



HIGH COURT OF AUSTRALIA

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Details of Filing

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

No. M104 of 2020

B E T W E E N:

JULIAN KINGSFORD GERNER
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

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AND

THE STATE OF VICTORIA
Defendant

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**ORAL OUTLINE OF SUBMISSIONS OF ATTORNEY GENERAL OF
THE STATE OF WESTERN AUSTRALIA (INTERVENING)**

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Part I: SUITABILITY FOR PUBLICATION

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

Part II: SUBMISSIONS

2. The plaintiffs submit that there is an implied constitutional freedom for Australian citizens to engage in intrastate movement for any reason without arbitrary restriction. That submission should be rejected.

Process of Implication

3. The Australian Constitution establishes a federal system of parliamentary Government with ministerial responsibility, subject to judicial oversight. Unlike the US Constitution, it does not contain a Bill of Rights: *McKinlay* (JBA 3/15/947) (Barwick CJ). See also *Nationwide News* (JBA 8/38/3257-3258) (Brennan J).
4. There are only limited freedoms expressly conferred by the Constitution. Express freedoms, such as the freedom of interstate trade and commerce in s 92, are limits on legislative power, not personal rights: *Cole v Whitfield* (JBA 5/21/401-403), *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 266-268 [42]-[50], 289 [115]. This is because the Constitution is concerned with defining institutions, not conferring individual rights.
5. Structural imperatives and freedoms should only be implied into the Constitution where they are *necessary* for the preservation of the integrity of the Constitution: *ACTV* (JBA 4/16/1033) (Mason CJ). This is particularly so where the Constitution was carefully drafted over many years. Structural implications must necessarily be deduced from the text and structure of the Constitution.
6. As constitutional structure is concerned with defining governmental institutions, not conferring personal rights, the only recognised implied freedom concerns political communication. This supports representative and responsible government: *Lange* (JBA 7/29/2471). As the implication is structural, it limits legislative power and is not an individual right: *Brown v Tasmania* (JBA 5/18/1431), [90], [150], [237], [258], [262], [313], [433], [465], [469], [559], *Comcare v Banerji* (2019) 93 ALJR 900, [20].
7. The plaintiffs submit that the implied freedom of political communication cannot be divorced from such movement of the individual as: (a) walking to see a political advertisement; and (b) movement as a form of protest: **Reply Submissions, [10]**.
8. Movement itself has no inherent purpose. Walking past an abortion clinic to go to work is

not a form of political communication. Equally, walking past an abortion clinic to go to an environmental political rally is not political communication about either abortion or the environment. On the other hand, a group marching past an abortion clinic with anti-abortion placards may be movement for a political protest.

9. The implied freedom of political communication already protects all movement which is for the purposes of, or is itself, a form of political protest. Equally, the implied freedom of political communication does not protect all movement whatsoever, in case it might later facilitate a political communication.
10. There is no need to imply any separate constitutional freedom to protect movement beyond an implied freedom of political communication. That is why there is no free-standing right of association: *Tajjour* (JBA 10/47/4077, 4089, 4116), [95], [143], [242].

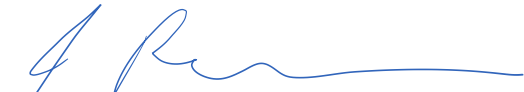
No Basis for Implication of Intrastate Freedom of Movement

11. No freedom of intrastate movement is practically or logically necessary to support a federal system of governmental institutions and powers.
12. In particular, federation does not imply any need for any general freedom of intrastate movement. Nothing said in *Smithers* (JBA 8/40/3353) or *Pioneer Express* (JBA 8/39/3321) suggests that the federal system of Australian Government could not operate without such a general freedom. The US decision of *Crandall* (JBA 13/61/5105) is irrelevant, due to an entirely different constitutional context.
- 20 13. Likewise, the implied freedom of association only exists to the extent necessary to support the implied freedom of political communication. That does not extend more broadly to an implied freedom of movement for any purpose.
14. Lastly, an express freedom of interstate intercourse does not imply anything about the existence of a freedom of intrastate intercourse. Indeed, the express statement of one freedom is inconsistent with the implication of another, unexpressed freedom.

Dated: 6 November 2020



J A Thomson SC, Solicitor-General for WA



J J E Perera