HIGH COURT OF AUSTRALIA

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Details of Filing

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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

SUBMISSIONS OF THE DEFENDANT ON THE DEMURRER

PART I: ONLINE PUBLICATION

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

PART II: STATEMENT OF ISSUE & SUMMARY OF ARGUMENT

2. The demurrer raises the issue of whether there is to be implied in the Constitution the freedom pleaded in paragraph 23 of the Amended Statement of Claim (**ASOC**). In particular, the question before this Court on the demurrer is as follows:

> 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
10 or for any reason, free from arbitrary restriction of movement?

3. It is important to bear in mind the scope of the pleadings in considering the question raised by the demurrer. The rearticulation of the question by the plaintiffs (**PS [3]**) does not alter that scope.

4. The plaintiffs' ASOC asserts that a broad freedom, protecting movement <u>for any reason</u>, is to be implied from the Constitution, primarily as a "free-standing freedom". The ASOC does not plead the existence of any more limited freedom of movement. In particular, the ASOC does not plead the existence of a more limited freedom of movement that is confined to movement that is necessary for the purposes of political communication, or movement that is necessary in order for a person to traverse a State border. To the extent that the existence
20 of the implied freedom of political communication, or s 92 of the Constitution, are said to be relevant at all, they are said to support the implication of the broad freedom described above, not some more limited form of freedom of movement.[1]

5. In summary, Victoria contends that the answer to the demurrer question is "no". Such an implication finds no foothold in the text or structure of the Constitution and would be contrary to principle, authority and the drafting history of the Constitution.

PART IV: SECTION 78B NOTICE

6. Notice was given by the plaintiffs on 12 October 2020. No further notice is necessary.

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[1] See particulars to ASOC at [23].

PARTS IV & V: FACTS AND ARGUMENT

A. INTRODUCTION

7. By its demurrer Victoria denies that the facts alleged in the statement of claim show any cause of action against it, on the ground set out in the demurrer.[2] In that regard, it is important to note that the plaintiffs plead no facts that could engage any more limited freedom of movement. Rather, the plaintiffs have, in summary, pleaded the following facts, which the State is taken to have admitted for the purposes of the demurrer:[3]

   (1) The first plaintiff is a natural person who is ordinarily resident in Mornington Peninsula Shire Council in Victoria, is the ultimate owner of the second plaintiff, has not been diagnosed with Covid-19 and is not a close contact of a diagnosed person.[4]

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   (2) The second plaintiff is a corporation that conducts a restaurant business in Victoria, in relation to which it:[5]

      (a) became subject to restrictions on 23 March 2020, at which time it ceased its normal restaurant activities and provided takeaway food and drink services only;

      (b) generated reduced revenue in April 2020 as compared to April 2019;

      (c) ceased to conduct any food or drinks services in July 2020.

   (3) The defendant is divided into municipal districts, of which Mornington Peninsula Shire Council is one, and Mornington Peninsula Shire Council falls with the "Restricted Area".[6]

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   (4) The first plaintiff is ordinarily resident in the Restricted Area, and the second plaintiff's business is located in the Restricted Area.[7]

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[2] *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 (Gibbs J).

[3] The parties agree that the facts that Victoria is taken to have admitted for the purpose of the demurrer are only those set out in the ASOC at: paragraphs 3(a)-(c); 3(f) to the extent that it entails a proposition of fact; 4(a)-(h); 5-7; 8(d); 9; 10 to the extent that it entails a proposition of fact; the first phrase of each of paragraphs 13 to 18 (up until but not including the words 'the effect of which…'); and 19-21: see Defendant's Submissions for Directions Hearing on 20 October 2020 at [25]; *Gerner v Victoria* [2020] HCATrans 172 at lines 164-176, 189-203. See also *South Australia v Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ).

[4] ASOC at [3(a)-(c), (f)].

[5] ASOC at [4(a)-(h)].

[6] ASOC at [5(c)-(d)]. "Restricted Area" is a term defined and used in the various public health directions, discussed at paragraph 14, below.

[7] ASOC at [6]-[7].

(5) The second plaintiff has suffered detriment in that it cannot earn income from the usual conduct of its business.[8]

(6) The defendant, through the Chief Health Officer (**CHO**), has given directions under the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**) that apply to persons resident in the Restricted Area.[9] (The nature and content of those directions is discussed further, below.)

8. It is thus plain that the plaintiffs have pleaded, and the parties have joined issue on, the existence of a general implied freedom of movement for any reason, as described in paragraph 23 of the ASOC, not on some more limited implied freedom of movement.[10] It is
10 in that context that the question raised by the demurrer must be determined.

B. THE PHW ACT

9. The purpose of the PHW Act is to provide a legislative scheme that promotes and protects public health and wellbeing in Victoria (s 1). Section 4(3) provides that it is the "intention of Parliament that in the administration of this Act and in seeking to achieve the objective of this Act, regard should be given to the guiding principles set out in sections 5 to 11A". Those principles relevantly include the principle of evidence based decision-making (s 5); the precautionary principle (s 6); the principle of primacy of prevention (s 7); the principle of accountability (s 8); the principle of proportionality (s 9); and the principle of collaboration (s 10). Those principles thus apply to all decision-making under the PHW Act,
20 including decisions under s 200.

10. Division 3 of Part 10 is headed "Emergency powers". The "emergency powers"[11] may only be exercised by "authorised officers"[12] if:

(1) the Minister for Health has, on the advice of the CHO and after consultation with the Minister and the Emergency Management Commissioner under the *Emergency Management Act 2013* (Vic), declared a "state of emergency"[13] under s 198; and

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8 ASOC at [8(d)].

9 ASOC at [13]-[18].

10 The plaintiffs describe the asserted freedom as a "qualified" freedom: **PS [3]**. Those qualifications are not identified. Victoria understands that they refer to some form of "proportionality" qualifications (eg, *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ)), but do not otherwise diminish the breadth of the proposed freedom. See also ASOC at [24(c)], [25(c)].

11 PHW Act, s 3(1) (definition of "emergency powers").

12 PHW Act, s 3(1) (definition of "authorised officer").

13 PHW Act, s 3(1) (definition of "state of emergency").

(2) the CHO has authorised, under s 199, "authorised officers" to exercise the emergency powers and the public health risk powers, which he may only do if he believes that it is "reasonably necessary" to do so to eliminate or reduce a "serious risk to public health".[14]

11. A "serious risk to public health" is defined to mean a "material risk that substantial injury or prejudice to the health of human beings has or may occur having regard to … the number of persons likely to be affected; the location, immediacy and seriousness of the threat to the health of persons; the nature, scale and effects of the harm, illness or injury that may develop; the availability and effectiveness of any precaution, safeguard, treatment or other measure
10 to eliminate or reduce the risk to the health of human beings" (s 3(1)).[15]

12. The "emergency powers" are set out in s 200(1) and relevantly include the power to "restrict the movement of any person or group of persons within the emergency area" (para (b)) and "give any other direction that the authorised officer considers is reasonably necessary to protect public health" (para (d)). Under s 203 it is an offence for a person to refuse or fail to comply with a direction given under s 200; however, a person is not guilty of an offence if they had a reasonable excuse for refusing or failing to comply (s 203(2)).

13. It is not necessary, for the purposes of resolving the question raised by the demurrer, for this Court to consider the construction of s 200 of the PHW Act. The State therefore makes no submissions in response to **PS [62]-[67]**.[16]

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B.1. The Directions

14. The Directions annexed to the demurrer were made in exercise of the emergency powers.[17] For the purposes of resolving the question raised by the demurrer, it is not necessary to consider the detail of those Directions. However, it can be noted in summary that:

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[14] The CHO may personally exercise the emergency powers if he or she has authorised "authorised officers" to exercise those powers (s 20A).

[15] For the purposes of Div 3 of Pt 10, "COVID-19 may pose a material risk of substantial injury or prejudice to the health of human beings even when the rate of community transmission of COVID-19 in Victoria is low or there have been no cases of COVID-19 in Victoria for a period of time" (s 3(4)).

[16] Victoria notes that the proper construction of s 200 may be informed by the scope of any constitutional limit, having regard to s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) and by the fact that s 200 confers a statutory discretion: see, eg, *Comcare v Banerji* (2019) 93 ALJR 900 at 915-916 [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 924-925 [96] (Gageler J), 945-946 [209]-[211] (Edelman J).

[17] Victoria notes that the Directions annexed to the demurrer have since been revoked, except for the *Area Directions (No 9)*. Victoria proposes to file a document with the Court on the day prior to the hearing that reflects the position as at that date.

(1) The *Stay at Home Directions (Restricted Areas)* limited the reasons for which a person may leave the premises at which they ordinarily reside if those premises were in the Restricted Area, and the distance they may travel from those premises.[18] They also placed limits upon public and private gatherings.[19]

(2) The *Permitted Worker Permit Scheme Directions* limited the circumstances in which a person who lives or works in the Restricted Area may attend work.[20]

(3) The *Workplace Directions* imposed obligations upon employers in relation to "Work Premises".[21] One such obligation as that employers must require their employees to work from home (or some other suitable premises other than the "Work Premises")
10 where reasonably practicable.[22]

(4) The *Restricted Activity Directions (Restricted Areas)* imposed restrictions on the circumstances in which businesses were permitted to operate.

C. THE DRAWING OF IMPLICATIONS

15. The demurrer raises for consideration a similar issue to that which arose in *Kruger v Commonwealth*, where the plaintiffs contended that there existed an "immunity from legislative and executive restrictions on freedom of movement and association for political, cultural and familial purposes".[23] That argument was rejected by a majority of the Court. In responding to that argument, Brennan CJ observed that "[n]o such right has hitherto been held to be implied in the Constitution and no textual or structural foundation for the
20 implication [was] demonstrated in this case".[24] For the reasons developed below, the same is true here.

16. His Honour's crisp rejection of that substantially similar argument rests upon the established approach of this Court to the drawing of constitutional implications. Any such implication

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18 Clause 5. The "Restricted Area" was defined in the *Area Directions* (clause 4).

19 Part 4.

20 Clause 5.

21 The *Workplace (Additional Industry Obligations) Directions* imposed additional obligations for certain industries.

22 Clause 6.

23 See *Kruger* (1997) 190 CLR 1 at 68 (Dawson J); see also at 10 (Mr Forsyth QC, for the plaintiffs).

24 *Kruger* (1997) 190 CLR 1 at 45; see also at 70 (Dawson J), 142 (McHugh J), 157 (Gummow J). There has been a similarly crisp rejection of a "free-standing right of association": *Tajjour v New South Wales* (2014) 254 CLR 508 at 566-567 [95] (Hayne J), 576 [136] (Gageler J), 605-606 [242]-[245] (Keane J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] (Gummow and Hayne JJ, Heydon J agreeing).

must be "securely based".[25] "Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure."[26] Thus, the relevant question is: "What do the terms and structure of the Constitution prohibit, authorise or require?"[27]

17. A number of further relevant propositions flow from those fundamental principles.

18. **First**, self-evidently, no implication will be drawn where the putative implication is "at variance with" the constitutional scheme or "contrary to" the express text.[28] For the reasons developed at paragraphs 26-30 below, that is a large obstacle to the plaintiffs' arguments.

10 19. **Second**, because any implication must be sourced in the text or structure of the Constitution, it is wrong to seek to derive an implication from doctrines or principles *outside* the Constitution. While the plaintiffs' submissions commence with an acceptance of that fundamental proposition (**PS [9(a)]**), they then retreat from it. In particular, they place significant reliance upon statements made by individual justices of this Court to the effect that certain implications are required by reason of being "indispensable to any free society"[29] or the "notion of a free society governed in accordance with the principles of representative parliamentary democracy".[30] But, as Gummow J observed in *Kruger*,[31] any proposition of that width did not survive *Lange v Australian Broadcasting Corporation*.[32] Likewise, an appeal to the Constitution's "plan … for the development of a free and confident society"[33]
20 does nothing to advance the plaintiffs' argument.

20. The requirement that any implication be sourced in the text and structure of the Constitution, not extrinsic matters or doctrines, also defeats the attempt by the plaintiffs to bolster their

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[25] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 134 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453 [389] (Hayne J).

[26] *McGinty v Western Australia* (1996) 186 CLR 140 at 168 (Brennan CJ) (citations omitted).

[27] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court).

[28] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 624 [41] (Gleeson CJ, Gummow and Hayne JJ), 662 [197]-[198] (Heydon, Crennan and Kiefel JJ).

[29] See, eg, **PS [44]**, referring to *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670 (Murphy J).

[30] See, eg, **PS [53]**, referring to *ACTV* (1992) 177 CLR 106 at 212 (Gaudron J).

[31] (1997) 190 CLR l at 156-157.

[32] (1997) 189 CLR 520.

[33] *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ). That statement was made, not in the context of drawing implications from the Constitution, but rather in considering the scope of the judicial power of the Commonwealth. It should not be taken to suggest (as the plaintiffs may suggest: see **PS [23]**) that Gummow J had retreated from his earlier views in *Kruger*.

argument by reference to the common law and its history (**PS [10]**). The possibility that such common law doctrines might impose some constraint upon the legislative power of the States or the Commonwealth has not been embraced by this Court,[34] most likely because it poses large conceptual difficulties.[35] Those same difficulties attend the submission that the common law might, seemingly less directly, "influence" the drawing of implied constraints on those powers (see **PS [10])**. "[T]he limits to constitutional freedoms are to be determined by evaluating what is necessary for the working of the Constitution and its principles. The antecedent common law can at most be a guide in this analysis".[36]

21. **Third**, at least in a case such as the present where the implication is structural rather than textual,[37] the requirement that an implication be "securely based" has been understood to require that the implication sought to be drawn must be "logically or practically necessary for the preservation of the integrity of [the constitutional] structure".[38] Indeed that appears to be common ground (see **PS [9(a)]**). The notion of necessity in this context means that the implication is conveyed by the language with such strength of impression that to entertain the contrary view would be "wholly unreasonable",[39] or would carry with it the consequence that the constitutional scheme would be "undermined to a significant extent".[40]

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34 See, eg, *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14]. See also Gummow, "The Constitution: Ultimate Foundation of Australian Law?" (2005) 79 *Australian Law Journal* 167 at 177.

35 See Goldsworthy, "Implications in Language, Law and the Constitution" in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150 at 176. See also *Building Construction Employees and Builders Labourers' Federation (NSW) v Minister for Industrial Relations (NSW)* (1986) 7 NSWLR 372 at 385-387 (Street CJ), 404-405 (Kirby P); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 71-76 (Dawson J); *Kruger* (1997) 190 CLR 1 at 72-73 (Dawson J).

36 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126 (Mason CJ, Toohey and Gaudron JJ).

37 See *ACTV* (1992) 177 CLR 106 at 135 (Mason CJ); contrast *APLA* (2005) 225 CLR 322 at 453-454 [389] (Hayne J).

38 *ACTV* (1992) 177 CLR 106 at 135 (Mason CJ). See also *Lange* (1997) 189 CLR 520 at 567 (the Court); *MZXOT* (2008) 233 CLR 601 at 618 [20], 623 [39], 627 [54] (Gleeson CJ, Gummow and Hayne JJ), 635 [83] (Kirby J), 656 [171] (Heydon, Crennan and Kiefel JJ); *Burns v Corbett* (2018) 265 CLR 304 at 355 [94] (Gageler J), 383 [175] (Gordon J). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 155 (Knox CJ, Isaacs, Rich and Starke JJ); *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 386 (McTiernan J), 417-418 (Gibbs J).

39 See Donaghue, "The Clamour of Silent Constitutional Principles" (1996) 24 *Federal Law Review* 133 at 159, suggesting that some assistance is derived from the approach to statutory implications (referring to *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 at 32 (the Court), more recently applied in *Carr v Western Australia* (2007) 232 CLR 138 at 147 [17] (Gleeson CJ). Such an approach may be understood to explain the reasoning in decisions such as *Attorney-General (Qld) ex rel Goldsbrough, Mort & Co Ltd v Attorney-General (Cth)* (1915) 20 CLR 148 at 163 (Griffith CJ) and *Payroll Tax Case* (1971) 122 CLR 353 at 417 (Gibbs J).

40 *Burns* (2018) 265 CLR 304 at 357 [99] (Gageler J).

An implication will not be drawn merely because some may consider it reasonable.[41] Necessity also informs the "breadth" of any implication which is drawn: it can extend only so far as is necessary for the effective operation of the constitutionally prescribed system.[42]

22. **Fourth**, where the asserted implication is said to be for the protection of "freedoms" (or "rights"), that analysis must be undertaken with an appreciation for the fact that the Constitution was drafted on the assumption that "there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens".[43] The plaintiffs' selective and acontextual quoting of various portions of the Convention Debates (**PS [10]-[19]**) does not detract from the correctness of that observation.[44]

10 23. The Constitution is rather framed in accordance with the notion that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy. As Mason CJ observed in *ACTV*, that draws attention to Professor Harrison Moore's well known observation that the "great underlying principle" of the Constitution 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."[45] That is the only relevant "predicate" underlying the heads of legislative power in s 51 and their bestowal upon the representatives chosen pursuant to ss 7 and 24[46] (contra **PS [26] and [32]**). It does not supply any sufficient basis for asserting that the freedom for which the plaintiffs contend is "necessary" in the sense identified above. And the "efficacy" of those (concurrent) powers
20 (**PS [32]**) is more than adequately preserved by the operation of s 109.

D. THE ASSERTED FREEDOM

24. Victoria contends that there is simply "no foothold"[47] in the text or structure of the Constitution to support a general implied freedom of movement as pleaded by the plaintiffs.

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41 *APLA* (2005) 225 CLR 322 at 453-454 [389] (Hayne J), 484-485 [469]-[470] (Callinan J).

42 *Lange* (1997) 189 CLR 520 at 561 (the Court).

43 *ACTV* (1992) 177 CLR 106 at 136 (Mason CJ).

44 The Debates may be used for the purpose of (1) identifying the contemporary meaning of the language used, (2) the subject to which the language was directed and (3) the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged: *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court). The plaintiffs do not explain how the portions they have selected are useful for any of those purposes in the context of the argument they advance.

45 *ACTV* (1992) 177 CLR 106 at 136, quoting Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) at 329.

46 *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56 (Stephen J).

47 *Tajjour* (2014) 254 CLR 508 at 576 [136] (Gageler J).

Further, the asserted freedom is contrary to authority — in particular to the decision of this Court in *Kruger* — and is not supported by the drafting history of the Constitution.

25. Before turning to the various bases on which the plaintiffs assert such an implied freedom, it is convenient to note some features of the constitutional text and structure that are in tension with such an asserted freedom.

D.1. Tension with the constitutional scheme

26. Returning to the point made at paragraph 18 above regarding the need for consistency with the express terms of the Constitution, there are tensions (if not outright inconsistency) between the implication for which the plaintiffs contend and the constitutional scheme.
10 Those tensions arise as follows.

27. **First**, by the intercourse limb of s 92, the Constitution provides an <u>express</u> guarantee directed in part to the very subject matter of the plaintiffs' proposed implication: freedom of movement. That guarantee is <u>limited</u> in the sense that <u>intrastate</u> movement is plainly not its concern: "The intercourse with which the section is concerned is confined to intercourse among the States. That is to say, it is confined to movement or activity <u>across</u> State borders".[48] That alone is sufficient to suggest that the Constitution does not incorporate by implication a general freedom of intrastate movement of the kind asserted by the plaintiffs. The asserted implication would render otiose the textual delineation in s 92.

28. **Second**, it is necessary to consider the significance of various enumerated heads of power
20 in s 51, which appears to have been overlooked by the plaintiffs (see **PS [32]**). As Gaudron J observed in *Kruger*,[49] a number of those powers — particularly ss 51(vi) (defence), (ix) (quarantine) and (xix) ("so far as it is concerned with aliens") — "clearly comprehend restrictions on movement and association".[50] So too does s 51(i) read with s 98. Indeed, the essence of quarantine law is that the "actual movement of persons …<u>is restricted or altogether prohibited</u>."[51] Section 92 intersects with, and constrains, those legislative powers,

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48 *ACTV* (1992) 177 CLR 106 at 192 (emphasis added); see also at 194 (Dawson J). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 333 (Brennan J), 366 (Dawson J), 384 (Toohey J); *Higgins v Commonwealth* (1998) 79 FCR 528 at 533 (Finn J).

49 (1997) 190 CLR l at 121 (Gaudron J).

50 It can be noted that the quote from Mr Wise at the Convention Debates in **PS [17]** anticipated legislative restrictions upon movement of aliens under s 51(xix).

51 *McCarter v Brodie* (1950) 80 CLR 432 at 454-455 (Latham CJ) (emphasis added). In the passages from the Convention Debates upon which the plaintiffs rely at **PS [15]**, Mr O'Connor was referring to the fact that the enumeration of that power would not affect the continued existence of <u>concurrent</u> legislative

but only insofar as they restrict movement or activity across State borders, and even then not absolutely.[52] A similar, equally limited, result applies to the legislative power of the States.[53]

29. Those textual features reveal a constitutional design directed to preserving legislative choice in the very area the plaintiffs say is constrained by unwritten limits.[54] Those features point to the fact that the framers sought to leave the Commonwealth and State Parliaments considerable freedom to regulate the movement of people within the Commonwealth, subject only to limits on burdening movement across State borders. That proposition is supported by the Convention Debates, which reveal the framers' recognition that "internal traffic" (ie intrastate movement) was to remain capable of regulation by the States — it was
10 interstate movement that was to be regulated by the Constitution.[55]

30. All of that tells strongly against the plaintiffs' asserted implication. It would treat intrastate movement as if it were protected in a like manner to interstate movement. The constitutional scheme leaves no room for such a textually-untethered limitation on legislative power.[56]

31. It is convenient, at this point, to turn to the three arguments the plaintiffs advance in support of their putative implication.

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powers of the States to pass laws which are "necessary for the preservation of the health of the inhabitants and of the property by the state" (provided that the proposed Constitutional restrictions on protectionist measures were not infringed): *Official Record of the Debates of the Australasian Federal Convention* (Syd) at 1062. The plaintiffs appear to have misunderstood the point there being made.

52 *APLA* (2005) 224 CLR 322 at 353 [38] (Gleeson CJ and Heydon J), 394 [178]-[179] (Gummow J), 463 [426]-[427] (Hayne J).

53 *Cole v Whitfield* (1988) 163 CLR 360 at 391 ("… deny to Commonwealth and States alike …"); see also ss 106 and 107 of the Constitution.

54 For a discussion of the range of Commonwealth laws that operate to limit freedom of movement, see Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment by Commonwealth Laws,* Report No 129 (2015), ch 7 at 196-218. See also *Biosecurity Act 2015* (Cth), ss 87, 367. In Victoria, by way of example, there are laws that restrict, or authorise the restriction of, entry to certain places; laws that authorise restrictions on movement by individuals by way of bail or control orders; and laws that authorise restrictions on movement to be imposed by police officers.

55 See, eg, *Official Record of the Debates of the Australasian Federal Convention* (Melb) at 1321, 1417, 1461, 2274-2275 (Mr Barton) (contra **PS [18]**). See also *Official Record of the Debates of the Australasian Federal Convention* (Syd) at 1061-1062 (Mr Isaacs and Mr O'Connor), discussing the States' continued powers in relation to public health.

56 It may be accepted that an argument of that kind did not prevent the implication of the freedom of political communication, which likewise falls within the notion of "intercourse": compare *ACTV* (1992) 177 CLR 106 at 213-214 (Gaudron J) and at 185-186 (Dawson J); see also at 133 fn 82 (Mason CJ). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 81 (Deane and Toohey JJ). However, that confined implied constraint does not present the same textual tensions posed by the general freedom of movement for which the plaintiffs contend. Further, both the existence and scope of the implied freedom of political communication are tethered to the constitutional text and structure.

D.2. The structure of a "federal system"

32. The first argument put by the plaintiffs is that the asserted freedom is to be implied from the text and structure of the Constitution, because it is logically and practically necessary for the preservation of "the constitutional structure" (**PS [9](a)**). That raises two questions:

    (1) What is the relevant text and structure of the Constitution?

    (2) Why is the implication of the asserted freedom logically and practically necessary for the preservation of that structure?

33. Neither of those questions can be answered by stating that the asserted freedom is "so obvious that detailed specification is unnecessary"[57] (**PS [24], [45]**).

10 34. The plaintiffs' answer to the **first question** appears to rest on the notion that the Constitution establishes a "federal system", which entails "uniform application of Commonwealth laws to the Australian people resident in every part of the Commonwealth" (**PS [24]**). It is unclear how that proposition might provide the basis for a broad implied freedom of movement.

35. Certain points identified by the plaintiffs, said to support that proposition, are uncontroversial but go nowhere. It can be accepted that:

    (1) the Constitution establishes a federal system of government;

    (2) Ch III and ss 106, 107, 117[58] of the Constitution are relevant to the establishment and ongoing existence of that system (**PS [25], [28]-[29]**);

    (3) there is "one common law in Australia" (**PS [28]**),[59] qualified by the fact that "within
20 their respective spheres of competence, the common law may be abrogated or amended by the federal Parliament and the Parliaments of the States".[60]

36. None of that "logically requires" implication of the broad freedom of movement for which the plaintiffs contend (contra **PS [30]**). Indeed, as we have already observed, such an implication is in tension with what appears from the express terms of the Constitution.

37. There are, of course, limitations on Commonwealth and State power that arise by reason of the federal structure of the Constitution. The *Melbourne Corporation* principle, and its

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57 Nor, it should be noted, were Gaudron J's observations to that effect in *ACTV* (1992) 177 CLR 106 at 209 (extracted at **PS [24]**) directly addressed to the existence of an implied freedom of movement.

58 The quotations from the Convention Debates at **PS [12]-[13], [19]** were made in the context of discussing cl 110, being the forerunner to s 117. The plaintiffs do not claim any breach of s 117.

59 *Lange* (1997) 189 CLR 520 at 563 (the Court).

60 *Lipohar v The Queen* (1999) 200 CLR 485 at 509 [57] (Gaudron, Gummow and Hayne JJ).

reciprocal counterpart,[61] are the paradigm examples. But those limitations do not arise by reference to the "federal system" in the abstract or on an appeal to federalism as a form of "political slogan".[62] They depend for their existence upon a more precise articulation of the nature of the federal structure of the Constitution. That is: "the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organized State governments".[63] It follows from that conception that there are restrictions on power that protect the continuing existence of those constituent entities.

38. That context is important when considering the **second question**: why is the implication of
10 the asserted freedom logically and practically necessary for the preservation of that structure?

39. The plaintiffs have not provided any clear answer to that question. They have not identified any aspect of the federal structure that will not be preserved, or which is said to be significantly undermined, in the absence of the asserted freedom. They identify no matters akin to those which animate the *Melbourne Corporation* principle (and its reciprocal) that would warrant the conclusion that the implication is "necessary" in the relevant sense.

40. Rather, the plaintiffs seek to resuscitate the reasoning of Murphy J first articulated in *Buck v Bavone*, where his Honour considered that the "right of persons to move freely across <u>or within</u> State borders is a fundamental right arising from the union of the people in an
20 indissoluble Commonwealth" (see **PS [44]**).[64] That attempted resuscitation must be rejected, for it is squarely inconsistent with later authorities of this Court (none of which the plaintiffs seek to re-open). In particular, that approach cannot be reconciled with the repeated rejection by this Court of any "free-standing" implication of a freedom of association.[65]

41. Nor, as explained in the next section, can that approach be reconciled with the limited scope of the implied freedom of political communication.

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[61] *Spence v Queensland* (2019) 93 ALJR 643 at 673 [106]-[108] (Kiefel CJ, Bell, Gageler and Keane JJ).

[62] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 556 [54] (McHugh J).

[63] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 218 (Mason J), quoted in *Austin v Commonwealth* (2003) 215 CLR 185 at 217 [24] (Gleeson CJ).

[64] (1976) 135 CLR 110 at 137 (emphasis added). See also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88; *McGraw-Hinds* (1979) 144 CLR 633 at 670; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581-582; **PS [44] fn 58**.

[65] *Mulholland* (2004) 220 CLR 181 at 234 [148] (Gummow and Hayne JJ), 297 [334]-[335] (Callinan J), 306 [364] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112] (Gummow, Hayne, Crennan and Bell JJ), [72] (French CJ and Kiefel J); *Tajjour* (2014) 254 CLR 508 at 566-567 [95] (Hayne J), 576 [136] (Gageler J), 605-606 [242]-[245] (Keane J).

D.3. The system of representative and responsible government

42. The second basis for the asserted freedom seeks to draw on the system of representative and responsible government established by the Constitution. It is important to emphasise again that this second basis is not said to support the existence of some narrower freedom of "political movement". Rather, the plaintiffs' pleaded case is that this second basis supports the existence of the broad freedom identified in paragraph 23 of the ASOC.

Political communication vs communication generally

43. This branch of the plaintiffs' argument cannot be considered in isolation from the existing limits on Commonwealth and State power arising from the system of representative and
10 responsible government. The Constitution gives effect to that system "only to the extent that the text and structure of the constitution establish it".[66]

44. One consequence of the establishment of that system is that there are limits on the power of the Commonwealth to restrict the franchise.[67] Another consequence is that there are limits on the power of the Commonwealth and the States to restrict "access by the people to relevant information about the function of government in Australia and about the policies of political parties and candidates for election".[68]

45. Importantly, as noted at paragraph 21 above, the notion of necessity informs both the existence and the "breadth" of the implied limitations that arise from those matters. Thus, it was explained in *Lange* that, to the extent that any requirement for freedom of
20 communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, "the implication can validly extend only so far as is necessary to give effect to th[o]se sections".[69] It is in that sense that the implied freedom of political communication is an "indispensable" incident of the system of representative and responsible government.[70]

46. Accordingly, the Constitution "does not create rights of communication".[71] It creates a freedom from government restriction, "limited to what is necessary for the effective

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[66] *Lange* (1997) 189 CLR 520 at 567 (the Court).

[67] *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Murphy v Electoral Commissioner* (2016) 261 CLR 28.

[68] *Lange* (1997) 189 CLR 520 at 560 (the Court).

[69] (1997) 189 CLR 520 at 567 (the Court) (emphasis added).

[70] *Lange* (1997) 189 CLR 520 at 559 (the Court). See also *McCloy* (2015) 257 CLR 178 at 222-223 [101]-[102] (Gageler J), 279 [301] (Gordon J).

[71] *Levy v Victoria* (1997) 189 CLR 579 at 622 (McHugh J). See also *Brown v Tasmania* (2017) 261 CLR 328 at 384 [185] (Gageler J), 410 [262] (Nettle J), 473 [459] (Gordon J).

operation of that system of representative and responsible government provided for by the Constitution".[72] In that way, the freedom protects: "systemic integrity, not personal liberty; communication, not expression; and political communication, not communication in general".[73]

47. That focuses attention on what constitutes "political" communication, for it is only communication so characterised that is protected by the Constitution. Bearing in mind the purpose served by the freedom, the touchstone is communication between the people concerning "political or government matters", being those matters which enable the people to "exercise a free and informed choice as electors".[74] That is the very point recognised by
10 Kiefel CJ, Bell and Keane JJ in *Unions NSW v New South Wales* (***Unions NSW (No 2)***) in the passages quoted at **PS [59]**.[75]

48. It necessarily follows that there will be a range of communication that will not be capable of being characterised as "political" in the relevant sense. For example, as Kiefel CJ, Bell and Keane JJ recognised in *Clubb v Edwards*, which was decided shortly after *Unions NSW (No 2)*, a discussion "between individuals of the moral or ethical choices to be made by a particular individual is not to be equated with discussion of the political choices to be made by the people of the Commonwealth as the sovereign political authority".[76] Moreover, the mere fact of a communication being on a topic that may be politically controversial is not sufficient for the communication to be protected by the freedom.[77]

20 Political movement vs movement generally

49. Any further freedoms arising because of the system of representative and responsible government must cohere with the limited scope of the freedom of political communication just identified.

50. To the extent that Murphy J's early attempts at recognising the existence of a freedom of movement were articulated by reference to the system of representative and responsible

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72 *Lange* (1997) 189 CLR 520 at 561 (the Court).

73 *McCloy* (2015) 257 CLR 178 at 228 [119] (Gageler J) (emphasis added). Compare *Kruger* (1997) 190 CLR 1 at 125 (Gaudron J).

74 *Lange* (1997) 189 CLR 520 at 560; see also at 571 (the Court).

75 (2019) 264 CLR 595 at 607 [14].

76 (2019) 93 ALJR 448 at 465 [29]; see also at 465 [31] (Kiefel CJ, Bell and Keane JJ), 540 [439] (Edelman J). See also *APLA* (2005) 224 CLR 322 at 351 [28] (Gleeson CJ and Heydon J), 359-360 [60]-[61] (McHugh J), 450-451 [379]-[380] (Hayne J), 477-478 [448]-[450] (Callinan J).

77 *Clubb* (2019) 93 ALJR 448 at 465 [29] (Kiefel CJ, Bell and Keane JJ), quoting *Cunliffe* (1994) 182 CLR 272 at 329. See also at 502 [249] (Nettle J), 540 [439] (Edelman J).

government,[78] they are plainly inconsistent with those limitations. So much is evident from that fact that Murphy J's early attempts at recognising an implied freedom of movement also encompassed recognition of an (equally broad) freedom of communication[79] — yet the nature and scope of the latter freedom ultimately recognised by this Court bears little resemblance to that contemplated by Murphy J.

51. Similar difficulties attend Gaudron J's later discussion of an implied freedom of movement in *ACTV*. Indeed, in her reasons in that case, her Honour explicitly drew on Murphy J's earlier statements and suggested that "[t]he notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement and
10 freedom of association, and perhaps, freedom of speech generally".[80] Three points can be made about that suggestion.

(1) In so far as her Honour's suggestion was based on the "nature of our society", later authorities explain why that concept "cannot legitimately be used as a source of constitutional implications".[81] To the extent the plaintiffs' submissions suggest otherwise (see **PS [45], [48], [53]**), those submissions must be rejected as contrary to principle and authority.

(2) In so far as her Honour's suggestion was based on the principle of "representative democracy", later authorities explain that it is "logically impermissible" to treat "representative democracy" as though it were a term contained in the Constitution, and
20 "to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed".[82] Again, to the extent the plaintiffs' submissions suggest otherwise (see **PS [53]**), those submissions must be rejected.

(3) It is plain from Gaudron J's reference to the potential existence of a "freedom of speech generally", in combination with her reliance on Murphy J's earlier reasoning, that her Honour initially conceived of the protection afforded to various freedoms to be potentially greater than that ultimately recognised by the Court in *Lange*.

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78 See, eg, *Miller* (1986) 161 CLR 556 at 581-582; contrast *Buck v Bavone* (1976) 135 CLR 110 at 137.

79 See, eg, *Miller* (1986) 161 CLR 556 at 581-582.

80 (1992) 177 CLR 106 at 212 (Gaudron J) (citations omitted).

81 *Kruger* (1997) 190 CLR 1 at 69 (Dawson J); see also at 156-157 (Gummow J).

82 *McGinty* (1996) 186 CLR 140 at 169 (Brennan CJ). See also *Kruger* (1997) 190 CLR 1 at 156-157 (Gummow J).

52. Gaudron J developed that proposition from *ACTV* in *Kruger*, where her Honour identified the existence of "freedoms of movement and of association as subsidiary to the freedom of political communication", in the sense that "they support and supplement that latter freedom" (**PS [55]-[56]**).[83]

53. Stated at that level of abstraction, her Honour's recognition of a "subsidiary" freedom of that kind may be reconcilable with the later recognition by this Court of the existence of a "freedom of association" as a "corollary" to the implied freedom of political communication.[84] So too may her statement that "political communication between citizen and citizen and between citizens and their elected representatives entails, at the very least, freedom on the part of citizens to associate with those who wish to communicate information and ideas with respect to political matters and those who wish to listen".[85]

54. However, some care must be taken in relying on those statements, because her Honour went further and appears to have conceived of the "movement" and "association" so protected by the "subsidiary" freedom as extending to movement "within society" for any reason.[86] That is revealed by her Honour's statement that "<u>any</u> abridgment of the right to move in society and to associate with one's fellow citizens <u>necessarily</u> restricts the opportunity to obtain and impart information and ideas with respect to political matters" (and see **PS [49]**).[87]

55. A freedom that protects "movement" (or "association") in that broad sense, said to be founded upon the system of representative and responsible government, should not be recognised by this Court for at least two reasons.

56. **First**, it would be inconsistent with the limited protection afforded to "political" communication. Once "political" communication is understood in the narrower sense now accepted by this Court (see paragraphs 43 to 47 above), it is not correct to suggest that all limits on movement will necessarily restrict the opportunity to obtain and impart communications of that kind.

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83 (1997) 190 CLR 1 at 126 (Gaudron J). Toohey J accepted a "freedom of association which political communication demands" (at 93) (contrast **PS [54]**), and McHugh J accepted what can described in a shorthand way as a freedom of political movement (at 142) (**PS [57]**).

84 *Tajjour* (2014) 254 CLR 508 at 566 [95] (Hayne J), 578 [143] (Gageler J), 605 [242] (Keane J). See also *Mulholland* (2004) 220 CLR 181 at 278 [286] (Kirby J); *Kruger* (1997) 190 CLR 1 at 68 (Dawson J).

85 *Kruger* (1997) 190 CLR 1 at 115-116 (Gaudron J).

86 *Kruger* (1997) 190 CLR 1 at 116 (Gaudron J).

87 *Kruger* (1997) 190 CLR 1 at 126-127 (Gaudron J) (emphasis added). Consistent with that understanding, in *Levy* (1997) 189 CLR 579 at 619-620, her Honour contemplated that one of the impugned regulations might burden freedom of movement, but **not** political communication.

57. **Second**, it would be inconsistent with the reasoning in *Tajjour*. There, one of the plaintiffs submitted that "all social interactions must be protected by the freedom of association because that is where political opinions are formed".[88] A majority of the Court upheld the validity of the impugned law. None of the majority considered it necessary to consider whether the law placed a burden on such interactions, and two members of the majority expressly held that any freedom of association only exists as a corollary of the implied freedom of political communication.[89] That conclusion and reasoning necessarily entails an implicit rejection of the notion that "all social interactions" are protected by that freedom.

58. The same position is reflected in the dissenting reasons of Gageler J. His Honour expressly
10 rejected the argument that s 93X was invalid as infringing an independent implied freedom of association.[90] Rather, he considered that an implied freedom of association is "part and parcel" of the implied freedom of political communication.[91] His Honour concluded that the impugned law, in so far as it regulated non-political association, did not impose any effective burden on the implied freedom of association.[92] That conclusion could not stand if the broad approach taken by Gaudron J to "association" (and "movement") were correct. That coheres with his Honour's later reasoning in *Brown*,[93] where he said that the effect of *Levy* was that "political communications include non-verbal communications and that non-verbal political communications include assembly and <u>movement for the purpose of protest</u>".

59. For those reasons, what Gummow J said in *Kruger* of the broad "freedom of association"
20 there claimed is equally applicable to the claim made by the plaintiffs here:[94]

> That the structure established by the Constitution has as essential elements a system of responsible government and representative government does not bring with it, as an implication of logical or practical necessity for the preservation of the integrity of that structure, an implied restriction upon federal legislative power, as regards "freedom of association" in any general sense of that expression.

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88 (2014) 254 CLR 508 at 513 (Mr Lange, for the plaintiff Tajjour).

89 *Tajjour* (2014) 254 CLR 508 at 566-567 [95] (Hayne J), 605-606 [242]-[245] (Keane J).

90 *Tajjour* (2014) 254 CLR 508 at 576 [136] (Gageler J).

91 (2014) 254 CLR 508 at 578 [143].

92 (2014) 254 CLR 508 at 582 [155] (Gageler J). In contrast, His Honour considered that, in so far as the law applied to an association formed for the purposes of political communication, it did amount to an effective burden: at 582 [156].

93 (2017) 261 CLR 328 at 383 [182] (emphasis added).

94 (1997) 190 CLR 1 at 157 (Gummow J). Gummow J did not expressly refer to "freedom of movement" in this passage, but it is reasonably clear, from the fact that the relevant section of his reasons identified the plaintiffs claim in terms of "movement and association for political, cultural and familial purposes", that his Honour considered "movement" and "association" were linked: see at 156, and contrast **PS [58]**).

60. If any implied freedom of movement exists because of the system of representative and responsible government, it will necessarily be a freedom that is limited to protecting "political movement", being movement that is necessary to enable the people to "exercise a free and informed choice as electors".[95]

61. That may include, for example, movement for the purposes of:

    (1) "voting for, or supporting or opposing the election of, candidates for membership of the Senate and the House of Representatives, monitoring the performance of and petitioning federal Ministers and parliamentarians and voting in referenda".[96]

    (2) accessing the seat of Government to engage in activity "for the purposes for which it was called into existence".[97]

    (3) attending an "on-site" political protest (while acknowledging that laws restricting movement of that kind have traditionally been analysed through the lens of political communication).[98]

62. Again, however, it is important to note that the plaintiffs have not pleaded any facts that establish that they wish to engage in movement that would be captured by any of those examples (see paragraph 7 to 8 above).[99]

63. Finally, to the extent that any freedom of political movement were to be recognised by this Court, it would necessarily follow that such a freedom would not be "absolute".[100] The validity of any law said to burden that freedom will fall to be determined by reference to the

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95 See *Lange* (1997) 189 CLR 520 at 560 (the Court).

96 **PS [57]**. See *Kruger* (1997) 190 CLR 1 at 142 (McHugh J), noting that His Honour there expressly rejected an asserted broader freedom of movement. A candidate or member of Parliament travelling within or to an electorate for a political purpose may fall within this category: **PS [50]**.

97 **PS [37]-[43], [46]**. See *Pioneer Express Pry Ltd v Hotchkiss* (1958) 101 CLR 536 at 549-550 (Dixon CJ). See also *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108-109 (Griffiths CJ), 109-110 (Barton J); *Theophanous* (1994) 182 CLR 104 at 166 (Deane J).

98 See again *Brown* (2017) 261 CLR 328 at 383 [182] (Gageler J).

99 For that reason, the plaintiffs cannot now seek to put their case on some narrower basis (for example, relying solely on the implied freedom of political communication, or an implied freedom of "political movement"). Had they pleaded a narrower freedom, Victoria may have demurred on a different ground, involving the question of threshold severance discussed in *Tajjour* (2014) 254 CLR 508, *Knight v Victoria* (2017) 261 CLR 306 and *Clubb* (2019) 93 ALJR 448. Note, in that regard, that the way in which the impugned provisions of the PHW Act and the Directions are enforceable against the plaintiffs is via the offence provision in s 203. That provision is readily capable of interpretation (including by way of severance (or disapplication)) in accordance with the presumption created by s 6(1) of the *Interpretation of Legislation Act*.

100 That is so on any view of the freedom: see *Buck* (1976) 135 CLR 110 at 137 (Murphy J); *Kruger* (1997) 190 CLR 1 at 121 (Gaudron J). So much is recognised by the plaintiffs: **PS [3]**.

test used to determine the validity of a law said to burden the implied freedom of political communication.[101]

D.4. Section 92

64. Section 92 of the Constitution guarantees "interstate intercourse". The plaintiffs appear to assert that, for that guarantee to be effective, there must be implied in the Constitution an independent guarantee of "intrastate" movement (**PS [61]**).[102] There is no basis for doing so.

65. **First**, as noted at paragraph 27 above, purely intrastate movement is not the concern of s 92.

66. **Second**, as we also there observed, the very existence of that express guarantee, and the absence of any similar guarantee for intrastate intercourse, *tells against* the implication of any implied freedom of movement on this basis.[103] That is not to say that a law that imposes a burden on intrastate intercourse or movement may not, as a result, also burden interstate intercourse. But the plaintiffs have not pleaded any breach of s 92 of the Constitution on that basis (and have expressly disavowed such an approach).[104] And, in any event, none of the facts pleaded establish that the first plaintiff wishes to move across any State border, and to move within Victoria for the purpose of doing so.

E. Conclusion

67. The question raised by State's demurrer should be answered "no". The demurrer should therefore be upheld.

68. The demurrer does not raise any question of costs. However, if this Court reaches that question, the costs of the demurrer should be reserved.

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101 *Wainohu* (2011) 243 CLR 181 at 230 [112] (Gummow, Hayne, Crennan and Bell JJ). See also *Kruger* (1997) 190 CLR 1 at 126, 128-129 (Gaudron J); *Levy* (1997) 189 CLR 579 at 617-618, 619 (Gaudron J); *Mulholland* (2004) 220 CLR 181 at 201 [42] (Gleeson CJ).

102 It is unclear whether the plaintiffs rely on s 92 as requiring a broad freedom of intrastate movement, unconnected with interstate movement, or only as requiring a freedom of intrastate movement for the purposes of crossing a State border. The ASOC and **PS [60]** suggests the former; **PS [61]** suggests the latter.

103 Compare *ACTV* (1992) 177 CLR 106 at 214 (Gaudron J).

104 *Gerner v Victoria* [2020] HCATrans 171 at lines 38-42 (Mr Wyles QC). Again, had the plaintiffs pleaded invalidity on the basis of a breach of s 92, Victoria may have instead demurred on the basis of a threshold severance ground (see footnote 99 above).

PART V: ESTIMATE OF TIME

69. Victoria estimates it will require 1.5 hours for the presentation of oral submissions.

Dated: 30 October 2020

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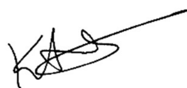

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

JULIAN KINGSFORD GERNER
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

and

10 **THE STATE OF VICTORIA**
Defendant

ANNEXURE TO SUBMISSIONS OF THE DEFENDANT

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

Number	Description	Date in Force	Provisions
Constitutional provisions			
1.	*Commonwealth Constitution*		ss 7, 24, 51, 51(i), 51(vi), 51(ix), 51 (xix), 64, 92, 98, 106, 107, 109, 117, 128
Statutes			
2.	*Biosecurity Act 2015* (Cth)	25 March 2020	ss 87, 367
3.	*Crimes Act 1900* (NSW)	13 June 2014 — 22 October 2014	s 93X
4.	*Emergency Management Act 2013* (Vic)	1 January 2020 — 5 April 2020	
5.	*Interpretation of Legislation Act 1984* (Vic)	1 March 2019	s 6(1)

6.	*Public Health and Wellbeing Act 2008* (Vic)	1 March 2020 — 5 April 2020	ss 198
7.	*Public Health and Wellbeing Act 2008* (Vic)	9 September 2020 — 20 October 2020	ss 199, 200
8.	*Public Health and Wellbeing Act 2008* (Vic)	24 October 2020	ss 1, 3(1), 3(4), 4(3), 5, 7, 8, 9, 10, 11, 11A, 20A, 199, 200, 203