



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M104/2020
File Title: Gerner & Anor v. The State of Victoria
Registry: Melbourne
Document filed: Form 27F - Outline of oral argument
Filing party: Defendant
Date filed: 06 Nov 2020

Important Information

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

BETWEEN:

JULIAN KINGSFORD GERNER

First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD

Second Plaintiff

AND:

THE STATE OF VICTORIA

Defendant

DEFENDANT'S OUTLINE OF ORAL ARGUMENT

PART I: ONLINE PUBLICATION

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

PART II: OUTLINE OF ORAL ARGUMENT

1.	There is no implied freedom for the people of Australia to move within the State where they reside from time to time, for any reason.	VS [5]
2.	The point of contest is whether there is a broad freedom of movement for any reason. It is not: (a) whether there is an implied freedom of "political movement"; or (b) whether the implied freedom of political communication or s 92 invalidates s 200 of the <i>Public Health and Wellbeing Act 2008</i> (Vic).	VS [4]
3.	<u>The drawing of implications</u> (a) Any implication must be sourced in the text or structure of the Constitution, not from doctrines outside the Constitution. (b) Any implication sought to be drawn must be logically or practically necessary for the preservation of the integrity of the constitutional structure. (c) The relevant question is "What do the terms and structure of the Constitution prohibit, authorise or require?" (d) Any implication can extend only so far as is necessary for the effective operation of the constitutionally prescribed system. • <i>Australian Capital Television Pty Ltd v Commonwealth</i> (1992) 177 CLR 106 at 133-136 (JBA Vol 4 Tab 16); • <i>Lange v Australian Broadcasting Corporation</i> (1997) 189 CLR 520 at 567 (JBA Vol 7 Tab 29); • <i>Kruger v Commonwealth</i> (1997) 190 CLR 1 (JBA Vol 6 Tab 28).	VS [16] VS [21] VS [16] VS [21]

4.	The general implied freedom of movement asserted by the plaintiffs is not supported by the text and structure of the Constitution.	VS [24]
3.	<p>There is a tension between the asserted general implied freedom of movement and certain textual aspects of the Constitution.</p> <p>(a) There is a tension between the asserted general implied freedom of movement and s 92.</p> <p>(b) There is a tension between the asserted general implied freedom of movement and various heads of power in s 51.</p> <ul style="list-style-type: none"> • <i>Higgins v Commonwealth</i> (1998) 79 FCR 528 at 534 (JBA Vol 13 Tab 64). 	VS [27] VS [28]
4.	The “structure of the federal system” does not require the implication of a general implied freedom of movement.	VS [39]
5.	<p>The system of representative and responsible government established by the Constitution does not require the implication of a general implied freedom of movement.</p> <p>(a) That system of government does not require a freedom of intrastate movement for “any reason”. Not all movement is political.</p> <p>(b) Recognition of a broad freedom of the kind asserted by the plaintiffs would be inconsistent with authority.</p> <p>(c) By parity of reasoning with the implied freedom of political communication, it may be that there is an implied freedom of movement within a state for purposes of the constitutionally prescribed system of government (“political movement”). However, the plaintiff pleaded neither such limited freedom nor any facts necessary to invoked such a freedom.</p> <ul style="list-style-type: none"> • <i>Lange</i> (1997) 189 CLR 520 at 557-561, 566-567 (JBA Vol 7 Tab 29); • <i>Kruger</i> (1997) 190 CLR 1 at 10-11 (argument), 45 (Brennan CJ), 68-70 (Dawson J), 116, 126-127 (Gaudron J), 142-144 (McHugh J), 156-157 (Gummow J) (JBA Vol 6 Tab 28); • <i>Tajjour v New South Wales</i> (2014) 254 CLR 508 at [46] (French CJ), [95] (Hayne J), [134] (Crennan, Kiefel and Bell JJ), [136], [143], [155] (Gageler J), [230]-[234], [242]-[244] (Keane J) (JBA Vol 10 Tab 47). 	VS [51] VS [15], [57] VS [62]
6.	<p>Section 92 of the Constitution does not require the implication of a general implied freedom of movement.</p> <p>(a) The express protection of interstate intercourse in s 92 tells against there being a broad implied freedom of intrastate movement.</p> <p>(b) A restriction on intrastate movement may be such as to impermissibly burden interstate intercourse and so breach s 92. However, the plaintiff has not pleaded a breach of s 92 nor any facts necessary to invoke that section.</p>	VS [64]- [66]

<p>7.</p>	<p><u>Utility of relief</u></p> <p>If the current restrictions on intrastate movement imposed by the Stay Safe Directions (No 2) are removed on Monday 9 November 2020, as foreshadowed, the relief sought will produce no foreseeable consequences for the parties.</p>	<p>VSuppS</p>
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Dated: 6 November 2020



Kristen Walker
Craig Lenehan
Kateena O’Gorman
Thomas Wood