HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

JULIAN KINGSFORD GERNER & ANOR PLAINTIFFS

AND

THE STATE OF VICTORIA DEFENDANT

Gerner v Victoria
[2020] HCA 48
Date of Hearing: 6 November 2020
Date of Order: 6 November 2020
Date of Publication of Reasons: 10 December 2020
M104/2020

ORDER

Demurrer allowed with costs.

Representation

B W Walker SC with M D Wyles QC, R F R Pintos-Lopez and S C B Brenker for the plaintiffs (instructed by Hamilton Locke)

K L Walker QC, Solicitor-General for the State of Victoria, with C L Lenehan SC, K A O'Gorman and T M Wood for the defendant (instructed by Victorian Government Solicitor's Office)

J A Thomson SC, Solicitor-General for the State of Western Australia, with J J E Perera for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with K E Dennis for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

L S Peattie for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

S K Kay with D R Osz for the Attorney-General for the State of Tasmania, intervening (instructed by Office of the Solicitor-General (Tas))

CATCHWORDS

Gerner v Victoria

Constitutional law (Cth) – Implications from *Constitution* – Where directions made under s 200(1)(b) and (d) of *Public Health and Wellbeing Act 2008* (Vic) restricted movement of persons within Victoria – Where plaintiffs sought declarations that directions and s 200(1)(b) and (d) of *Public Health and Wellbeing Act* were invalid as an infringement of a freedom to move wherever one wishes for whatever reason ("freedom of movement") said to be implicit in *Constitution* – Where defendant demurred on ground that *Constitution* did not imply freedom of movement – Whether freedom of movement implicit in federal structure of *Constitution* – Whether freedom of movement protected by implied freedom of political communication – Whether freedom of movement implicit in s 92 of *Constitution*.

Words and phrases – "constitutional implication", "constitutional interpretation", "COVID-19", "federal structure", "federation", "freedom of movement", "implied freedom of movement", "implied freedom of political communication", "interstate intercourse", "intrastate intercourse", "political communication", "quarantine", "terms and structure", "text and structure".

Constitution, ss 51(ix), 92.
Public Health and Wellbeing Act 2008 (Vic), ss 200(1)(b), 200(1)(d).

1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ. The *Public Health and Wellbeing Act 2008* (Vic) ("the Act") empowers authorised officers, appointed by the Chief Health Officer, to exercise "emergency powers" when a "state of emergency" has been declared by the Minister for Health ("the Minister")[1]. On 16 March 2020, the Minister declared that a state of emergency existed in the whole of Victoria by reason of the serious risk to public health posed by the COVID-19 pandemic ("the State of Emergency Declaration"). The State of Emergency Declaration was repeatedly extended so that it remained in force when the present proceedings were heard and determined by the Court on 6 November 2020.

2 By virtue of s 200(1)(b) and (d) of the Act, the emergency powers exercisable by the Chief Health Officer include the ability to "restrict the movement of any person or group of persons within the emergency area" and to "give any other direction that the authorised officer considers is reasonably necessary to protect public health". Since 16 March 2020, directions restricting the movement of people within Victoria ("the Lockdown Directions") have been made from time to time. The Lockdown Directions remained in force when the present proceedings were heard and determined.

3 The first plaintiff, Mr Gerner, lives in Melbourne. He is the owner of the second plaintiff, which conducts a restaurant business in Melbourne. Prior to the making of the State of Emergency Declaration and the Lockdown Directions, the second plaintiff generated annual sales of approximately $2 million per annum. It was alleged by the plaintiffs that the second plaintiff has suffered a significant loss of revenue by reason of the restrictions on movement imposed by the Lockdown Directions.

4 The plaintiffs commenced proceedings in the original jurisdiction of this Court seeking declarations that s 200(1)(b) and (d) of the Act and the Lockdown Directions made thereunder are invalid as an infringement of a guarantee of freedom of movement said to be implicit in the *Constitution*. The defendant demurred to the plaintiffs' claim on the ground that the *Constitution* does not imply the freedom of movement for which the plaintiffs contend.

5 With a view to determining the demurrer, the parties agreed to present the following question to the Full Court:

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1 *Public Health and Wellbeing Act 2008* (Vic), ss 3(1), 198, 199, 200, 201.

"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?"

6 On 6 November 2020, the Full Court answered this question against the plaintiffs; and ordered that the demurrer be allowed with costs. The reasons for making those orders may be stated by reference to the arguments advanced by the plaintiffs.

The plaintiffs' contention

7 The plaintiffs' contention was that a freedom of movement of the kind contemplated by the demurrer question 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*."

8 Insofar as the plaintiffs' contention asserted a conflict between the challenged provisions of the Act and the Lockdown Directions on the one hand, and the implied freedom of political communication on the other, it is to be noted that the plaintiffs' amended statement of claim did not allege or particularise any facts to support a case that such a conflict has occurred. There was, for example, no allegation in the plaintiffs' pleading that the Act or the Lockdown Directions burdened political communication. Similarly, insofar as the plaintiffs asserted a conflict between the Act and the Lockdown Directions and s 92 of the *Constitution*, there was no allegation in the plaintiffs' pleading that the Act or the Lockdown Directions burdened any aspect of interstate trade, commerce or intercourse. The absence of any pleaded basis for these aspects of the plaintiffs' contention was sufficient reason to reject the plaintiffs' claim for declarations of invalidity by reference to them. For the Court to have determined the question

posed on either of these bases would have amounted to the provision of a hypothetical opinion[2].

9 The position was different in relation to the plaintiffs' contention that the provisions of the Act and the Lockdown Directions conflicted with an implied freedom of movement that stands independently of political communication and independently of interstate trade, commerce and intercourse. This contention was at least supported by the allegations of fact in the plaintiffs' pleaded case. The plaintiffs' contention in this respect failed, however, on the ground that there is no basis in the text and structure of the *Constitution* for the implication which the plaintiffs assert.

An implication from federation?

10 At common law individuals may move about as they see fit. But that freedom is subject to the laws of the land. In Blackstone's *Commentaries on the Laws of England* it is said that the personal liberties of the subjects of the common law, including "locomotion", may only be abrogated or regulated by "due course of law"[3]. Because freedom of movement may be limited by statute, to speak of a constitutionally guaranteed freedom of movement is to assert the invalidity of a statute by reason of a conflict between the *Constitution* and the statute. It must be understood that to speak of an implied freedom is to speak of a limitation on legislative or executive power rather than a personal right[4]. Accordingly, to assert that a freedom of movement is implicit in the *Constitution* is to assert that the *Constitution* impliedly denies to the Commonwealth and the States power to make laws the object of which is to restrict freedom of movement.

11 The plaintiffs argued that the restriction on the legislative power of the Commonwealth and the States for which they contend springs from the fact that federation produced "one people, one nation, where there had been several peoples and several colonies". Freedom to move wherever one wishes for whatever reason was said to follow, it being the essence of being a community or society or nation that the people can know each other.

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2 *The Commonwealth v Queensland* (1987) 62 ALJR 1 at 1-2.

3 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 130-131.

4 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

12 It must be said at the outset of a discussion of this contention that the notion that a freedom of communication or movement is a freestanding implication of the *Constitution*, cognate with but standing separately from the implied freedom of political communication recognised in *Lange v Australian Broadcasting Corporation*[5], is contrary to the settled course of authority in this Court. The orthodox view, the basis for which will be discussed under the next heading, is that freedom of movement or communication enjoys constitutional protection as an aspect or corollary of the protection of freedom of political communication[6].

13 The plaintiffs relied on the suggestion by Murphy J in *McGraw-Hinds (Aust) Pty Ltd v Smith* that a constitutional implication of freedom of communication, including physical movement, may be drawn from "the nature of Australian society"[7]. It may be said immediately that this suggestion was not supported by the other members of the Court in *McGraw-Hinds*, all of whom decided the case in accordance with the requirements of s 92 of the *Constitution*[8]. Further, the suggestion that the *Constitution* implies a broad freedom of communication was expressly rejected by a majority of this Court in *Miller v TCN Channel Nine Pty Ltd*[9]. The suggestion of Murphy J in *McGraw-Hinds* is distinctly inconsistent with the settled approach to the drawing of constitutional implications.

14 Contrary to the plaintiffs' submission, the question is not, "what is required by federation". It is now well settled that what the *Constitution* implies depends on "what ... the terms and structure of the Constitution prohibit, authorise or

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5 (1997) 189 CLR 520.

6 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148], 297 [334]-[335], 306 [364]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 566-567 [95], 576-578 [136]-[143], 605-606 [242]-[245].

7 (1979) 144 CLR 633 at 670. See also *Buck v Bavone* (1976) 135 CLR 110 at 137; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 87-88.

8 *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 644-646, 650-652, 659-660, 665, 671-672.

9 (1986) 161 CLR 556 at 569, 579, 615, 636-637.

require"[10]. That is because federation is not a "one size fits all" proposition; the kind of federation that is created depends on the text and structure of its constitutive instrument. So, just as the *Constitution* "gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it"[11], the legal nature and effect of the federation established by the *Constitution* can be known only from the terms and structure of the *Constitution* itself.

15 The legislative powers of the States as members of the federation established by the *Constitution* are expressly preserved by s 106 of the *Constitution*. The proposition that those powers are necessarily limited by the freedom of movement for which the plaintiffs contend draws no support in the text or structure of the *Constitution*. It is surprising, to say the least, that it is suggested by the plaintiffs that State laws for the licensing of users of the States' roads have to conform to this limitation on State legislative power. That suggestion was rejected when made in *Higgins v The Commonwealth*[12]. In that case, Finn J rejected a challenge to the validity of a law[13] that suspended the payment of unemployment benefits on the recipient's moving to an area considered to have lesser employment prospects. Finn J said[14]:

> "It is inconceivable ... that the Constitution implicitly puts at risk (subject to considerations of proportionality, etc) a significant range of routine Commonwealth and State laws merely because in particular ways, they limit either freedom of movement or else the making of choices within that freedom. I instance criminal laws authorising or requiring incarceration, curfew provisions, some forms of town planning and road traffic legislation,

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10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (footnote omitted). See also *McGinty v Western Australia* (1996) 186 CLR 140 at 168, 182, 183, 231, 284-285; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20], 627 [54], 635 [83], 656 [72]; *Re Gallagher* (2018) 263 CLR 460 at 472 [24].

12 (1998) 79 FCR 528.

13 *Social Security Act 1991* (Cth), s 634.

14 (1998) 79 FCR 528 at 534-535.

> and statutes which exclude or regulate entry on real property, public transport etc."

16 Finn J might equally have instanced laws providing for quarantine as a routine response to outbreaks of contagious or infectious diseases. The essence of quarantine is, as Latham CJ put it in *McCarter v Brodie*[15], that "the actual movement of persons ... is restricted or altogether prohibited". Section 51(ix) of the *Constitution* confers on the Commonwealth Parliament an express power to make laws with respect to "quarantine". By virtue of s 106 of the *Constitution* the concurrent legislative power of the States with respect to the same subject matter was expressly preserved. In the *Engineers' Case*[16], Knox CJ, Isaacs, Rich and Starke JJ said[17]:

> "The doctrine of 'implied prohibition' finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning. The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec 109."

17 The plaintiffs argued that the restriction on legislative power for which they contend may be discerned by a process of reasoning akin to that adopted in *Leeth v The Commonwealth*[18] by Deane and Toohey JJ. In that case, their Honours suggested that "specific provisions of the Constitution which reflect or implement some underlying doctrine or principle are properly to be seen as a manifestation of it and not as a basis for denying its existence by invoking the inappropriate rule of

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15 (1950) 80 CLR 432 at 454-455.

16 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*") (1920) 28 CLR 129.

17 *Engineers' Case* (1920) 28 CLR 129 at 155.

18 (1992) 174 CLR 455.

expressio unius"[19]. This approach to the interpretation of the *Constitution* did not find favour with the majority of the Court in that case[20]. Nor, for that matter, did it command the support of a majority in any subsequent decision of this Court[21]. It is not difficult to understand why. To seek to discern, by a process of induction from the presence in the *Constitution* of specific express restrictions upon legislative power, the existence of a broader limitation upon legislative power is distinctly inconsistent with the orthodox approach to constitutional interpretation established by the *Engineers' Case*[22].

18 On behalf of the plaintiffs, heavy emphasis was put upon the unappealing prospect that State Parliaments, unconstrained by a limit upon legislative power of the kind urged by the plaintiffs, might divide the people of the Commonwealth by creating "enclaves" that prevent people knowing each other[23]. Again, the *Engineers' Case* stands in the way of the plaintiffs' argument. To point to the possibility that legislative power may be misused is distinctly not to demonstrate a sufficient reason to deny its existence[24]. The interpretation of the *Constitution* is not to be approached with a jaundiced view of the integrity or wisdom or practical competence of the representatives chosen by the people[25]. In any event, as has been noted, the plaintiffs did not plead any factual basis for a contention that the Act or the Lockdown Directions are apt to effect a division of the people of the Commonwealth into "enclaves" so as to impede the exercise of political sovereignty by the people of the Commonwealth.

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19 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484-485 (footnote omitted).

20 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467-468, 475-476, 480.

21 See, eg, *Kruger v The Commonwealth* (1997) 190 CLR 1.

22 (1920) 28 CLR 129 at 146-151.

23 Compare *Kruger v The Commonwealth* (1997) 190 CLR 1 at 115.

24 *Engineers' Case* (1920) 28 CLR 129 at 151-152; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 117-118 [188].

25 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43-44.

19 The closest that the plaintiffs were able to come to finding support in the decided cases for the notion of a freedom of movement implicit in the federal structure was in observations of Griffith CJ and Barton J in *R v Smithers; Ex parte Benson*[26]. In *Smithers*, the impugned law[27] made it an offence for a resident of another State to enter New South Wales if he or she had been convicted in his or her home State of an offence carrying a penalty of either death or imprisonment for a year or more, and less than three years had passed since his or her release from any imprisonment. Griffith CJ held the law to be invalid on the basis that the States' power to exclude residents of other States had been "cut down ... by the mere fact of federation" and the "elementary notion of a Commonwealth". His Honour reached that conclusion irrespective of ss 92 and 117[28]. He drew support for this implication from the holding of Miller J in *Crandall v State of Nevada*[29] that citizens of the United States have an implicit right to come to the seat of the federal government and to access federal executive and judicial facilities[30]. Barton J reasoned similarly, holding that s 92 did not carry the freedom of interstate intercourse much further than the constitutional implication arising from the fact of federation[31]. Barton J also drew support from the holding in *Crandall*[32].

20 It is apparent that the observations of Griffith CJ and Barton J were concerned with movement between the States, as well as the movement between the States and (what is now) the Australian Capital Territory in order to participate in the affairs of the federation. Their Honours were not concerned to deny or confine the legislative power of the States over intrastate movement. And, in any event, the other members of the Court did not follow the approach of Griffith CJ and Barton J. In that regard, Isaacs and Higgins JJ held that the law was invalid

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26 (1912) 16 CLR 99.

27 The *Influx of Criminals Prevention Act 1903* (NSW).

28 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108-109.

29 (1867) 73 US 35 at 44.

30 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108.

31 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 110.

32 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 109-110.

because it interfered with the freedom of interstate intercourse expressly guaranteed by s 92. Isaacs J held that s 92 effects an "absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians"[33]. Higgins J observed that the impugned legislation was impermissibly "pointed directly at the act of *coming* into New South Wales" in that it "ma[de] the coming into New South Wales an offence" (emphasis in original)[34].

21 The plaintiffs also argued that the implied freedom of movement for which they contend was accepted as implicit in the federal structure of the *Constitution* in *Pioneer Express Pty Ltd v Hotchkiss*[35]. That case concerned a law said to interfere with intercourse between New South Wales and the Australian Capital Territory[36]. The appellant had been convicted under the impugned law of carrying passengers in an unlicensed public motor vehicle between points involving no interstate journey[37]. The appellant's coach had, relevantly, carried passengers from Sydney to Canberra. The plaintiffs relied on the statement of Dixon CJ that, in addition to the freedom of interstate intercourse guaranteed by s 92, there is implicit in the *Constitution* an "immunity from State interference with all that is involved in [the] existence [of the Australian Capital Territory] as the centre of the national government", which "means an absence of State legislative power to forbid restrain or impede access to it"[38]. But what was said by Dixon CJ does not support the plaintiffs' contention in relation to intrastate movement. Importantly, Dixon CJ concluded that[39]:

> "to press that kind of implication so far as to disable a State from making such a law as [the impugned law, which did not interfere with intercourse between New South Wales and the Australian Capital Territory but rather

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33 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 117.

34 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 118.

35 (1958) 101 CLR 536.

36 The *State Transport (Co-ordination) Act 1931* (NSW), s 12.

37 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 548.

38 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 549-550.

39 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 550.

related to intrastate movement] would be to go beyond and outside the constitutional doctrines by which implications are authorized."

22 It is thus apparent that nothing in either *Smithers* or *Pioneer Express* recognises a constitutional impediment to the regulation of intrastate movement. In any event, the kind of implication spoken of in *Smithers* and *Pioneer Express* is better understood today under some other rubric such as the implied freedom of political communication so far as access to the seat of government is concerned, or the implications of Ch III of the *Constitution* so far as access to the courts of the Commonwealth is concerned.

Freedom of political communication and representative and responsible government

23 Under this heading, the plaintiffs sought to argue that movement *for any purpose* amounts to political communication and as such is protected by the implied freedom of political communication. The plaintiffs submitted that freedom of movement is necessary for the maintenance of the constitutional system of representative and responsible government as an aspect of the implied freedom of political communication[40].

24 The implied limitation on legislative power recognised in *Lange* protects "political communication, not communication in general"[41]. This implied limitation on legislative power of the Commonwealth and the States has been recognised as a necessary implication from the express provisions of ss 7, 24 and 128 and related provisions of the *Constitution*, which establish the political sovereignty of the people of the Commonwealth, because it is indispensable to enabling the people to "exercise a free and informed choice as electors"[42]. The

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40 First recognised in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 and later explained in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Unions NSW v New South Wales* (2019) 264 CLR 595.

41 *McCloy v New South Wales* (2015) 257 CLR 178 at 228 [119].

42 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136; *McCloy v New South Wales* (2015) 257 CLR 178 at 207 [45]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 607 [14].

implied freedom of political communication is seen as necessary to preserve the system of representative and responsible government. While legislated limits on movement that burden political communication may fall foul of this constitutional protection, as the measures limiting movement for the purpose of political protest were held to do in *Levy v Victoria*[43] and *Brown v Tasmania*[44], limits on communication or movement which do not have a political character do not.

25 Accordingly, the short answer to the plaintiffs' argument under this heading is that a statute said to limit freedom of movement so as to burden political communication may be invalid; but that is because it is an impermissible burden on political communication. As has already been noted, the plaintiffs did not plead that the Act or the Lockdown Directions restricted political communication.

Section 92

26 The plaintiffs submitted that freedom of movement is implicit in s 92 on the basis that intrastate movement is a necessary incident of the freedom of interstate intercourse it guarantees.

27 The plaintiffs' argument is distinctly contrary to *Miller v TCN Channel Nine Pty Ltd*[45]. There, a majority of the Court held that a guarantee of freedom of communication (which can be taken to include movement of persons) cannot be implied from s 92. The plaintiffs' argument is logically deficient in that it does not explain why the validity of a law burdening interstate intercourse via restriction of intrastate movement should be assessed against a freestanding freedom of movement rather than directly against the requirements of s 92.

28 Indeed, the implied freedom for which the plaintiffs contend would swallow the freedom expressly guaranteed by s 92. The implication asserted by the plaintiffs would render otiose the delineation clearly drawn by the text of s 92 between protected interstate intercourse, that is to say, "movement ... across State

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43 (1997) 189 CLR 579.

44 (2017) 261 CLR 328.

45 (1986) 161 CLR 556 at 569, 579, 615, 636-637.

borders"[46], and intrastate intercourse, which it does not purport to protect. To accept the plaintiffs' argument would be to accept an implied restriction on legislative power that is wider in its operation than the express terms of s 92 of the *Constitution*. It would be also contrary to the approach in the *Engineers' Case*[47], where the plurality applied the statement of Lord Loreburn LC, in reference to the *British North America Act 1867* (Imp), that "if the text is explicit the text is conclusive, alike in what it directs and what it forbids"[48].

29 To conclude that the express limitation on legislative power in respect of the specific subject matter, being interstate trade, commerce and intercourse, does not cover other subject matter as well, being intrastate trade, commerce and intercourse, is not mere slavish adherence to the maxims "*expressio unius est exclusio alterius*" (the express mention of one thing is the exclusion of another thing) or "*expressum facit cessare tacitum*" (there is no room for an implication in the face of an express provision). Rather, it is to recognise that the legislative powers granted or preserved by the *Constitution* are not to be confined by implications which are not necessary and which would undermine the application of the freedom of interstate intercourse in s 92. As Mason J said in *Miller v TCN Channel Nine Pty Ltd*[49] in response to the argument that s 92 implicitly protects freedom of communication, there is no "basis for implying a new s 92A into the Constitution".

30 If the issue is looked at more broadly, there can be not the slightest doubt that the mischief at which s 92 was directed was the possibility of legislative interference with interstate trade, commerce or intercourse between the States of the new federation to be established[50]. The possibility that State laws might restrict intrastate trade, commerce or intercourse was not identified as an impediment to a successful federation. At the 1897 Adelaide Convention, the Hon Isaac Isaacs

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46 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192.

47 (1920) 28 CLR 129 at 150.

48 *Attorney-General for Ontario v Attorney-General for Canada* [1912] AC 571 at 583.

49 (1986) 161 CLR 556 at 579.

50 See *Cole v Whitfield* (1988) 165 CLR 360 at 385.

(later Isaacs CJ) noted that the mischief at which the provision that was to become s 92 was directed was the restriction of the free flow of goods across State borders. The provision was, Isaacs said, "really pointed at the border duties", rather than "interfer[ing] with the internal management of the State so long as the effect of that management does not extend to intercourse with another State"[51].

31 At the 1897 Sydney Convention, the Hon Richard O'Connor (later O'Connor J) said, in a discussion regarding what became ss 51(i) and 92, that the *Constitution* would not remove the States' "police powers" to "interfere with ... freedom of commerce and of human intercourse" for the purpose of "prohibiting both persons and animals, when labouring under contagious diseases ... entering their territory"[52].

32 Finally, it may be noted that it was argued on behalf of the plaintiffs that the implied limitation on legislative power for which they contend means that in s 92 of the *Constitution*, "trade, commerce and intercourse among the States" must be understood "pragmatically" to refer to trade, commerce and intercourse "throughout the Commonwealth". This latter form of words was expressly adverted to and rejected in the course of the Convention Debates. In this regard, Isaacs said[53]:

> "What we intend to do is to prevent any State from charging importation duty on goods coming into its territory. If we use the words:
>
> Throughout the Commonwealth,
>
> I feel no shadow of doubt that these words will be construed as much larger than the well-known phrase expression:
>
> Among the States.

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51 *Official Report of the National Australasian Convention Debates* (Adelaide), 22 April 1897 at 1142-1143.

52 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1062. See also at 1049.

53 *Official Report of the National Australasian Convention Debates* (Adelaide), 22 April 1897 at 1142.

We know what we intend, but these provisions are to be subject to judicial interpretation hereafter."

33 At the 1898 Melbourne Convention, the Hon Edmund Barton (later Barton J) was also of the view that the phrase "throughout the Commonwealth" ought to be rejected because it could be "so read as to interfere with a state's own right of regulating that kind of internal trade which is quite unconnected with inter-state commerce"[54].

34 It would be a distinctly unsound approach to the interpretation of the constitutional text actually adopted by the framers to attribute to that text a meaning that they were evidently "united in rejecting"[55].

Conclusion

35 For these reasons, the plaintiffs' contention was rejected and the defendant's demurrer allowed.

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54 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 16 February 1898 at 1020.

55 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 353. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 21.