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

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

Part I: PUBLICATION OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV SUBMISSIONS

4. The question of law that arises on the demurrer is as follows:

> Does the *Constitution* provide for an implied freedom of 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 (the Freedom of Movement)?

The question should be answered, 'no'.

5. South Australia submits that the Freedom of Movement cannot be implied from the sources identified by the plaintiffs, namely the text and structure of the Constitution,[1] as part of the implied freedom of political communication,[2] or as an aspect of s 92.[3]

6. Additionally, South Australia submits that reliance by the plaintiffs on the concern of the common law to preserve liberty of movement,[4] the consideration given by the framers to movement within the federation,[5] and the agreement of the Australian people to be governed by the Constitution,[6] in support of the Freedom of Movement, is misplaced.

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1 Plaintiffs' submissions (**PS**), [24]-[47]; see [12]-[27] below.
2 PS, [48]-[59]; see [28]-[35] below.
3 PS, [60]-[61]; see [36]-[42] below.
4 PS, [10]; see [44] below.
5 PS, [11]-[19]; see [45]-[47] below.
6 PS, [20]-[23]; see [48] below.

Constitutional implications

7. In undertaking its duty to expound the meaning of the Constitution, this Court should not be fearful to discern constitutional implications.[7] Nonetheless, any implications that may be discerned must be "securely based" in the text and structure of the Constitution.[8]

8. It is important in determining whether an implication may properly be discerned to distinguish between implications that may be drawn from the text and those that are required in order to preserve the structural integrity of the Constitution.[9] In a passage repeatedly endorsed in the judgments of this Court, Mason CJ observed in *Australian Capital Television Pty Ltd v Commonwealth* (***ACTV***) that:[10]

> It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

9. The test of necessity applicable to the discernment of structural implications serves as an important safeguard against the incorporation of "unexpressed assumptions"[11] and "extra-constitutional"[12] notions based on "pre-conceptions having their origin outside the Constitution".[13]

10. The implication that the plaintiffs seek to draw is structural. Whilst reference is made in the plaintiffs' submissions to a variety of express terms, the plaintiffs do not contend

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7 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85 (Dixon J); *Spence v Queensland* (2019) 93 ALJR 643, 672-673 [105] (Kiefel CJ, Bell, Gageler and Keane JJ).

8 *Burns v Corbett* (2018) 265 CLR 304, 383 [175] (Gordon J), citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134-135 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178, 283 [318] (Gordon J).

9 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 168-169 (Brennan CJ), 231 (McHugh J).

10 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 168-169 (Brennan J), 231 (McHugh J); *Austin v Commonwealth* (2003) 215 CLR 185, 245 [113] (Gaudron, Gummow and Hayne JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 409 [240] (Gummow J); *Burns v Corbett* (2018) 265 CLR 304, 355 [94] (Gageler J), 383 [175], 388-389 [188] (Gordon J); *Spence v Queensland* (2019) 93 ALJR 643, 712 [298] (Edelman J).

11 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J).

12 A phrase employed in, for example, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P); George Winterton, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *Federal Law Review* 223.

13 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186 (Dawson J).

that the implied Freedom of Movement can be drawn from the text of the Constitution itself. Rather, the contention appears to be that the implication may be drawn from a range of sources, including particular constitutional provisions, aspects of the federal system of the Constitution, the implied freedom of political communication and s 92.

11. Accordingly, the implication contended for by the plaintiffs may only be sustained if the plaintiffs can demonstrate that it is "logically or practically necessary" to preserve the structural integrity of the Constitution. For the reasons that follow, South Australia submits that the implication is not logically or practically necessary in the relevant sense.

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

12. The plaintiffs seek to draw support from both the federal system of government provided for by the Constitution, specific express provisions and a number of authorities of this Court.

13. In so far as the plaintiffs seek to rely on aspects of the federal system of government,[14] it may be accepted that some forms of movement do attract, at least qualified, constitutional protection for particular purposes. The protection afforded by the implied freedom of political communication is the most obvious example. Participation in the system of representative and responsible government provided for by the Constitution may protect movement which is capable of being characterised as
20 political communication.[15] For example, participation in a protest march might find protection.

14. There may be other circumstances in which movement for particular purposes may find constitutional protection. It is possible that the franchise[16] might in particular circumstances entail a freedom of movement. For example, attending at a polling station may find protection.[17]

15. Further, for the sake of argument, let it be assumed that Chapter III of the Constitution might ground the protection of movement to travel to this Court,[18] that the establishment of the seat of government might entail a right to travel to the Australian

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[14] PS, [24]-[36].
[15] See [31]-[32] below.
[16] In the sense described in, for example, *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[17] *Kruger v Commonwealth* (1997) 190 CLR 1, 142 (McHugh J).
[18] PS, [36].

Capital Territory in certain circumstances[19] and that the intergovernmental immunity doctrine might protect travel in certain circumstances to and from Commonwealth places as required to facilitate the business of federal agencies.[20]

16. However, even if it was to be assumed that movement for particular purposes may find constitutional protection in the ways mentioned above, this would not support the implied Freedom of Movement. By virtue of the very broad terms in which the plaintiffs seek to draw the implication, its operation would extend well beyond that which is logically or practically necessary to preserve the integrity of the Constitution.

17. The plaintiffs also seek to rely on a range of express constitutional provisions.[21] Of course, physical movement is integral to very many kinds of human endeavour. It is, therefore, unremarkable that the plaintiffs can catalogue a range of enumerated constitutional powers the exercise of which might have a bearing upon movement. However, the plaintiffs' reliance on these powers in support of a Freedom of Movement constitutes an impermissible attempt to elevate what might have been an unexpressed assumption on the part of the framers into an implication.[22] It may be accepted that the framers would have assumed that, generally speaking, the residents of the various States would be permitted, subject to limitations imposed by the general law, to move freely within their States, and by virtue of s 92, amongst the States. It does not follow that freedom of movement should be constitutionally entrenched, any more than it might be contended that the Constitution incorporates implied freedoms to eat, sleep and work.[23]

18. The plaintiffs refer to particular statements in this Court's decisions of *R v Smithers; Ex parte Benson* (***Smithers***),[24] *Pioneer Express Pty Ltd v Hotchkiss* (***Pioneer Express***),[25] *McGraw-Hinds (Aust) Pty Ltd v Smith* (***McGraw-Hinds***)[26] and *ACTV*, in

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19 PS, [33].
20 PS, [33].
21 PS, [32]-[36].
22 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ)
23 Cf *Clayton v Heffron* (1960) 105 CLR 214, 248-249 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), in which their Honours opined that an assumption that there would be two State Houses of Parliament did not amount to the *Constitution* denying the New South Wales legislature the power to abolish one House. See also *Cheatle v The Queen* (1993) 177 CLR 541, 560-561 (the Court) regarding the rejection of the continuing relevance of any presumed justification for the exclusion of women on juries as at 1900, to the content of s 80 of the *Constitution.*
24 (1912) 16 CLR 99.
25 (1958) 101 CLR 536.
26 (1979) 144 CLR 633.

support of the implied Freedom of Movement.[27] Each of these authorities draw in different ways upon the decision of the Supreme Court of the United States in *Crandall v Nevada* (***Crandall***).[28]

19. Before turning to the cases on which the plaintiffs rely, it is important to bear in mind the reasoning underpinning *Crandall*. There are two important passages in that judgment that identify two kinds of "rights". First, in a passage commencing with a discussion about the seat of government, the decision identifies the need to protect freedom of movement in so far as that may be necessary to preserve the operations of the federal government. The rights identified include:[29]

> the right [of the citizen] to come to the seat of government … to transact any business he may have with it [and] … a right to free access to its sea-ports, … to the sub-treasuries, the land offices, the revenue officers, and the Courts of justice in the several States.

Second, in a passage at the conclusion of the judgment,[30] the Court endorses the following passage from the judgment of Taney CJ in the *Passenger Cases*:[31]

> 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.

This much more expansive right subsumes the specific rights referred to earlier and is not referrable to particular federal purposes, but is rather declared to be an incident of citizenship. It is important in considering the extent to which *Crandall* has gained acceptance in the Australian case law to identify the particular principle, and class of "rights", for which *Crandall* has been cited.

20. In *Smithers*, the Court unanimously held the impugned provision of the *Influx of Criminals Prevention Act 1903* (NSW) to be invalid. Chief Justice Griffith and Barton J held the impugned provision to be invalid on the basis of notions of federation.[32] Although Griffith CJ set out the passage from which the narrower rights were drawn in *Crandall*, Barton J considered that, "[t]he whole of that memorable judgment is instructive upon the rights of the citizen of a federation."[33] In any event,

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27 PS, [37]-[47].
28 (1867) 73 US 35.
29 *Crandall v State of Nevada* (1867) 73 US 35, 44 (Miller J).
30 *Crandall v State of Nevada* (1867) 73 US 35, 49 (Miller J).
31 (1849) 48 US 283, 492 (Taney CJ).
32 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108-109 (Griffith CJ), 109-110 (Barton J).
33 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 109 (Barton J).

it is clear that, in light of their Honours' application of the principle to the facts of that case, that both Griffith CJ and Barton J endorsed the broader principle from *Crandall*. Justices Isaacs and Higgins, on the other hand, held that the impugned provision interfered with freedom of interstate intercourse provided for by s 92 of the Constitution.[34] Although Higgins J referred to *Crandall*, his Honour said that this was not the case to decide its correctness in respect of movement within States.[35] In light of the differences in approach, the plaintiffs' submission that the Freedom of Movement "was confirmed by Griffith CJ, Barton, Isaacs and Higgins JJ … in *R v Smithers*",[36] cannot, with respect, be accepted.

10 21. In *Pioneer Express*, the Court considered the validity of s 12 of the *State Transport (Co-ordination) Act 1931* (NSW), insofar as it applied to criminalise the operation by an unlicensed company of a bus journey from Sydney to Melbourne by way of Canberra. In argument, the company referred to *Crandall*, not in support of the broad proposition from that case, but rather in support of a much more modest submission that, "[t]here is implicit in the Constitution a right of free movement of all persons to and from the seat of government".[37] The submission was based, not upon the incidents of citizenship, but upon the doctrine of implied intergovernmental immunities.[38] In disposing of the company's appeal, Dixon CJ referred to "protecting the Capital Territory, from attempts on the part of State legislatures to prevent or
20 control access … and to hamper or restrain the full use of the federal capital".[39] His Honour concluded that no such "immunity" could be held to have been invaded by the State law in question. His Honour then said that the case before him was not an occasion to examine "the place which the very general principles expounded in *Crandall* ... possess with us", but nonetheless noting that if they did have application they would need to take account of the Australian constitutional context. Justice Fullagar relevantly agreed with the Chief Justice regarding the company's appeal.[40]

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34 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 117 (Isaacs J), 119 (Higgins J).
35 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 119.
36 PS, [37].
37 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 540.
38 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 540-541.
39 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 550 (Dixon CJ, Fullagar J relevantly agreeing, 553). This passage, drawing upon only a narrow implication was quoted with approval in *AMS v AIF* (1999) 199 CLR 160, 178-179 [44] (Gleeson CJ, McHugh and Gummow JJ).
40 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 553 (Fullagar J).

22. Justice McTiernan rejected the implied intergovernmental immunity argument without addressing *Crandall*.[41] Justice Taylor considered that an implication permitting "citizens of the Commonwealth freely to travel to and fro on journeys between the Australian Capital Territory and the State of New South Wales" was "clearly justifiable", but considered that the law in question did not infringe such a principle.[42] His Honour did not make reference to *Crandall*. Justice Menzies rejected the implied intergovernmental immunities argument and considered that it would be "unwise to do more than say that any [broader] implication ... would not invalidate the law here in question."[43]

10 23. The above survey of the judgments in *Pioneer Express* demonstrates that no support can be drawn from the decision for the transposition of "the very general principles expounded in *Crandall*" in support of the implied Freedom of Movement.

24. In *McGraw-Hinds*, a majority of this Court held the impugned provision of the *Unordered Goods and Services Act 1973* (Qld) to be invalid because it infringed s 92. Justice Murphy referred to *Crandall* with apparent approval.[44] In light of the breadth of the implications that his Honour drew in *McGraw-Hinds*, and a series of other decisions,[45] it may be assumed that his Honour's reference to *Crandall* embraced the broader proposition from that case. His Honour proceeded to hold that provision to be invalid because it infringed a freedom of communication which his Honour considered
20 could be implied, together with a freedom of movement, "from the nature of our society, reinforced by parts of the written text".[46] These freedoms were, in his Honour's words, "indispensable to any free society." The approach to constitutional interpretation adopted by his Honour expressly drew upon values external to the text and structure of the Constitution in a manner inconsistent with the approach that was later expounded in *Lange v Australian Broadcasting Corporation* (***Lange***).[47]

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41 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 551 (McTiernan J).
42 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 560 (Taylor J).
43 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 556 (Menzies J).
44 *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670 (Murphy J).
45 See, for example, *Buck v Bavone* (1976) 135 CLR 110, 137; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 87; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 311-312; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-582.
46 *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670 (Murphy J).
47 (1997) 189 CLR 520. Methods of constitutional construction that draw upon sources such as the "nature of society" and "a free society" incorporate norms and principles that are extrinsic to the *Constitution*. They fail to provide objective limits on what may relevantly bear on the task of construction: *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P); *Australian Capital Television Pty Ltd v Commonwealth*

Accordingly, the conclusions arrived at by Murphy J about the freedom of movement do not assist the plaintiffs' case.

25. In *ACTV*, a majority of this Court held that the impugned provisions of the *Broadcasting Act 1942* (Cth) were invalid. Justice Gaudron held that the provisions infringed an implied freedom of political discourse.[48] In doing so, her Honour conjectured that, "[t]he 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."[49] However, her Honour did not in fact confirm the correctness of the approach taken by Murphy J in *McGraw-Hinds*. Her Honour's finding, which immediately followed, was that: "so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse." It was only this narrower conclusion that her Honour confirmed as a member of this Court in *Lange*.[50]

26. Reference was also made to *Crandall* in *ACTV*. Justice Gaudron referred to the "specific rights" in *Crandall*, in making an observation about the discussion of s 92 in *Smithers*.[51] Justice McHugh observed 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". In doing so, his Honour referenced the narrower proposition to be drawn from *Crandall*.[52] However, neither of those passages provide support for the implied Freedom of Movement for which the plaintiffs contend.

(1992) 177 CLR 106, 186 (Dawson J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 362 (Dawson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 69 (Dawson J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 44 (Brennan J); *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 194 (Dawson J); George Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 239; Leslie Zines, *Constitutional Change in the Commonwealth* (1991, Cambridge University Press) 51.

48 Justice Gaudron referred to *Crandall* in the context of referring to the conclusion in *Smithers* that s 92 did not deal exhaustively with the topic of movement between the States. In doing so, her Honour made reference to the narrower proposition from *Crandall* and the accompanying "specific rights": *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 214 (footnote 11).

49 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212 (emphasis added).

50 In later cases her Honour referred to the freedom of movement as a freedom tethered to the freedom of political communication, "as an aspect of freedom to engage in political communication or subsidiary to that freedom": *Levy v Victoria* (1997) 189 CLR 579, 617; see also *Kruger v Commonwealth* (1997) 190 CLR 1, 114-116, 126-127. However, the scope of movement that her Honour considered to be protected was not limited to "political" movement: *Kruger v Commonwealth* (1997) 190 CLR 1, 116, 126-127.

51 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 214 (footnote 11).

52 Indeed, this is apparent not only from the discussion found at *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232 (McHugh J), but also the precise passage from *Crandall* to which his Honour refers at footnote 69.

27. To summarise, South Australia submits that to the extent that the plaintiffs seek to rely upon the broader implication drawn from the decision in *Crandall* in support of the implied Freedom of Movement, the only support from the cases identified by the plaintiffs is that of Griffith CJ and Barton J in *Smithers* (which must be treated with great caution given they drew directly on United States jurisprudence concerning an incidence of citizenship prior to the decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (***Engineers***))[53] and those of Murphy J[54] (which never garnered any support from the members of this Court, beyond a mere supposition on the part of Gaudron J in *ACTV*). *Crandall* has more soundly been drawn upon in the narrower sense as an analogue to the manner in which freedom of movement may find expression as an aspect of the implied intergovernmental immunities doctrine. As noted above, any freedom of movement that may be manifested as an aspect of that doctrine would not support the broad implication of Freedom of Movement contended for by the plaintiffs.

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

28. The implied freedom of political communication is a "limitation upon legislative and executive power, arising from ss 7, 24, 64 and 128 of the Constitution, which is necessary to ensure that those provisions operate effectively."[55] The implication arises because freedom of communication on matters of government and politics is an "indispensable incident" of the system of representative and responsible government provided for by the Constitution.[56]

29. The precise scope of the "political communication" which is protected by the implied freedom has not been definitively stated. However, its contours are to be derived from the constitutional purpose which the implication serves.[57]

30. The only occasion on which this Court has given detailed consideration to whether a freedom of movement should be implied from the Constitution, since the decision in

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[53] (1920) 28 CLR 129, 145-147 (Knox CJ, Isaacs, Rich and Starke JJ).
[54] *Buck v Bavone* (1976) 135 CLR 110, 157; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 87; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 582-583; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670.
[55] *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [195] (Keane J) quoting *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560-561 (the Court).
[56] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559-561 (the Court).
[57] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560-561 (the Court).

Lange, was *Kruger v Commonwealth* (***Kruger***).[58] In *Kruger*, this Court considered whether the Constitution contains an implied freedom of movement and association.[59] The case, decided by six members of this Court, was ultimately inconclusive on this issue. Justices Toohey, Gaudron and McHugh held that an implication does exist but did not agree as to the breadth of the movement protected.[60] Justice Gummow rejected the drawing of the implication.[61] Chief Justice Brennan and Dawson J did not need to decide the question and left it open.[62]

31. Although *Kruger* was inconclusive, on various occasions members of this Court have considered that particular forms of political movement warrant constitutional protection. For instance, in *Kruger* itself, Gaudron J considered that freedom to access the institutions of government and the seat of government would find protection.[63] Again, in *Kruger*, McHugh J said that the freedom to travel would "extend, at the very least, to such matters as voting".[64] In *Levy v Victoria*, a restriction on the movement of protesters was assumed to impose a burden on political communication,[65] as were the restrictions considered most recently in *Clubb v Edwards*.[66]

32. 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 then, by analogy to the ambit of the implied freedom of political communication, 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.[67]

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58 (1997) 190 CLR 1.

59 This claim was reformulated in argument to a "constitutional right to and immunity from legislative and executive restrictions on freedom of movement and association for political, cultural and familial purposes": *Kruger v Commonwealth* (1997) 190 CLR 1, 68 (Dawson J), 88 (Toohey J), 156 (Gummow J).

60 *Kruger v Commonwealth* (1997) 190 CLR 1, 91-92 (Toohey J), 114-116, 126-127 (Gaudron J), 142 (McHugh J).

61 *Kruger v Commonwealth* (1997) 190 CLR 1, 157 (Gummow J).

62 *Kruger v Commonwealth* (1997) 190 CLR 1, 45 (Brennan CJ).

63 *Kruger v Commonwealth* (1997) 190 CLR 1, 115-116 (Gaudron J). Not all of the authorities referred to in PS appear to support the Freedom of Movement in the manner suggested. At paragraph 50 of PS the plaintiffs set out a passage from the judgment of Gummow J in *McGinty v Western Australia* (1996) 186 CLR 140. However, the paragraph quoted inaccurately inserts the words "by moving in and among the represented" which do not appear in the text of his Honour's judgment at 286.

64 *Kruger v Commonwealth* (1997) 190 CLR 1, 142 (McHugh J).

65 (1997) 189 CLR 579, 610 (Toohey and Gummow JJ).

66 (2019) 93 ALJR 448, 471 [75], 477 [119], cf 464-465 [25]-[31] (Kiefel CJ, Bell and Keane JJ).

67 The present case presents an inappropriate vehicle for the Court to consider drawing an implied "political" freedom of movement because, insofar as movement constitutes non-verbal conduct capable of communicating a relevantly political idea, it may already be capable of characterisation as political communication (such as, for example, participation in a protest march): *Brown v Tasmania* (2017) 261

Although identifying the boundaries of "political movement" may involve questions of fact and degree, it is clear that the drawing of such an implication would not support the implied Freedom of Movement which is said, by the plaintiffs, to permit movement "for any reason".

33. If the Court was to discern an implied freedom of "political" movement then, by analogy to those cases concerning the freedom of association, it should not be conceptualised as an "independent" or "free-standing" freedom.[68] However, it is unnecessary for the Court to consider whether or not an implied freedom of "political" movement would operate as a "corollary"[69] or a "derivative"[70] of the implied freedom of political communication. Whether or not such an implication might be derived directly from the text and structure of the Constitution, or indirectly, as a derivative of the implied freedom of communication, its ambit will still be defined by reference to what is necessary for the maintenance of representative and responsible government provided for by the Constitution. As noted above, such an implication would not support the implied Freedom of Movement in the broad terms for which it is contended.

34. The plaintiffs refer repeatedly to passages supporting the proposition that the implied freedom protects not only communications between Australians and their representatives, but also communications between members of the Australian public.[71] This principle is uncontentious,[72] but it is also of no assistance to the plaintiffs. With one exception, addressed immediately below, none of the statements referred to by the plaintiffs, read in context, support the drawing of any implication of free communication, association or movement "for any reason." Justice Gaudron in *Kruger* considered that "any abridgement of the right to move in society and to associate with

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CLR 328, 380 [171], 383 [182] (Gageler J); *Levy v Victoria* (1997) 189 CLR 579, 594-595 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-623 (McHugh J), 638 (Kirby J). See also *Tajjour v New South Wales* (2014) 254 CLR 508, 577-578 [142]-[143] (Gageler J). Accordingly, there is some uncertainty about whether a separate implication is logically or practically necessary in the relevant sense.

68 *Tajjour v New South Wales* (2014) 254 CLR 508, 566 [95] (Hayne J), 575 [134] (Crennan, Kiefel and Bell JJ), 578 [143], 589 [180] (Gageler J), 606 [243] (Keane J), (French CJ not deciding).

69 *Tajjour v New South Wales* (2014) 254 CLR 508, 566 [95] (Hayne J), 578 [143] (Gageler J), 606 [244] (Keane J); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan and Bell JJ); *Mullholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ).

70 Cf *Tajjour v New South Wales* (2014) 254 CLR 508, 578 [143] (Gageler J).

71 PS [49], [52], [53], [56], [59].

72 *Unions New South Wales v New South Wales* (2013) 252 CLR 530, 551-552 [27]-[30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), referring to *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (the Court).

one's fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters."[73] This conclusion has not received the support of any other member of this Court.

35. To discern in the Constitution an implied Freedom of Movement "for any reason", referrable to the system of representative and responsible government provided for by the Constitution, would be analogous to extending the implied freedom of political communication to encompass freedom of speech. This outcome was unanimously rejected by this Court in *Lange*.[74] The implied Freedom of Movement should also be rejected on the basis that it goes beyond that which is necessary to preserve the integrity of the system of representative and responsible government provided for by the Constitution.

The Freedom of Movement cannot be implied as an aspect of s 92 of the Constitution

36. Section 92 protects interstate intercourse by creating "a free trade area throughout the Commonwealth and [denying] to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries".[75]

37. Whilst the protection of interstate movement is a central principle of federation, the focus of s 92 is on interstate, not intrastate, movement. This focus is apparent from the Convention Debates, to which the Court may have regard for the purpose of identifying the contemporary meaning of the language used.[76] The interstate dimension of s 92 is reflected in the use of the words "among the States" instead of "throughout the Commonwealth". The Hon Isaac Isaacs first raised concerns at the 1897 Adelaide Convention that the phrase "throughout the Commonwealth" went beyond the intended scope of s 92. He argued that s 92 was "really pointed at the border duties"[77] rather than being concerned with the internal management of the States.[78] This position was supported by Dr John Quick, who stated: "whilst we are anxious to provide for absolute freedom of trade on the frontiers between the colonies, there is no desire to

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[73] *Kruger v Commonwealth* (1997) 190 CLR 1, 126-127.
[74] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566-567 (the Court); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon J); *Coleman v Power* (2004) 220 CLR 1, 48-49 [88]-[89] (McHugh J).
[75] *Cole v Whitfield* (1988) 165 CLR 360, 391 (the Court).
[76] *Cole v Whitfield* (1988) 165 CLR 360, 385 (the Court).
[77] *Official Record of the Debates of the Australasian Federal Convention* (Adel), 22 April 1897, 1142.
[78] *Official Record of the Debates of the Australasian Federal Convention* (Adel), 22 April 1897, 1143.

interfere with the local regulation of trade once the packages of goods, wares, and merchandise have arrived within the state territory".[79] Mr Edmund Barton raised concerns the phrase "might 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".[80]

38. The position of the Hon Isaac Isaacs, with support from Sir Samuel Griffith, that s 92 was clearly "not proposed to interfere with the internal regulation of trade by means of licences, nor to prevent the imposition of reasonable rates on state railways",[81] was agreed to by the Convention.[82] The phrase "throughout the Commonwealth" was thought to refer to "'every part of the Commonwealth",[83] effectively meaning that no restrictions could ever be placed on trade, commerce or intercourse.

39. The adoption of the phrase "among the States" instead of "throughout the Commonwealth", confirms that the purpose of s 92 was intended to ensure trade, commerce, and intercourse *among* States was absolutely free. The section was not intended to be concerned with trade, commerce, and intercourse *within* States.

40. For these reasons, and contrary to the plaintiffs' submissions, the Convention Debates speak against a contention that s 92 may have been understood by the framers as, in effect, an extension of a pre-existing intrastate Freedom of Movement. The Convention Debates indicate that the framers intended that intrastate movement was something that fell predominantly to the States to regulate and, thereby, speak against the implied Freedom of Movement contended for by the plaintiffs.

41. The intention of the framers is reflected in the s 92 jurisprudence of this Court which has maintained an important distinction between interstate and intrastate movement.[84] The distinction has not always been easy to draw as a matter of fact and has sometimes been said to be somewhat artificial.[85] Nonetheless, the authorities maintain that the distinction "must be observed",[86] such that the freedom guaranteed by s 92 only applies

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79 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 16 February 1898, 1016.
80 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 16 February 1898, 1020.
81 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 16 February 1898, 1014.
82 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 16 February 1898, 1020.
83 *Official Record of the Debates of the Australasian Federal Convention* (Melb), 16 February 1898, 1014.
84 *W & A McArthur Ltd v State of Queensland* (1920) 28 CLR 530, 549 (Knox CJ, Isaacs and Starke JJ); *Associated Steamships Pty Ltd v Western Australia* (1969) 120 CLR 92, 109 (Kitto J); *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124, 180-181 (Stephen J); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 293 [126] (Kiefel J).
85 *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 293 [126] (Kiefel J).
86 *Wragg v New South Wales* (1953) 88 CLR 353, 386 (Dixon CJ); see also *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 293 [126] (Kiefel J).

to that movement that is interstate, or which is intrastate but which forms part of an interstate journey.

42. The plaintiffs' submission that the freedom of intrastate movement may be necessary within a State in order to facilitate movement across a border may be accepted, but only with respect to intrastate movements that form part of interstate journeys. As s 92 has no operation with respect to those intrastate movements that do not form part of an interstate journey, s 92 also cannot provide a foundation for the drawing of the implied Freedom of Movement in the broad terms contended for by the plaintiffs.

The common law, the Framer's considerations and the act of federation do not support the Freedom of Movement

43. As noted above, the plaintiffs place reliance on the concern of the common law to preserve liberty of movement, the consideration given by the framers in the Convention Debates to movement within the federation, and the agreement of the Australian people to be governed by the Constitution, in support of the implied Freedom of Movement. For the reasons that follow, South Australia submits that reliance on these matters is misplaced.

Common law principle does not support the implied Freedom of Movement

44. It may be accepted that personal liberty is a fundamental principle recognised by the common law,[87] and that the notion of liberty of movement may be construed as part of that broader common law principle.[88] It may also be accepted that the interpretation of the Constitution may be guided, in appropriate cases, by reference to common law principle.[89] It is not clear how the plaintiffs seek to marshal the common law principle of liberty in support of the Freedom of Movement. To the extent that the plaintiffs contend that from the long standing recognition of personal liberty at common law it follows that the Freedom of Movement should be constitutionally entrenched, serious doubts as to the tenability of such arguments arise,[90] and this Court should reject any such contention.

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87 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J), citing *Cox v Hakes* (1890) 15 App Cas 506, 527 (Lord Herschell, with Lord Watson agreeing).

88 *Kruger v Commonwealth* (1997) 190 CLR 1, 125 (Gaudron J).

89 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ); *Cheatle v The Queen* (1993) 177 CLR 541, 552 (the Court); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (the Court).

90 *Durham Holdings Pty Ltd v New South Wales* (2001) 105 CLR 399, 410-411 [12]-[14] (Gaudron, McHugh, Gummow and Hayne JJ); cf *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (the

Consideration of movement by framers does not support the implied Freedom of Movement

45. As noted above, movement is fundamental to very many kinds of human endeavour. It is unremarkable that the framers considered movement in a range of different respects in the course of the Convention Debates and that they gave specific consideration to rights of movement recognised under the United States Constitution at the time of federation.

46. 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."[91] Crucially, however, the means by which the framers considered that freedoms of these kinds were to be secured under the Constitution was not by the implied constitutional entrenchment of rights or freedoms. Unlike their American counterparts before them, the framers of the Constitution did not generally propose to fetter the legislative powers of the Commonwealth and the states, but rather to devise a scheme to distribute them.[92] 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.[93] Justice Dawson captured the essential point concisely in the following terms in *ACTV*:[94]

> The fact, however, remains that in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values.

The discernment of the implied Freedom of Movement would be inconsistent with the considered refusal by the framers to constitutionally entrench rights and freedoms in the Constitution.[95]

Court); *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ). See also Leslie Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166, 183; cf John Toohey, "A Government of Laws and Not of Men" (1993) *Public Law Review* 159, 170.

91 PS, [13].

92 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43-44 (Brennan J); Owen Dixon, "Two Constitutions Compared" in S Crennan and W Gummow (eds), *Jesting Pilate* (2019, 3rd ed, Federation Press) 221-222.

93 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151-152 (Knox CJ, Isaacs, Rich and Starke JJ); Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902, University Press), 76, quoted in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 229 (McHugh J).

94 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 183 (Dawson J).

95 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

47. The implied freedom of political communication, by contrast, may be regarded as a necessary exception to the general scheme describe above. It is not inconsistent with the principles of representative and responsible government adopted by the framers because it operates only in so far as is it necessary to preserve the integrity of those very principles. The implied Freedom of Movement, on the other hand, given that it travels well beyond what is necessary to preserve the integrity of representative and responsible government, would in doing so not only fail to support those democratic principles but would, in fact, undermine them.[96]

The agreement of the Australian people to federate does not support the Freedom of Movement

48. The fact that the Australian people agreed to be united in a federation by adopting the Constitution does not provide a foundation for the implied Freedom of Movement. Although the preamble records that the people "have agreed to united in one indissoluble Federal Commonwealth" and covering clause 5 provides that "the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth", what is "rendered 'binding' is the federal scheme manifested in the text and structure of the Constitution."[97] The consequence of federation was explained in *Engineers*:[98]

> When the people of Australia, to use the words of the Constitution itself, 'united in a Federal Commonwealth,' they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.

Any attempt to incorporate norms and values extrinsic to the Constitution by reference to the fact that the Australian people agreed to federate would be contrary to our legal history[99] and the well-established authority of this Court.

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[96] In the sense described in, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43-44 (Brennan J).

[97] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 618 [20] (Gleeson CJ, Gummow and Hayne JJ). Justice McHugh makes a similar observation in *McGinty* where his Honour notes that, "since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means. It must therefore be interpreted … according to the ordinary and natural meaning of its text, read in the light of its history, with such necessary implication as derived from its structure": *McGinty v Western Australia* (1996) 186 CLR 140, 230.

[98] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151-152 (Knox CJ, Isaacs, Rich and Starke JJ).

[99] George Williams, 'A Republican Tradition for Australia?' (1995) 23 *Federal Law Review* 149.

Part V: TIME ESTIMATE

49. It is estimated that 20 minutes will be required for the presentation of South Australia's oral argument.

Dated 30 October 2020

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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

10

and

THE STATE OF VICTORIA
Defendant

ANNEXURE:
PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE
20 **ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA**
(INTERVENING)

Number	Description	Date in Force	Provision
Constitutional Provisions			
1	Commonwealth Constitution	01 January 1901	cl 5; ss 7, 24, 64, 80, 92, 128
Statutes			
2	*Broadcasting Act 1942* (Cth)	19 December 1991	Pt. IIID
3	*Influx of Criminals Prevention Act 1903* (NSW)	03 October 1903	s 3

4	*Judiciary Act 1903* (Cth)	25 August 2018	s 78A
5	*State Transport (Co-ordination) Act 1931* (NSW)	17 August 1931	s 12
6	*Unordered Goods and Services Act 1973* (Qld)	13 April 1973	s 8