



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

M104/2020

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' REPLY

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PART I FORM OF SUBMISSIONS

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

PART II ARGUMENT

Free-standing freedom implied from text and structure of the *Constitution*

- 2 The plaintiffs’ submissions start and finish with the text, structure and function of the *Constitution*,¹ and “the plan laid out in the Constitution for the development of a free and confident society”.² A “free and confident society” where ““choice by the people” of parliamentary representatives is a constitutional notion signifying individual citizens having a share in political power through a democratic franchise.”³
- 10 3 The Convention Debates, and constitutional history more broadly, identify “the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged”.⁴
- 4 The plaintiffs do not contend “that the Freedom of Movement should be constitutionally entrenched... from the long standing recognition of personal liberty at common law.”⁵ The purpose of the implication of a qualified freedom for the people in and of Australia to move within the State where they reside “is to protect the efficacious working of”⁶ “the plan laid out in the Constitution for the development of a free and confident society.”⁷
- 20 5 The implied freedom of movement “should be understood as being capable of extending to freedom from restraints imposed by... statute law or common law.”⁸ The content of the implication to be drawn from the Constitution, where statute law interferes unduly with that freedom of movement, is not limited by the beliefs of the framers as to the sufficiency of the protection of movement conferred by the common law.⁹

¹ PS [24]-[46]. Cf defendant’s submissions (DS) [51], Qld [5(c)].

² *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61], 442 [385]; [2007] HCA 33, referred to in *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131]; [2010] HCA 39.

³ *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [347] per Crennan J.

⁴ *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

⁵ See SA[44].

⁶ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 128.

⁷ *Mowbray* at [61].

⁸ *Theophanous* at 128.

⁹ *Theophanous* at 128.

6 Contrary to the Defendant’s submissions,¹⁰ the freedom of Australians to move within their State of residence is not an implication of a “freedom of association”. Liberty of movement subject to the due process of the law¹¹ is not association,¹² and the Defendant’s conflation of movement and association is apt to lead to error.

7 The freedom to move within one’s State of residence includes a freedom to move for “federal purposes”.¹³ There appears to be some consensus that the freedom would protect travel to the seat of government,¹⁴ to a Chapter III court,¹⁵ or for the purpose of facilitating the business of federal agencies.¹⁶ This is comprehensible as an incident of membership of the “people of the Commonwealth.” The freedom of movement extends to all movement within one’s State of residence for the purpose of “due participation in the activities of the nation”.¹⁷

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8 The decision in *Smithers*¹⁸ does not need to be treated with caution¹⁹ because it preceded the *Engineers’ Case*.²⁰ To the contrary, that decision of two of the framers²¹ confirms the freedom of movement implied from the structure and function of the Constitution. As put by Windeyer J:²²

In 1920 the *Constitution* was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs. For lawyers the abandonment of old interpretations of the limits of constitutional powers was readily acceptable. It meant only insistence on rules of statutory interpretation to which they were well accustomed. But reading the instrument in this light does not to my mind mean that the original judges of the High Court were wrong in their understanding of what at the time of federation was believed to be the effect of the Constitution and in reading it accordingly.

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Implied as part of freedom of political communication and from system of representative and responsible government

9 The plaintiffs agree with the defendant and interveners that the implied freedom of political communication protects the freedom of Australians to move within their State

¹⁰ At [40].
¹¹ For example the criminal law and the law of trespass and the law of negligence.
¹² See Gummow J in *Kruger* at p 157.
¹³ *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108; [1912] HCA 96.
¹⁴ DS [61]. See also Qld [25], SA [15].
¹⁵ Qld [17(c)], SA [15].
¹⁶ SA [15].
¹⁷ *Smithers* (1912) 16 CLR 99 at 110.
¹⁸ (1912) 16 CLR 99.
¹⁹ SA [27].
²⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)* (1920) 28 CLR 129; [1920] HCA 54.
²¹ Griffith CJ and Barton J.
²² *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 396; [1971] HCA 16.

of residence,²³ including movement for the purpose of: (a) voting;²⁴ (b) protest;²⁵ (c) handing out political pamphlets;²⁶ (d) supporting or opposing the election of candidates for Parliament;²⁷ (e) petitioning members of Parliament;²⁸ and (f) “monitoring the performance of members of Parliament”.²⁹

10 The implied freedom of political communication cannot be divorced from such movement of the individual as walking to see a political advertisement and movement as a form of protest, whether or not anyone is watching. Movement of the person as a form of political expression is, equally, a political communication.

10 11 Freedom to move within the State where one resides is fundamental to making a “free and informed choice as electors”.³⁰ That exercise of choice requires “access to political information”,³¹ not limited access through *communication*. Accessing political information involves movement to a place, person or thing for the purpose of *observation*.³² Freedom of movement to access political information encompasses movement to a public place, a public building, a publicly funded piece of infrastructure or a public park to observe and assess the product of taxpayer funding.³³

12 The freedom of movement is, as explained above, separate to and distinct from a ‘freedom of association’.³⁴ It is not contrary to the decision or observations in *Kruger*.³⁵

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²³ DS [60]-[61]. See also PS [49].
²⁴ DS [61]; Qld [25]; SA [14]; NT [46].
²⁵ DS [58], [61]; Qld [25]; SA [13]; NT [46].
²⁶ NT [46].
²⁷ DS [61]; Qld [25].
²⁸ DS [61]; Qld [25].
²⁹ DS [61]; Qld [25].
³⁰ *Clubb v Edwards* (2019) 93 ALJR 448 at 465 [29]-[31]; [2019] HCA 11.
³¹ NT [43].
³² See generally Reynolds, “An implied freedom of political observation in the Australian Constitution” (2018) 42(1) *Melbourne University Law Review* 199.
³³ See also PS [50].
³⁴ cf DS [55]ff; SA [30]; Tas [27]; NT [22]ff, [38].
³⁵ (1997) 190 CLR 1 at 45, 90-93, 115, 142, 157, cf DS [24], [59].



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