLR 106 at 212.
71 (1997) 190 CLR 1.
72 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35; [1975] HCA 53; *Buck v Bavone* (1976) 135 CLR 110 at 137; *Cole v Whitfield* (1998) 165 CLR 360 at 393; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69-70, 72; [1992] HCA 46; *Australian Capital Television* (1992) 177 CLR 106; *Theophanous* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; [1994] HCA 45; *McGinty* (1996) 186 CLR 140 at 198; *Lange* (1997) 189 CLR 520.
73 *Kruger* (1997) 190 CLR 1 at 93.
74 *Kruger* (1997) 190 CLR 1 at 114.
75 *Kruger* (1997) 190 CLR 1 at 115.
76 *Kruger* (1997) 190 CLR 1 at 115.

56 Her Honour, citing *Nationwide News v Wills*[77], concluded that just as communication would be impossible if each person was an island, "so too it is substantially impeded if citizens are held in enclaves" and that freedom of political communication "depends on human contact and entails at least a significant measure of freedom to associate with others" which, in turn, "necessarily entails freedom of movement".[78] Further, "modern methods of communication notwithstanding, freedom of political communication between citizen and citizen and between citizens and their elected representatives entails, at the very least freedom to move within society, freedom of access to the institutions of government and, as was early recognised in [*Smithers*], freedom of access to the seat of government".[79] Because "freedom of movement and freedom of association are, at least in the respects mentioned, aspects of freedom of political communication, they, too, are implicit in the Constitution and constrain the power conferred by s 51".[80]

57 Justice McHugh reasoned, similarly to Gaudron J, that the system of representative and responsible government provided for by the *Constitution* led to the drawing of the implication that "'the people' must be free from laws that prevent them … from travelling inside and outside Australia for the purposes of the constitutionally prescribed system of government in referendum procedure".[81] His Honour stated that implication of "freedom from laws preventing association and travel must extend, at the very least, to such matters as voting for, or supporting or opposing the election of, candidates for membership of the Senate and the House of Representatives, monitoring the performance of and petitioning federal Ministers and parliamentarians and voting in referenda".[82]

58 Justice Gummow noted that the "structure established by the *Constitution* has as essential elements a system of responsible government and representative government".[83] His Honour was not satisfied that it was logically or practically necessary for the preservation of the integrity of that structure to imply a restriction

---

77 (1992) 177 CLR 1 at 72. See also *Australian Capital Television* (1992) 177 CLR 106 at 139, 174, 212, 231; *Lange* (1997) 189 CLR 520 at 559-560.
78 *Kruger* (1997) 190 CLR 1 at 115.
79 *Kruger* (1997) 190 CLR 1 at 116.
80 *Kruger* (1997) 190 CLR 1 at 116. The freedom of movement and freedom of association are not absolute and are subject to whether the ordinance impermissibly restricts those freedoms: at 121.
81 *Kruger* (1997) 190 CLR 1 at 142.
82 *Kruger* (1997) 190 CLR 1 at 142.
83 *Kruger* (1997) 190 CLR 1 at 157.

upon federal legislative power with respect to "freedom of association".[84] His Honour did not consider, in the same manner, the question of "freedom of movement" for political, cultural and familial purposes[85].

59 In *Unions NSW v New South Wales*[86], Kiefel CJ, Bell and Keane JJ stated that the validity of a statutory provision which restricts or burdens the freedom of political communication depends upon the answers to the questions posed in *Lange*.[87] In doing so, their Honours confirmed that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters", as that "freedom is implied by the provision the
10 Commonwealth Constitution makes for representative government and the choice to be made by the people".[88]

Right to free intercourse among States guaranteed by s 92

60 The protection afforded by s 92 of the *Constitution*, that intercourse among the States shall be absolutely free, is an expression of the freedom to move.[89] Having regard to the Convention Debates, summarised at paragraphs 11 to 19 above, it may be inferred that the framers required the freedom to move between former colonies to be stated expressly in the *Constitution* in circumstances where that freedom already existed within the colonies but, following federation, needed to be assured with respect to citizens wishing to travel from one State to another.

20 61 The freedom to move intrastate can therefore be regarded as an aspect or necessary incident to the right to free intercourse among the States. The right to cross borders must

---

84 *Kruger* (1997) 190 CLR 1 at 157, comparing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 175-176, 183-184; [1951] HCA 5.

85 See *Kruger* (1997) 190 CLR 1 at 156-159.

86 (2019) 264 CLR 595 at 607.

87 (1997) 189 CLR 520 at 571.

88 *Unions NSW* (2019) 264 CLR 595 at 607. Justice Gageler cited Dixon J in *Australian Communist Party* who warned that "[f]orms of government may need protection from dangers likely to arise from within the institutions to be protected": at 620. Justice Gordon stated that the implied freedom of political communication had been recently explained in *Brown v Tasmania* (2017) 261 CLR 328 at 430 [312]-[313]. Her Honour cited, at 646, *Australian Capital Television* for the proposition that the freedom cannot be understood as confined in the manner stated because the "efficacy of representative government depends … upon free communication … between all persons, groups and other bodies in the community": (1992) 177 CLR 106 at 139. Justice Edelman stated the freedom is qualified in that legislative purposes can be pursued even if they burden the freedom provided that the purposes are legitimate and that the burden is justified: at 652. His Honour stated that the three questions set out in the joint judgment in *Brown v Tasmania* "provide a clear and principled way of approaching the issue of whether a law is invalid is contrary to the implied freedom of political communication": at 654.

89 See generally *Smithers* (1912) 16 CLR 99; *Cole* (1998) 165 CLR 360.

entail a freedom to travel intrastate up to that border. A law that would otherwise prevent movement to the border would infringe upon those persons who do not reside proximate to the border from exercising that freedom; similarly, that law would make the right to free intercourse among the States ineffectual.

Section 200(1)(b) and (d) of Health Act and Lockdown Directions

62 The impact of a qualified freedom for the people in and of Australia to move within the State where they reside from time to time, will be attenuated in accordance with the *Lange* test.[90] By way of example, s 200(1)(b) and (d) of the Health Act, the underlying issue in this proceeding, demonstrates an impermissible burden upon the Freedom of
10 Movement, as the unlimited power reposed in the Executive to restrict movement cannot be reconciled with maintenance of the constitutional text and structure outlined above.

63 The directions annexed to the defendant's demurrer, along with the earlier directions referred to in the statement of claim, made under s 200(1)(b) and/or (d) of the Health Act, provide a sufficient basis to apply the second limb in *Lange*.

64 The statutory scaffolding of the exercise of that power is contained in Pt 10, the protection and enforcement provisions, Div 3 entitled "emergency powers". Access to the emergency powers in s 200(1) requires *first*, the Minister, on the advice of the Chief Health Officer, declaring a state of emergency under s 198; *second*, the Chief Health Officer under s 199 forming a belief that it is reasonably necessary to eliminate or reduce
20 a serious risk to public health to authorise a second public official (an authorised officer) to exercise the emergency powers; and, *third*, that second public official, once authorised, may exercise the emergency powers in s 200(1), including s 200(1)(b) and (d).

65 The emergency power, exercised by the second public official, in s 200(1)(b) is to "restrict the movement of any person or group of persons within the emergency area" without any qualification. The emergency power in s 200(1)(d) is to "give any other direction that the authorised officer considers is reasonably necessary to protect public health". Those powers in the hands of the second public official are otherwise unconstrained.

---

90 *Levy v Victoria* (1997) 189 CLR 579 at 619.

66 The position is to be compared with the power in s 200(1)(a) to "detain any person or group of persons in the emergency area for the period reasonably necessary to eliminate or reduce a serious risk to public health". The formation of the opinion of the second public official that the exercise be for a period reasonably necessary directed to the serious risk of public health provides a necessary constraint upon the power. In addition, various other constraints are imposed upon the exercise of that power in s 200(2) to (10), including: provision of an explanation; facilitating requests for communication; a review to be conducted every 24 hours as to whether the continued detention of the person is reasonably necessary; notice to the Chief Health Officer; and the Chief Health Officer advising the Minister.

67 The protections afforded to persons detained under the Health Act are absent in relation to the restriction of movement. The untrammelled nature of the power in s 200(1)(b) is evident in its capacity to restrict the movement, and, in practical terms, in relation to the Lockdown Directions[91] imposed upon the more than 5 million residents of Greater Melbourne which have the effect of confining residents to their homes.

68 The circumstances of the powers under s 200(1)(b) and (d), and their grant in relation to the Lockdown Directions, provide the necessary factual basis for the Court to identify the interest affected, an implied freedom of movement, which is a freedom enuring to the residents of Victoria and to all Australians.

PART VII ORDERS SOUGHT

69 The question asked by the defendant's demurrer, dated 21 October 2020, should be answered as follows:

> Q. Does the Constitution provide for an implied freedom for the people in and of Australia, members of the Australian body politic, to move within the State where they reside from time to time, for the purpose of pursuing personal, recreational, commercial, and political endeavour or for any reason, free from arbitrary restriction of movement?
>
> *A: Yes.*
>
> Q. Who should pay the costs of the demurrer?
>
> *A. The defendant.*

91 ASOC [2] [**CB-5]-[CB-6]**.

PART VIII TIME FOR ORAL ARGUMENT

70 The plaintiffs estimate that up to 2 hours will be required for oral submissions.

Dated: 23 October 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

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

ANNEXURE TO PLAINTIFFS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No.1 of 2019, the Plaintiffs set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

No	Description	Date in Force	Provisions
Legislation			
1.	*Judiciary Act 1903* (Cth)	6 September 2018	s 78B
2.	Commonwealth *Constitution*	4 September 2003	1, 3, 4, 5, 6, 7, 9, 24, 28, 34, 51, 52, 92, 98, 106, 107, 109, 117, 121, 122
3.	*Public Health and Wellbeing Act 2008* (Vic)	21 October 2020	200
4.	*Biosecurity Act 2015* (Cth)	25 March 2020	42(1)
Statutory Instruments			
5.	Declaration of Human Biosecurity Emergency	18 March 2020	475
6.	Declaration of State of Emergency	Various dates since 16 March 2020 with current operative instrument issued 11 October 2020	

No	Description	Date in Force	Provisions
7.	Stay at Home Directions (Restricted Areas) (No. 17)	4 October 2020	
8.	Stay at Home Directions (Restricted Areas) (No. 18)	11 October 2020	
9.	Stay at Home Directions (Restricted Areas) (No. 19)	18 October 2020	
10.	Permitted Worker Permit Scheme Directions (No. 6)	27 September 2020	
11.	Permitted Worker Permit Scheme Directions (No. 7)	11 October 2020	
12.	Workplace Directions (No. 6)	27 September 2020	
13.	Workplace 10 Directions (No. 7)	11 October 2020	
14.	Restricted Activity Directions (Restricted Areas) (No. 11)	4 October 2020	
15.	Restricted Activity Directions (Restricted Areas) (No. 12)	11 October 2020	
16.	Restricted Activity Directions (Restricted Areas) (No. 13)	18 October 2020	
17.	Workplace (Additional Industry Obligations) Directions (No. 7)	4 October 2020	
18.	Workplace (Additional Industry Obligations) Directions (No. 8)	11 October 2020	
19.	Workplace (Additional Industry Obligations) Directions (No. 9)	18 October 2020	