



HIGH COURT OF AUSTRALIA

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

M104 of 2020

BETWEEN:

JULIAN KINGSFORD 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 FOR THE STATE OF
TASMANIA (INTERVENING)**

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PART I: PUBLICATION OF SUBMISSIONS

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General for the State of Tasmania intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: SUBMISSIONS**Summary**

- 10 4. The question of law to be answered on the defendant's demurrer is:

Does the Constitution provide for an implied freedom for the people in and out 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?

5. The plaintiffs restate the question (**PS [3]**) as whether the Constitution implies a qualified freedom for the people in and of Australia to move within the State where they reside from time to time.
6. The question, however formulated, should be answered in the negative and the demurrer
20 upheld.
7. Tasmania's submissions may be summarised as follows:
 - (a) There is no legitimate basis upon which an implied freedom of movement may be said to derive from the Constitution as a free standing freedom, right or guarantee. It is well established that a constitutional implication can only

legitimately be derived from the text and structure of the Constitution¹. However, there is no foothold in the Constitution, either in its text or structure, to support an implication as asserted by the plaintiffs.

(b) The plaintiffs seek to elevate what is appropriately characterised as a common law freedom of movement into an implied constitutional guarantee. The existence of common law rights at the time the Constitution was framed does not mean that common law rights were magically woven through the fabric of the Constitution itself to give them new life as constitutional rights. By contrast, there is no doubt that the Constitution may be informed by the common law².

10 (c) The plaintiffs' alternative arguments that freedom of movement is to be implied from the system of representative and responsible government and as part of the implied freedom of political communication or is to be implied as an aspect of s 92 of the Constitution (**PS[9](b) and (c)**) ought not be accepted. The asserted freedom must either stand alone as an implication to be revealed by the text or structure of the Constitution or sit within the existing freedoms. Seeking to draw an implication from an existing implication rather than from the text or structure is not a valid approach. Likewise, attempts to find an implication as an aspect of an express provision have been rejected³.

Common law freedom of movement

- 20 8. The plaintiffs seem to argue in favour of the elevation of the common law rights of individuals to freedom of movement to the status of a constitutional freedom.
9. Freedom of movement may be a right at common law but it is not a constitutional "right". Although Murphy J considered such a freedom of movement to be constitutionally

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566-567 (the Court); *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan J), 182-183 (Dawson J), 231 (McHugh J).

² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (the Court).

³ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 569 (Gibbs CJ), 579 (Mason J) 615 (Brennan J), 636 (Dawson J).

implied based on the view that the Constitution was a Constitution of a ‘free society’⁴, the view has not received any general support from the Court⁵.

10. There is no constitutional Bill of Rights in this country⁶.
11. As the High Court said in *Lange v Australian Broadcasting Commission*⁷:

Under a legal system based on the common law, ‘everybody is free to do anything, subject only to the provisions of the law’, so that one proceeds ‘upon an assumption of freedom of speech’ and turns to the law ‘to discover the established exceptions to it’.

- 10 12. The framers of the Constitution left to parliament the policy decisions around the protection of rights and freedoms, relying upon the common law to continue to protect such rights, whilst leaving to parliament the question of restriction⁸.
13. To the extent to which freedom of movement exists as a fundamental common law right, it will receive protection through the principle of legality and representative government, not by any constitutional imperative.
14. It is well established that parliaments are able to abrogate fundamental common law rights, although they are presumed not to do so except in the face of clear and unambiguous intention⁹. As such, it is a matter for parliament, in the exercise of legislative power, to determine whether fundamental common law rights ought to be abrogated or restricted.

⁴ *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633, 670 (Murphy J).

⁵ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 569 (Gibbs CJ), 579 (Mason J), 615 (Brennan J), 626 (Deane J), 636 (Dawson J); *Kruger v The Commonwealth* (1997) 190 CLR 1, 69 (Dawson J). See also Geoffrey Kennett, ‘Individual Rights, the High Court and the Constitution’ (1994) 19(3) *Melbourne University Law Review* 581, 599.

⁶ *Kruger v The Commonwealth* (1997) 190 CLR 1, 61 (Dawson J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 159 (Brennan J), 167 (Deane J), 201 (McHugh J).

⁷ (1997) 189 CLR 520, 564 (the Court).

⁸ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135-6 (Mason CJ); *Kruger v The Commonwealth* (1997) 190 CLR 1, 61 (Dawson J).

⁹ *Coco v The Queen* (1994) 179 CLR 427; *Al-Kateb v Godwin* (2004) 219 CLR 562, 565 [19] (Gleeson CJ).

15. If the electors are not satisfied, then parliamentarians will face the political consequences.
16. The plaintiffs' case fails to recognise the significance of the protection of individual rights through the common law and the role of political power and accountability in the system of representative government.
17. If the Constitution is to imply a freedom of movement in the exceedingly broad terms expressed in the question raised by the demurrer, it arguably leaves the door open to the implication of a whole range of other common law rights to operate as limitations on legislative power. But, there is nothing in the constitutional text or structure to support the constitutionalising of common law rights of this type. The plaintiffs' arguments in favour of such a freedom pays insufficient regard to the plenary powers of State parliaments and the role that the principle of legality plays in conjunction with the democratic process.
18. The suggestion that the Constitution should be read in light of the common law's history (PS[10]) provides no justification for the discovery of implications in the Constitution. Implications are not found in the common law but in the text or structure of the Constitution.

Constitutional implications

19. It has been pointed out in a number of cases that the Constitution was never intended to create individual rights but is concerned with the structure and relationship of government¹⁰. As noted above, the framers instead chose to place faith in the democratic process for the protection of individual rights¹¹.
20. Whilst that is not to say that the Constitution does not contain provisions which offer protection to individual rights¹², if a freedom exists as a limitation on legislation power¹³,

¹⁰ *Kruger v The Commonwealth* (1997) 190 CLR 1, 61 (Dawson J).

¹¹ *Ibid.*

¹² Sections 41, 51(xxiiiA), 80, 116, 117; *Kruger v The Commonwealth* (1997) 190 CLR 1, 61 (Dawson J).

¹³ *Kruger v The Commonwealth* (1997) 190 CLR 1, 69 (Dawson J).

it must (as previously submitted) be found either within its text or structure. No implication will be drawn from the Constitution which is not based on its terms or structure¹⁴.

21. As Barwick CJ observed in *Attorney-General (Cth) (Ex rel. McKinlay) v The Commonwealth*¹⁵:

The Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility.

22. The framers of the Constitution were disinclined to incorporate guarantees of individual rights¹⁶. Mason CJ recognised this in *Australian Capital Television Pty Ltd v The Commonwealth*¹⁷:

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They refused to adopt a counterpart to the Fourteenth Amendment to the Constitution of the United States. Sir Owen Dixon said:

“[t]hey were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to control of the legislature itself”.

The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen’s rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.

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So it was that Professor Harrison Moore, writing in 1901, was able to say of the Constitution:

¹⁴ *McGinty v Western Australia* (1996) 186 CLR 140, 168-169 (Brennan CJ), 231-232 (McHugh J).

¹⁵ (1975) 135 CLR 1, 24 (Barwick CJ); see also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

¹⁶ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135-6 (Mason CJ).

¹⁷ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ) (citations omitted).

“The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power.”

In light of this well recognized background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms.

23. Of course, the Court went on to find that freedom of political communication is so indispensable to the efficacy of the system of representative government provided by the Constitution that it is necessarily implied¹⁸. That finding reflected the earlier observation of the Court that where the implication sought to be derived is structural, “the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure”¹⁹.
24. As Windeyer J observed in *Victoria v The Commonwealth* “our avowed task is simply the revealing or uncovering of implications that are already there”²⁰. That then raises the question as to what is “already there” and yet to be revealed or uncovered regarding freedom of movement (specifically, freedom of intrastate movement).

Plaintiffs’ argument

25. The plaintiffs’ argument in favour of an implied freedom of movement sits at the bottom of a constitutional cliff face without any obviously secure footholds to offer assistance to the top. Attempts to grasp at the Commonwealth’s legislative powers in provisions such as those set out in **PS[32]** or the federal system itself (**PS [24] – [30]**) are tenuous at best and, in Tasmania’s submission, are necessarily doomed to fail as a foundation upon which such a freedom may be implied.

¹⁸ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 140 (Mason CJ), 149 (Brennan J), 168 (Deane and Toohey JJ), 214 (Gaudron J), 233-234 (McHugh J).

¹⁹ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ), 231 (McHugh J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 409 [240] (Gummow J).

²⁰ (1971) 122 CLR 353, 401-402.

26. In Tasmania’s submission, it is quite plain that the implication for which the plaintiffs contend is not contained in the text of the Constitution. Nor is it an implication which can be said to inhere in the structure which is "logically or practically necessary for the preservation of the integrity of (the) structure" of the Constitution²¹.
27. In *Kruger*, the existence of such an implication in relation to freedom of movement was rejected²².
28. The assertion that freedom of movement, at least in the very broad terms reflected in the demurrer, is “so obvious that detailed specification is unnecessary” (PS [24]) is therefore implausible and contrary to authority.
- 10 29. To the extent to which the Commonwealth’s legislative powers are relied upon by the plaintiffs to justify a qualified constitutional freedom of movement as a limitation upon State legislative powers, the answer should instead be found in the application of s 109 of the Constitution. If the Commonwealth Parliament chose to legislate in recognition or regulation of such rights (to the extent that its powers allow), conflicting State laws would be rendered invalid to the extent of any inconsistency. However, those legislative powers do not, it is submitted, provide a suitable structure to support the implication contended for by the plaintiffs. Commonwealth legislative powers do not negate or restrict State legislative powers in and of themselves (exclusive powers aside).
- 20 30. The plaintiffs rely upon the judgment in *R v Smithers; Ex parte Benson*²³ as supporting an implied freedom of movement. However, it is to be observed that the facts in *Smithers* did not revolve around the more confined question of intrastate freedom of movement as distinct from interstate movement and two of the four justices based their findings on freedom of interstate intercourse protected by s 92.

²¹ *McGinty v Western Australia* (1996) 186 CLR 140, 234 (McHugh J); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

²² *Kruger v The Commonwealth* (1997) 190 CLR 1, 45 (Brennan CJ), 69-70 (Dawson J), 142 (McHugh J), 157 (Gummow J).

²³ (1912) 16 CLR 99.

Plaintiffs' alternative arguments

31. The plaintiffs appear to accept at **PS [23]** that an implication must be “logically or practically necessary for the preservation of the integrity of” the constitutional structure. It is therefore not apparent why the first alternative argument is raised (**PS [9(b)]**). Arguably, it conveys nothing more than the point raised in the plaintiffs’ primary argument (**PS [9(a)]**).
32. Further, the issues raised in the alternative arguments ought not to be confused with the scope and extent of presently recognised freedoms and guarantees. The plaintiffs’ submissions conflate the matter of the extent and scope of recognised freedoms with the
10 existence of an asserted yet previously unrecognised constitutional freedom.
33. Whether a restriction on freedom of movement is impermissible as an adjunct or corollary of those recognised freedoms does not markedly differ, if at all, from whether such a restriction is invalid as constituting an impermissible burden on those freedoms. No new issue arises and no new freedom can be said to be brought to life merely as an appendage to a recognised constitutional freedom. Whilst freedom of movement might find some limited protection under the freedoms protected by the Constitution, it will do so as a component of those freedoms, but not otherwise.
34. By way of analogy, there has been some recognition of freedom of association as a
20 common law right²⁴. Yet it is not a free standing right which finds protection through a constitutional implication, although it might exist as a corollary to the implied freedom of political communication²⁵. Just as the proposition that freedom of association had an additional life as an independent right as distinct from being a consequence of another constitutional freedom has been rejected, the same logic ought to allow for the rejection of an independent constitutionally protected freedom of movement.

²⁴ *Tajjour v New South Wales* (2014) 254 CLR 508, 566-567 [95] (Hayne J), 575 [134] Crennan, Kiefel and Bell JJ, 576 [136] (Gageler J), 605 [242] – [244] (Keane J).

²⁵ *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan and Bell JJ).

35. With regard to the plaintiffs' reliance upon s 92 to found an implication, the argument must fail in light of the express protection of interstate intercourse²⁶. Just as the express guarantee in s 92 has been said to leave no room for a separately implied guarantee of freedom of communication²⁷, there is likewise no room in s 92 for an implication of freedom of intrastate movement.
36. Unlike the guarantees in s 92 which depend upon an element of interstateness and the implied freedom of political communication which hinges upon the very nature of the democratic institutions established by the Constitution, a freedom to move at will within one's own State, standing alone, has no apparent connection with the nature of the federation or the Constitution to which it owes its existence. The freedom asserted by the plaintiffs finds its proper home in the common law.
37. In any event, the alternative arguments, whether alone or together, are directed to matters of insufficient width to find an implied freedom in the very broad terms set out in the question arising on the demurrer. The purposes set out in the question extend well beyond matters which might be said to fall within the scope of the implied freedom of political communication and s 92.

PART V: TIME ESTIMATE

38. Tasmania estimates that no more than 10 minutes will be required for oral submissions.

20 Dated 30 October 2020



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²⁶ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 569 (Gibbs CJ), 579 (Mason J), 615 (Brennan J), 636 (Dawson J).

²⁷ *Ibid.*

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BETWEEN:

JULIAN KINGSFORD GERNER

First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD

Second Plaintiff

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THE STATE OF VICTORIA

Defendant

**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF TASMANIA (INTERVENING)**

20 Pursuant to paragraph 3 of Practice Direction No 1 of 2019, Tasmania sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Date in Force	Provisions
Legislation			
2.	<i>Commonwealth Constitution</i>		ss 41, 51(xxiiiA), 80, 92, 109, 116, 117