



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

JULIAN KINSFORD GERNER

First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD

Second Plaintiff

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and

THE STATE OF VICTORIA

Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE
ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
(INTERVENING)**

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Part I: PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSIONS

Freedom of Movement cannot be implied from the text and structure of the Constitution

2. It may be accepted that some forms of movement do attract, at least qualified, constitutional protection for particular purposes (SA [13]). However, by virtue of the very broad terms in which the plaintiffs seek to draw the implication for the Freedom of Movement, its operation would extend well beyond that which is logically or practically necessary to preserve the integrity of the Constitution (SA [8];
10 *Burns v Corbett* (2018) 265 CLR 304, 355 [94] (Gageler J), 383 [175], 388-389 [188] (Gordon J) **JBA Vol 5, 1692, 1720, 1725-1726**; *Spence v Queensland* (2019) 93 ALJR 643, 712 [298] (Edelman J); **JBA Vol 15, 5899**).
3. The plaintiffs' rely on authorities which draw from the United States Supreme Court decision in *Crandall*. That decision identified two kinds of "rights". First, the need to protect freedom of movement in so far as that may be necessary to preserve the operations of the federal government. Second, a much more expansive right to move freely throughout the country, which was declared to be an incident of citizenship (SA [19]; *Crandall v State of Nevada* (1867) 73 US 35, 44, 49 (Miller J); **JBA Vol 13, 5114, 5119**).
- 20 4. *Crandall* has been drawn upon in the narrower sense in considering whether freedom of movement may find expression as an aspect of the implied intergovernmental immunities doctrine. In *Pioneer Express* the Court considered whether "[t]here is implicit in the Constitution a right of free movement of all persons to and from the seat of government". No support can be drawn from this decision for the transposition of "the very general principles expounded in *Crandall*" in support of the implied Freedom of Movement (SA [21]-[23]; *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 550 (Dixon CJ, Fullagar J relevantly agreeing, 553), 551 (McTiernan J), 556 (Menzies J), 560 (Taylor J) **JBA Vol 8, 3335, 3338, 3336, 3341, 3345**).
- 30 5. The only support for the broader proposition in *Crandall* is that of Griffith CJ and Barton J in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108-110; **JBA**

Vol 8, 3362-3364), where their Honours adopt passages from that decision with little exposition as to why they are apt to apply in the Australian constitutional context, and those of Murphy J (which never garnered any support from the members of this Court, beyond a mere supposition on the part of Gaudron J in *ACTV (Australian Capital Television Pty Ltd v Commonwealth)* (1992) 177 CLR 106, 212; **JBA Vol 4, 1110**) (SA [27]).

The Freedom of Movement cannot be implied as part of the implied freedom of political communication

- 10 6. It is unnecessary for the purposes of the present case for this Court to determine whether a freedom of “political” movement should now be discerned in the Constitution because even if such a freedom was to be implied, it would only protect freedom of movement in so far as that movement is necessary for the maintenance of representative and responsible government provided for by the Constitution (SA [32]-[33]).
7. The only support that can be drawn from the relevant authorities for implying a freedom of movement from the constitutionally prescribed system of representative and responsible government in the broad terms contended for by the plaintiffs is from the judgment of Gaudron J in *Kruger* (SA [32]-[34]; *Kruger v Commonwealth* (1997) 190 CLR 1, 126-127; **JBA Vol 6, 2377-2378**). Her Honour’s reasoning in *Kruger* was, with respect, inconsistent with the rejection by this Court of an implied freedom of speech (SA [35]; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566-567 (the Court); **JBA Vol 7, 2478-2475**).
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The Freedom of Movement cannot be implied as an aspect of s 92 of the Constitution

8. It may be accepted that intrastate movement may be protected by s 92 in so far as that movement forms part of an interstate journey. However, s 92 has no operation with respect to those intrastate movements that do not form part of an interstate journey (SA [42]).
9. The interstate dimension of s 92 is reflected in the use of the words “among the States” instead of “throughout the Commonwealth”. The adoption of this phrase was agreed to by the Convention after concerns were raised by delegates that the phrase “throughout the Commonwealth” unduly interfered with a State’s own right of regulating internal trade and intercourse (SA [36]-[39]; *Official Record of the*
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Debates of the Australasian Federal Convention (Adel), 22 April 1897, 1142, 1143; **JBA Vol 16, 6091-6093**; *Official Record of the Debates of the Australasian Federal Convention* (Melb), 16 February 1898, 1014, 1016, 1020; **JBA Vol 17, 6531-6534, 6537-6538**).

10. This confirms that the purpose of s 92 was intended to ensure trade and intercourse *among* States was absolutely free. The section was not intended to regulate trade and intercourse *within* States. The Convention Debates indicate that the framers intended that interstate trade was to be protected by the Constitution. Intrastate trade, on the other hand, fell to be regulated in the conventional way by responsible government.
- 10 In this way, the framers' intentions speak against the implied Freedom of Movement contended for by the plaintiffs (SA [40]).

The framers' rejection of a bill of rights does not support the Freedom of Movement

11. The plaintiffs submit that the framers rejected a clause modelled on the 14th amendment to the United States Constitution, that a state shall not "deprive any person of life, liberty, or property without due process of law", "because such freedoms were already encompassed" (PS [13]). The method by which the framers intended that rights and freedoms would be secured was to entrust them to the common law and the democratic processes of responsible government. The implied Freedom of Movement would be inconsistent with the considered refusal by the framers to constitutionally entrench rights and freedoms in the Constitution
- 20 (SA [45]-[48]; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ); **JBA Vol 4, 1034**; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151-152 (Knox CJ, Isaacs, Rich and Starke JJ); **JBA Vol 3, 662-663**).

Dated: 6 November 2020



MJ Wait SC