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 27C - Intervener's submissions-- as requested
Filing party:	Defendant
Date filed:	28 Oct 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

AMENDED (AS REQUESTED BY THE CANBERRA REGISTRY)

APPLICATION BY JEREMY RICHARD LUDLOW

FOR LEAVE TO BE HEARD AS AN *AMICUS CURIAE*

Part I: Internet publication

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

Part II: Asserted basis of application

2. The author, Jeremy Richard Ludlow (**Amicus**), applies for leave to be heard in writing as an *amicus curiae* in support of the Plaintiffs.
3. In particular, the Amicus applies for leave to contend, on the basis submitted below, that in general terms the real question raised by the demurrer in the present proceedings is a question along the following lines:

> "Are Australia's constitutional arrangements such that in Australia, as in Canada, there is implied into the federal Constitution a "Privileges or Immunities Clause" that prevents any State (or Province) from making or enforcing any law which shall abridge the privileges or immunities of the People of Australia (as defined below) (or their Canadian equivalents)?"

4. The basis of the Amicus's application is as follows.
5. In 1989, La Forest J, on behalf of a majority of the Supreme Court of Canada, delivered a judgment in which he held, in effect, that the federal Constitution of Canada included such an implied clause, even before 1982, when the *Canadian Charter of Rights and Freedoms* (which has no Australian equivalent) was added to

that Constitution.[1] In two subsequent decisions, the Supreme Court unanimously endorsed that part of the judgment of La Forest J.[2]

6. For the reasons submitted below, the differences between the written aspects of Australia's and Canada's federal Constitutions are such that that part of the judgment of La Forest J is even more obviously applicable to Australia than it is to Canada. This Court should therefore adopt and apply that part of that judgment.

7. If this Court were to follow the Canadian authorities in that way, then this Court would conclude that the impugned portion of the impugned law in the present proceedings is invalid, and that the demurrer should be overruled accordingly.

10 **Part III: Why leave to be heard as amicus curiae should be granted**

8. First, the Plaintiffs are stating the issue raised by the demurrer too broadly, and are not citing or relying upon the Canadian authorities, even though those authorities are exactly on point, and unequivocally in their favour. It would be most unfortunate if this Court were to decide the real issue raised by the demurrer without having been referred to, and without having taken into account, those Canadian authorities.

9. These proceedings are more than just a civil dispute between parties. They also raise constitutional issues of fundamental importance to millions of Australians, and especially, but not exclusively, to residents of Victoria. It is therefore more than usually important that in these proceedings the Court be willing:

20 a. to hear from any person willing to make contentions about the relevant law that differ from those of the parties;

b. to consider whether those contentions are correct; and

c. to come to a final and definitive conclusion on the constitutional issues of fundamental importance at a suitable level of abstraction to be of benefit to those millions of Australians.[3]

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[1] See *Black v Law Society of Alberta* [1989] 1 SCR 591 (**Black**), at 608 to 612, and especially at 610 to 611. See also the three earlier judgments of the Privy Council and Rand J, respectively, cited by La Forest J in Black, at 610 to 611.

[2] See *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, at 1099 (La Forest J, on behalf of the Court) and *Hunt v T&N plc* [1993] 4 SCR 289, at 321 to 325 (La Forest J, on behalf of the Court).

[3] See *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529, at 548 (McGarvie J). See also *Private R v Cowen* [2020] HCA 31, in which both Gageler J (at [107]) and Edelman J (at [153]) held that the practice of this Court to decline to resolve constitutional issues not squarely presented by the facts is not inflexible.

10. In the end, the Court is entitled, and indeed required, to take its own view of the law relevant to the validity of the *Public Health and Wellbeing Act 2008* (Vic) (**Health Act**), s 200(1)(b), or any directions made under that provision, because Judges are more than mere selectors between rival views of the law presented by the parties.[4] The Court also has jurisdiction and power to resolve the real issue raised by the demurrer in a manner that it considers to be correct in law, if any such resolution would likely be of at least some benefit to at least one of the parties.[5]

11. Secondly, and alternatively, the Amicus is contending that the Court should accept the Plaintiffs' general contention, namely that the Health Act, s 200(1)(b), and/or the directions made under that provision, is/are invalid, but on the basis of different submissions, relying upon authorities of a constitutional Court of another federation that the Plaintiffs have neither cited nor relied upon.

12. Thirdly, at the time this document was prepared, the Attorney General for the Commonwealth (**Attorney General**), had not intervened in these proceedings. The Commonwealth has not only a statutory power, by the Attorney General, to intervene in these proceedings, but also a very old and important common law duty, as the sovereign power of Australia, to protect Australian citizens, and aliens lawfully present within Australia,[6] including the First Plaintiff. That common law duty applies not only when a citizen is abroad, but also when a citizen or lawful alien is in Australia, and in particular where a citizen or lawful alien is or may be affected by unconstitutional conduct of a State or self-governing Territory. As the Commonwealth by the Attorney General is not complying with that duty, this Court, which is part of the judicial arm of the Commonwealth, should provide the First Plaintiff with the required assistance on the Commonwealth's behalf by giving the Amicus leave to assist him on the basis described in the previous paragraph.

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[4] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at [13] (Brennan CJ); *Roberts v Bass* (2002) 212 CLR 1, at [143] (Kirby J); *Coleman v Power* (2004) 220 CLR 1, at [243] (Kirby J); *Fingleton v The Queen* (2005) 227 CLR 166, at [140] (Kirby J).

[5] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. See also *Annetts v McCann* (1990) 170 CLR 596.

[6] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL), at 366 (the appellant in that case was better known as 'Lord Haw Haw') (**Joyce v DPP**). So, eg, in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, the Commonwealth complied with its common law duty by bringing the successful claim in that case.

13. Fourthly, the Amicus is suited by qualifications and experience to make the submissions he makes in this document. In particular, he has been a Practitioner of the Supreme Court of Western Australia since 1990. ~~In that regard, he repeats the submissions he made in his application in *Palmer v Western Australia*, pars [16] to [20].~~

Part IV: Submissions the Amicus seeks leave to make

Overview and terminology

14. The submissions in this Part should be read together with the submissions in Part II.

15. The Plaintiffs' submissions rightly use the expression "**People of the Commonwealth**", but do not clearly define it. In these submissions, that expression means the combination of the following groups of people (and the expression should be taken to have the same meaning in the Plaintiffs' submissions):

    a. *British subjects of Australia*, being British subjects who have a connection with Australia such that they are beyond the reach of the "immigration" power in section 51 of the Constitution;[7]

    b. *Constitutional non-aliens*, being persons who are beyond the reach of the "aliens" power in that section;[8] and

    c. *Australian citizens*, being persons who have that status pursuant to a valid law of the Commonwealth.[9]

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[7] See *Potter v Minahan* (1908) 7 CLR 277 (**Potter v Minahan**), in which this Court held unanimously that Mr Minahan was beyond the reach of the "immigration" power, because he was a British subject born in Australia who had not renounced his status as a British subject, even though he had long lived overseas and could not speak English.

[8] See *Pochi v Macphee* (1982) 151 CLR 101 at 109 (**Pochi v Macphee**), in which Gibbs CJ (with whom Mason and Wilson JJ concurred) held, in effect, that certain humans are beyond the reach of the Commonwealth's "aliens" power to exclude and deport. In *Love v Commonwealth* (2020) 94 ALJR 198 **(Love v The Commonwealth**), all seven members of this Court accepted the correctness of that aspect of Pochi v Macphee. See Love v The Commonwealth, at [7] (Kiefel CJ), [50] and [64] (Bell J), [87] (Gageler J), [168] (Keane J), [236] and [252] (Nettle J), [310] and [311] (Gordon J), [401], [433] and [466] (Edelman J, who also points out, at [433], that the dictum of Gibbs CJ had earlier repeatedly been accepted as correct). The Court also unanimously accepted a concession by the Commonwealth that constitutional non-aliens included persons born in Australia to Australian parents who had not renounced their link with Australia, and held 4-3 that constitutional non-aliens included Australian Aborigines.

[9] Currently the *Australian Citizenship Act 2007* (Cth). The Commonwealth can enact such a law pursuant to (at least) an implied power to make a citizenship law, its implied nationhood power, and/or the "naturalisation

16. These three groups of course substantially overlap.

The nature of the status of subject or citizen

17. By its very nature, the status of subject or citizen is created by a relationship between a person and either a *sovereign* or the republican equivalent of a *sovereign*, because that relationship involves allegiance (a word derived from "liege", which refers to a feudal superior or sovereign).

18. In Australia, the Commonwealth has the status of sovereign State. Prior to the Commonwealth's achievement of full sovereignty in 1942 (backdated to 3 September 1939),[10] the Commonwealth had delegated British sovereign power to make laws in respect of "immigration"[11] and "naturalisation and aliens",[12] along with an implied sovereign power to make laws with respect to citizenship.[13] Thus, a person can be made a citizen of the Commonwealth, and the status of constitutional non-alien is a form of citizenship of the Commonwealth created by the Constitution itself.

19. By contrast, the States have never been sovereign States, and, it is submitted, have never had any sovereign power to make anyone a citizen or subject of a State.[14]

20. In Australia, we are either British subjects of *Australia*, and/or constitutional non-aliens and/or citizens of the *Commonwealth* (or aliens lawfully present pursuant to a valid law of the Commonwealth), and can only *reside* in a State or Territory.

The inherent rights of the People of Australia

21. A person who is one of the People of Australia should be taken to have certain rights, privileges or immunities inherent to that status. Relevantly to the present proceedings, those inherent rights, privileges or immunities should be taken to include at least the following:

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and aliens" power in section 51 of the Constitution. See *Hwang v The Commonwealth* (2005) 80 ALJR 125; 222 ALR 83 (McHugh J) (**Hwang v The Commonwealth**).

[10] See the *Statute of Westminster 1931* (Imp), and the *Statute of Westminster Adoption Act 1942* (Cth).

[11] The "immigration" power authorises the Commonwealth to make a law providing for the exclusion from Australia of a person who falls within the scope of that power. See Potter v Minahan.

[12] The "naturalisation and aliens" power authorises the Commonwealth to make a law providing for the exclusion of a person who falls within the scope of the "aliens" power, and for the bestowal of citizenship. See *Robtelmes v Brenan* (1906) 4 CLR 395 (**Robtelmes v Brenan**), and Hwang v The Commonwealth.

[13] See Hwang v The Commonwealth.

[14] To the extent that Hwang v The Commonwealth is *obiter* authority for the view that the States *can* bestow citizenship, it is submitted, with respect, that that authority should be disapproved.

a. The right or privilege to enter the Commonwealth, including every State of the Commonwealth, and remain there (and/or the privilege against deportation (as opposed to extradition) from the Commonwealth or any State thereof).[15] That is because the antonyms of People of Australia include "aliens", and because a person who has no right to enter and remain in any territory in the world is really a stateless person, not a subject or citizen.

b. The right or privilege to protection by the Commonwealth, because the status of subject or citizen is a relationship under which the subject or citizen gives allegiance to a sovereign (or the republican equivalent of a sovereign), and the sovereign (or equivalent) provides protection in return.[16]

c. The right or privilege of freedom of movement within the territory or territories controlled by the Commonwealth, because traditionally another antonym of subject or citizen is "slave", namely a person who, being a chattel owned by another person, has no freedom of movement.[17]

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[15] See Potter v Minahan, *Air Caledonie v The Commonwealth* (1988) 165 CLR 462, and Love v The Commonwealth. See also Irving, Helen --- "Still Call Australia Home: The Constitution and the Citizen's Right of Abode" [2008] SydLawRw 8; (2008) 30(1) Sydney Law Review 131, which contends, correctly, "… that the constitutional concept of citizenship embraces the right of abode …", and in that respect relies in part upon Potter v Minahan.

[16] See Joyce v DPP.

[17] The traditional distinction between citizen (or subject) and slave dates back at least as far as ancient Athens and ancient Rome, which classified people as either citizens, slaves or women. See McAdam, Jane "An Intellectual History of Freedom of Movement in International Law: The right to leave as a personal liberty" (2011) 12 *Melbourne Journal of International Law* 1, at 6. In *Ireland*, slavery was outlawed in 1171 (see Council held at Armagh in Ireland, 1171, in *Fordham University Medieval Sourcebook: Decrees on Sale of Unfree Christians, c. 922-1171* - https://sourcebooks.fordham.edu/source/1171latrsale.asp), and in *Scotland* it was determined to be unlawful in 1778 (see *Knight v Wedderburn* (1778), Court of Session records in the National Archives of Scotland (reference CS235/K/2/2)). In *England*, the common law was less clear; in *Pearne v Lisle* (1749) Amb 75, 27 ER 47 it was held, without citation of authority, that slavery was lawful, but in *Shanley v Harvey* (1763) 2 Eden 126 it was held that as soon as a person set foot on English soil, he or she became free. Subsequently, the famous case of *Somerset v Stewart* (1772) 98 ER 499 held only that a slave in England could not be forcibly removed from the jurisdiction, but that case was often considered to have decided that the law of England did not recognise slavery. As far as *Australia* is concerned, Governor Phillip decided, after being appointed as Governor of New South Wales but before arriving there, that slavery would not be lawful ('There can be no slavery in a free land and consequently no slaves'). Subsequently, the *Slavery Abolition Act 1833*, Stat 3 & 4 Will IV outlawed slavery throughout the Empire, and from 1 August 1834, all

d. The right to own real property within the territory or territories controlled by the Commonwealth.[18]

22. In the famous United States case of *Corfield v Coryell*, cited by the Plaintiffs, Washington J held that the inherent privileges and immunities of citizens of the United States included a bundle of other privileges and immunities. For the purposes of the present proceedings, it is not necessary to determine whether that case can or should be followed in Australia.

The Amicus's three broad contentions

23. In these proceedings, the Amicus makes the following three broad contentions in support of the Plaintiffs' contention that under Australia's constitutional arrangements, the People of Australia have an inherent right of freedom of movement, with the consequence that the impugned laws in these proceedings (ie the Health Act, s 200(1)(b), and/or the directions made under that provision) are invalid:

a. The Australian colonies (now States) that were granted self-government in the nineteenth century after 1834 have never been sovereign, and have never had any sovereign powers, save those conferred where, unusually, the relevant proposed law was reserved by the relevant Governor for the personal assent of the British Monarch on advice from the Monarch's sovereign British Ministers.

b. The power to prevent a person who is one of the People of Australia from entering a State, and the power to deport (as opposed to extradite) such a person from a State, is a sovereign power, and as the States have no sovereign powers, the impugned law in *Palmer v Western Australia*, which is a law of a State, is wholly invalid.

c. The power to abridge the privileges or immunities of the People of Australia, including their inherent privilege of freedom of movement within Australia (which is subject to certain limitations and exceptions – see below), is a sovereign power, and as the States have no sovereign powers, the impugned law in the present proceedings, which is a law of a State, is wholly invalid.

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slaves in the British colonies were "absolutely and forever manumitted." No Australian colony was granted self-government until after that date.

[18] In the famous *Calvin's Case* (1608), 77 ER 377, (1608) Co Rep 1a (**Calvin's Case**), the issue was whether the plaintiff could own real property in England. It was held that he could, on the basis that he was a subject not only of the King of Scotland, but also of the King of England.

Contention a.

~~24. In support of this contention, the Amicus repeats the submissions he has made in *Palmer v Western Australia*, at pars [2] to [6], [21] to [28], and [32] to [46].~~

25. In 2006, in the joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in the *Work Choices case*,[19] their Honours quoted and applied a passage from the judgment of Windeyer J in 1971 in the *Payroll Tax case*[20] including:

> "The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation."

26. To that authority should be added an important part of the judgment of Barwick CJ (Owen J concurring) in the Payroll Tax case referring to the status of the States.[21]

27. In the 19th century, the sovereign British Imperial government granted self-government to the six Australian colonies (now States). Except in the case of Tasmania, each was given an express power to make laws "for the peace, order [or welfare] and good government" of the relevant colony (**POGG power**).[22]

28. It is settled law that "within the limits of the grant", the words of the POGG power are not words of limitation, except perhaps in relation to territoriality.[23] However, in the present proceedings the "limits of the grant" are vitally important, because the grant of power to the Australian colonies was a grant not of sovereign independence, but merely of self-government within a world-wide Empire controlled by the sovereign Imperial Parliament at Westminster. It follows that the grant of power was subject to certain implied limits. In particular, the grant did not include any share of the Imperial Parliament's sovereignty. That sovereignty continued to be vested solely

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[19] *New South Wales v The Commonwealth* (2006) 229 CLR 1, at [54] (**Work Choices case**).

[20] *Victoria v The Commonwealth* (1971) 122 CLR 353 at 395-396 (**Payroll Tax case**).

[21] See Payroll Tax case, at 371 (Barwick CJ; Owen J concurring at 405).

[22] In Western Australia, see the *Constitution Act 1889* (WA), s 2(1); in Tasmania the power is implied. Since the initial grants of power, the wording of some of those grants (but not the POGG power granted to the First Defendant) has been amended. However, the limits of the grants were not affected by those amendments.

[23] See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 and *Duncan v New South Wales* (2015) 255 CLR 388, at [37] (The Court).

in the Imperial Parliament.[24] In that respect, the grant was fundamentally different from the grant given to the federal parliaments of Canada (in 1867) and Australia (in 1901), each of which, on a transitional basis, was *expressly* given certain sovereign powers, and in particular the sovereign power to make laws with respect to "naturalisation and aliens".[25]

29. In Victoria, the equivalent of Western Australia's POGG power is the *Constitution Act 1975* (Vic), s 16. Although that section is differently worded, the power it confers is subject to the same implied limits, and therefore does not confer any sovereign powers, because the Defendant, like Western Australia, is not a sovereign State.

10 30. Further, and for avoidance of doubt, the decision of the Imperial Parliament in 1986 to renounce its sovereignty over Australia's States did not confer on them any sovereign powers, because:

a. a sovereign State is a State that is not subject to another power;

b. by 1986, Australia's States were already subject to Australia's Constitution, including sections 106, 107, 109 and 128 of the Constitution, and therefore also subject to the already existing sovereignty of the Commonwealth; and

c. the mere renunciation by the Imperial Parliament in 1986 of its sovereignty over Australia's States was therefore, without more, incapable of transforming them into sovereign States.

20 **Contention b.**

~~31. In support of this contention, the Amicus repeats the submissions he has made in *Palmer v Western Australia*, at pars [2] to [6], [21] to [28], and [30] to [50].~~

32. The 19th century Australian self-governing colonies (now States) had no power to set their own external boundaries or to move them by annexing or surrendering

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[24] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (**Madzimbamuto**); see also the Payroll Tax case, at 395 (Windeyer J), in relation to the Australia of 1971: "There is dual authority but only one sovereignty."

[25] See Robtelmes v Brenan, and Cain, cited in note 35 below. The *Federal Council of Australasia Act 1885* (Imp), s 15(i), implicitly recognised that the self-governing colonies had power to make laws in respect of "naturalisation of aliens", and that the colonies could therefore refer that power to the Federal Council. However, that power was *not* a sovereign power, and therefore it was held, correctly, in *Ex parte Lau You Fat* (1888) 9 LR (NSW) 269, that Victorian letters of naturalisation were of no effect outside Victoria. Further, Edelman J in Love v The Commonwealth was correct in observing, at [404]-[405], that the "naturalisation and aliens" power, which is a sovereign power, was and is broader than the "naturalisation of aliens" power.

territory.[26] Such matters were self-evidently matters for the Empire, not for individual colonies. Further, the self-governing colonies had no power to make laws for the unilateral closure of their borders to entry by humans.[27]

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[26] The external boundaries of the self-governing Australian colonies (now States) were set by various Imperial executive acts and Imperial statutes. These are described by Mason J and Jacobs J in *New South Wales v The Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337, at 459-461 and 481-484, respectively. To that description may be added, at least, the vaguely worded and apparently temporary *Western Australia Act 1829* (Imp). Importantly, in 1883 the colony of Queensland purported unilaterally to annexe the territory of Papua for the British Empire, but the sovereign British government refused to ratify that annexation. See also the *Australian Constitutions Act 1850* (Imp), the *Australian Colonies Act 1861* (Imp), and the *Colonial Boundaries Act 1895* (Imp), all of which were enacted on the assumption that the Constitutions of the Australian colonies conferred no legislative power in respect of external boundaries.

[27] As to British subjects, according to Quick & Garran: "In their political relations, … subjects of the Queen … are considered as inhabitants and individual units of the Empire over which Her Majesty presides. That is the widest political relationship known to British law. 'I am a British subject,' is equal in practical and Imperial significance to the proud boast of the Roman *'civis Romanus sum.'* Subjects of the Queen, or British subjects, have rights, privileges, and immunities secured to them by Imperial law, which they may assert and enjoy without hindrance in any part of the Queen's dominions, and in British ships on the high seas." As to aliens in particular (and also British subjects), see Gageler, Stephen, "A tale of two ships: the MV *Tampa* and the SS *Afghan*" (2019) 40(3) *Adelaide Law Review* 615-626, at 618-619; see also the judgments of Windeyer J in *Ex parte Lo Pak* (1888) 9 LR (NSW) 221, 221 (**Lo Pak**), at 244, and (1888) 9 LR (NSW) 250 (**Leong Kum**), at 262-264, and of Williams J in *Toy v Musgrove* (1888) 14 VLR 349 (**Toy**), esp at 419 ("… to say that [the *Constitution Act*] gives to this colony the same rights and powers in regard to all colonial and local affairs, and applicable thereto, as the British Government possesses in regard to the affairs of Great Britain, is the enunciation of a proposition which is not only startling but positively unintelligible to me."), and of Holroyd J (a'Beckett J concurring) in Toy, esp at 431 ("… supposing any treaty now to subsist between the Crown and any foreign State, whereby Her Majesty is obliged to permit the subjects of such State in time of peace to enter Victoria upon due observance of any conditions imposed upon their entry by any Statute having legal force in Victoria, that treaty cannot be violated by colonial legislation."), and of Wrenfordsley J in Toy, esp at 442 ("… this colony did not as a State receive any recognition from the Imperial Government with respect to its external relations; nor could such a recognition take place under its existing connection with the mother State …"). In those judgments, their Honours assert, *inter alia* that the relevant colonial Parliament had no sovereign power to make laws for the closure of the colony's borders to entry by at least alien humans, except where, unusually, assent to a proposed law was given personally by Queen Victoria on the advice of Her sovereign British Ministers. See also, by comparison, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)* [2009] 1 AC 453, in which a majority of the House of Lords held that the law impugned in that case, by which British subjects were completely excluded from an Imperial territory, was valid because the POGG power in reliance upon which the law had been made had been exercised by the *sovereign* British monarch, on the advice of Her *sovereign* British Ministers, and related to a *non*-self-governing territory.

33. Between federation on 1 January 1901 and the coming into force of the *Australia Acts 1986* (Imp and Cth), the legislative (and executive) powers of the States continued to be subject to the sovereign power of the Imperial Parliament at Westminster. For that reason, the "limits of the grant" discussed under the previous heading continued to apply. Additionally, the constitutions of the States became subject to the national Constitution,[28] which imposed further limits on the powers of the States, and corresponding limits on any self-governing Territories, including the following. In particular, the States and self-governing Territories have no power unilaterally to close their borders to entry by humans, especially because (a) Constitutional-Non Aliens have a constitutional right to enter every State and self-governing Territory (subject only to valid regulation),[29] and (b) the States and self-governing Territories have no power to reduce the inherent rights of statutory non-aliens (ie Australian citizens), which are conferred on them by express terms of, or by implication from, laws of the Commonwealth.[30] The most fundamental of all of those rights, as confirmed by landmark case law in the United States,[31] is of course

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[28] See the Constitution, ss 106 and 107. See also par [22] above.

[29] See *Crandall v Nevada*, 73 U.S. (6 Wall.) 35 (1868) (**Crandall**), which was followed by this Court in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (**Smithers**). Crandall also held that the US States had no power to impose any form of tax on border crossings by humans. By analogy, the Amicus submits that the Australian States have no power to impose any such tax, or any similar 'fee', such as a compulsory "quarantine fee", on border crossings by humans. (Note also that Smithers refers to some extent to the "police power" of the States; however, the US constitutional law doctrine of "police power", which is associated with the doctrine of implied immunities, must now be considered as not applicable in Australia, in light of the Engineers' case, which rejected the doctrine of implied immunities.)

[30] The Amicus submits that this principle applies by analogy from the pre-Federation principle that prevented the self-governing colonies from hindering/reducing the rights of British subjects. See note 27 above. The principle is not that any such hindrance/reduction is invalidated by s 109, but, rather, that the States simply have no power, whether by laws or by executive acts, to hinder/reduce rights of Australian non-aliens.

[31] In *Sáenz v. Roe*, 526 U.S. 489 (1999), all nine members of the Court, including the two dissentients, held that citizens of the United States have a constitutional right to enter every State. Stevens J, writing for the majority, wrote that, "the 'constitutional right to travel from one State to another' is firmly embedded in [US] jurisprudence … [and] is … 'a virtually unconditional personal right, guaranteed by the Constitution to us all'." Rehnquist CJ, for the dissentients, wrote that if US citizenship means anything less than the right to enter, remain in, and leave, every State, then "it means nothing". In an earlier case in this line of case law, *United States v. Guest*, 383 U.S. 745 (1966), the Court had noted that this fundamental constitutional principle is derived *both* from the Fourteenth Amendment (which has no Australian equivalent) *and* from Crandall (which, as noted in note 29 above, was followed by this Court in 1912). The Court also observed that "Although the

the right to enter and remain in Australia, including every State and self-governing Territory.[32]

34. Since the Amicus filed ~~those~~his submissions in *Palmer v Western Australia*, the Defendants and Interveners in *Palmer v Western Australia* have filed their submissions in those proceedings. The Amicus briefly responds to those submissions as follows.

35. In essence, those submissions are to the effect that section 92, on its proper construction, gives the States a power they did not have prior to federation, namely a sovereign power to turn humans away from their borders, or to deport them.

36. Such a construction would be absurd, because it would give section 92 the opposite of the effect that it was intended to have, namely to take away some of the powers of the then colonies (now States) (and to withhold certain powers from the Commonwealth). Further, to accept that construction, this Court would have to disapprove its majority view, in *Work Choices*,[33] that the States are not sovereign.

37. In any event, the impugned Direction in *Palmer v Western Australia* is so extreme that no matter how one might reasonably formulate the legal test for its validity, it must be invalid. In particular, the Direction denies a right of entry to Western Australia even to People of Australia ordinarily resident in Western Australia.

Contention c. – the applicable law in Australia

38. In support of this contention, which is to the effect that the applicable law in Australia is the Black principle formulated by the Supreme Court of Canada, the Amicus relies upon a number of matters.

39. First, the Amicus relies upon his submissions above in support of contention a. and contention b.

[United States] Articles of Confederation [of 1781] provided that 'the people of each State shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the [United States] Constitution [of 1787]. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." The Amicus submits that exactly the same principle applies to the national Constitution of Australia.

[32] Subject only to a valid law providing for the extradition of a person in connection with the due administration of criminal justice, or a valid law of the Commonwealth providing for, eg, "quarantine" or the conferral of sovereign independence on a Territory.

[33] See *New South Wales v The Commonwealth* (2006) 229 CLR 1 (**Work Choices case**), at [54] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting and applying a passage from the judgment of Windeyer J in *Victoria v The Commonwealth* (1971) 122 CLR 353 (**Payroll Tax case**), at 395-396.

40. Secondly, the Amicus relies upon the Canadian authorities on 'mobility rights' in Canada prior to 1982, and especially upon Black.

41. In Black, the key passages, which the Amicus submits apply equally to Australia, are as follows:

> "A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish "a new political nationality" …
>
> The concept of Canada as a single country … was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.
>
> …
>
> Before the enactment of the Charter … there was no specific constitutional provision guaranteeing personal mobility, but it is fundamental to nationhood, and even in the early years of Confederation there is some, if limited, evidence that the courts would, in a proper case, be prepared to characterize certain rights as being fundamental to, and flowing naturally from a person's status as a Canadian citizen …
>
> … Rand J. in *Winner v. S.M.T. (Eastern) Ltd.* [1951] S.C.R. 887 … makes it clear that Canadian citizenship carries with it certain inherent rights, including some form of mobility right. The essential attributes of citizenship including the right to enter and the right to work in a province, he asserted, cannot be denied by the provincial legislatures. And he extended this right for practical purposes to other residents of Canada.
>
> …
>
> … citizenship, and the rights and duties that inhere in it … defines the relationship of citizens to their country and the rights that accrue to the citizen in that regard, a factor not lost on Rand J. … Citizenship and nationhood are correlatives. Inhering in citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries."

42. In *Winner*, Rand J left open the question whether the provinces could temporarily refuse entry in cases of emergency. In the USA and Australia, the case law[34] ~~cited in the Amicus's submissions in *Palmer v Western Australia*, par [44],~~ should be held to have resolved that question, on the basis that even during an epidemic or pandemic

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[34] *Morgan's Steamship Co. v Louisiana Board of Health* 118 U.S. 455 (1886) (quarantine law valid if it lets in healthy humans without significant delay, quarantines only unhealthy humans, and does not provide for any human to be turned away), *Railroad Company v Husen*, 95 U.S. 465 (1877) (law excluding healthy cattle not valid), *Tasmania v Victoria* (1935) 52 CLR 157 (law excluding healthy potatoes not valid).

the States have no power to turn anyone away, no power to detain an uninfected person, and a power to quarantine an infected person only for a reasonable time.

43. Thirdly, the Amicus contends that the internal barriers to which Black refers in the quoted passage did not include any power on the part of the then Australian colonies (now States) to abridge the inherent freedom of movement of British subjects, because those colonies were not sovereign States, and therefore had no power to abridge the inherent freedom of movement of British subjects within the British Empire.[35] In other words, there was no need for the Constitution to include any express term depriving the States of any power they may have had to abridge that inherent freedom of movement, because as at 1900 the Australian colonies (now States) were not sovereign States and therefore had no such power.

44. Fourthly, the Amicus contends that there are subtle differences between the written aspects of Australia's and Canada's constitutions that make the quoted passage from Black even more obviously applicable to Australia than it is to Canada:

    a. Australia's constitution gives much greater prominence to the people. In particular:

        i. The preamble to the *Constitution Act, 1867* states that the *provinces* had "expressed their Desire to be federally united into One Dominion", whereas the preamble to the *Commonwealth of Australia Constitution Act 1900* states that the *people* of five of the six colonies had "agreed to unite in one indissoluble Federal Commonwealth" (emphasis added). Thus, Canada is a union of provinces, whereas Australia is a union of people to which the States are conscripted.

        ii. Canadian Senators are appointed, and Canadian Members of the House of Commons are not required to be directly elected, whereas by the Constitution, ss 7 and 24, Australian Senators and Members of the House of Representatives are "directly elected by the people".

    b. Section 92 of the Constitution is much broader in scope than its Canadian equivalent (section 121 of the *Canada Act*). In particular, section 92 protects "intercourse", it requires "intercourse" to be "absolutely free", and "intercourse" is a much broader concept than merely physical human movement.

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[35] See ~~the Amicus's submissions in *Palmer v Western Australia*,~~ par ~~[37]~~ [32] above.

c. Section 91 of the *Canada Act* confers on the federal Parliament of Canada a list of express powers, including at least one sovereign power, the "Naturalisation and Aliens" power,[36] and also all of Canada's residual powers, which must include the residual sovereign powers conferred on Canada when the United Kingdom granted Canada full sovereignty in 1931.[37] Section 92 of the Canada Act confers on the provinces a list of express powers, and, for the reasons submitted in pars [46] and [47] below, at least one of those express powers, the "Property and Civil Rights in the Province" power, has at least an element of sovereign power.

d. By contrast, the Constitution confers on the Commonwealth a list of express powers, including the sovereign "Naturalisation and Aliens" power, and leaves residual powers to the Australian States. However, and crucially, as the States have never been sovereign States, and as the States were never granted any express sovereign powers exercisable unilaterally that could be said to have survived federation, the residual powers of the States can *only* be non-sovereign powers.

e. Canada has no express equivalent of section 117 of the Constitution.

45. Some of the relevantly important differences between the written aspects of the Constitutions of the Australia and Canada can be illustrated by reference to *Morgan v Prince Edward Island (AG)* (**Morgan**).[38]

46. The plaintiff in Morgan was a Canadian citizen who resided outside the defendant province. He challenged a law of the defendant that prohibited non residents from owning more than a specified amount of real property in the province without approval from the Minister. The challenge failed, on the basis that the province was authorised by the "Property and Civil Rights in the Province" power to make the law.

47. It follows, on the authority of Morgan, that the Canadian provinces must have the sovereign power to abridge the inherent right or privilege of Canadian citizens to own real property in Canada.[39]

48. By contrast, if Morgan had been fought and decided on the basis of Australian constitutional law, then its outcome would have been the reverse. Specifically, the

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[36] See *Attorney General for the Dominion of Canada v Cain* [1906] AC 542 (PC). See also Robtelmes v Brenan.

[37] See the *Statute of Westminster 1931* (Imp).

[38] [1976] 2 S.C.R. 349.

[39] As to whether this right or privilege is inherent to the status of citizen or subject, see par [21.d] above.

plaintiff's contention would have been upheld, not only because of section 117 of the Constitution, but also, it is submitted, because the solely non-sovereign residual powers of Australia's States do not include the sovereign power to abridge the inherent privilege of the People of Australia to own real property in Australia.

49. As the principle formulated by a majority of the Supreme Court of Canada in Black and since twice endorsed by unanimous judgments of that Court[40] applies even more clearly to Australia than it does to Canada, this Court should now hold that it applies to Australia, in particular because it is settled law in Australia that the Australian States have never been sovereign, and lost and did not gain power on federation.[41]

Some brief comments on relevant US constitutional law

50. As the Plaintiff's submissions rely to a significant extent on US authorities, some brief comments should be made here about the fact that the US Constitution has an *express* "Privileges or Immunities Clause" when it was held in Black, in effect, that Canada has an *implied* clause to similar effect.

51. The reason why the US Constitution has an express "Privileges or Immunities Clause", which was inserted by the Fourteenth Amendment, and not an implied clause to similar effect, is that the constitutional history of the United States is significantly different from that of Canada and Australia.

52. Prior to the entry into force of the Thirteenth and Fourteenth Amendments, there was a genuine issue in the USA as to whether the US States were sovereign States, and as to whether slavery should be, or should continue to be, lawful. In the 1860s, the USA even engaged in a civil war primarily over those two issues.[42]

53. An important reason why the US States were in a position to contend that they were sovereign States is that they had gained independence in a revolution; by contrast, the Canadian provinces and Australian States have never been independent.

54. In the aftermath of the US civil war, the Thirteenth and Fourteenth Amendments were introduced to the US Constitution to abolish slavery and confer US citizenship on emancipated slaves, and to ensure, *inter alia*, that the States could not abridge the freedom of movement of emancipated slaves.

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[40] See note 2 above.

[41] See note 19 above.

[42] The preamble to the 1862 permanent Constitution of the pro-slavery Confederate States of America expressly provided that the States in that Confederation were sovereign States.

55. No such *express* laws have ever been necessary or appropriate in Australia, because the Australian States have never been sovereign States[43] (and have never been able, unilaterally, to exercise any sovereign powers), and slavery has never been lawful. The inability of the Australian States to abridge the privileges or immunities of the People of Australia is mainly a consequence of their lack of any sovereign power.

56. In the USA, under the influence of the "reserved powers" doctrine, and the express terms in the US Constitution acknowledging the existence of citizenship of the individual States (which was part of the basis of the dispute over whether the States were sovereign States, the express "Privileges or Immunities Clause" has been construed narrowly.[44] In Australia, as in Canada, a narrow construction of the corresponding implied terms would be inappropriate, not only because Australian law, like Canada's, contemplates only one citizenship, namely of the nation as a whole, but also because this Court decided in the *Engineers case*[45] to reject the US-inspired "reserved powers" doctrine.

57. In any event, in recent years Thomas J of the Supreme Court of the United States has advocated a broader construction of the express "Privileges or Immunities Clause",[46] and in 2019 he was joined in that respect by Gorsuch J.[47]

The limits and exceptions to the freedom of movement of the People of Australia

58. The freedom of movement inherent to the status of a person who is one of the People of Australia is of course not absolute. It is subject to certain limits and exceptions, with the consequence that the Defendant does have extensive powers in respect of the rights of movement of such persons. So, eg:

    a. The Defendant has power to make laws limiting the movement of infants, because the inherent right to freedom of movement of People of Australia who are infants are of course subject to the powers and responsibilities of any person who is *in loco parentis*, and such persons could include the Defendant.

    b. The Defendant has power to make laws limiting the movement of persons of unsound mind, for much the same reason.

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[43] See the Work Choices case, at [54].

[44] See in particular the Slaughterhouse cases cited by the Plaintiffs.

[45] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[46] See *Sáenz v Roe*, 526 U.S. 489 (1999), *McDonald v Chicago*, 561 US 742 (2010), *Timbs v Indiana*, 586 US _____ (2019) and *Ramos v Louisiana*, 590 US ____ (2020), in each case per Thomas J.

[47] See *Timbs v Indiana*, per Gorsuch J.

c. The Defendant has power to make laws for detention or imprisonment for the purpose of the due course of criminal justice, because a person who is one of the People of Australia has no inherent immunity from criminal processes.

d. The Defendant has power to make laws for the detention of a person who is a danger to the public due to a propensity to commit acts of physical violence, subject to the *Kable* principle.[48]

e. The Defendant has power to make laws for the reasonable detention/quarantine of a person who is infected with a communicable illness.[49]

f. The Defendant has power to make laws mandating the wearing of seatbelts by persons engaged in the specific activity of driving or being a passenger in a moving vehicle;[50] such laws apply not merely because the person is a human physically present in Victoria or a defined part of Victoria, but because the person is engaged in a specific activity that is inherently hazardous.

59. This list of limits and exceptions is not intended to be exhaustive.

Contention c. – application of the Black principle to the impugned laws

60. On application of the Black principle to the Health Act, s 200(1)(b), and/or the directions made under that provision:

a. Section 200(1)(b) either is invalid, or must be construed so as not to authorize any direction to the effect that a person is to be detained, interned or imprisoned merely because the person is physically present in Victoria or a part of Victoria, even if the motivation for the detention, internment or imprisonment is only to protect the person from an epidemic or pandemic.

b. The impugned directions made under s 200(1)(b) are invalid because they are to the effect that persons are to be detained, interned or imprisoned merely because the person is physically present in Victoria or a part of Victoria, even though the motivation for the detention, internment or imprisonment is only to protect the person from an epidemic or pandemic.

61. There are two reasons why this must be the conclusion as to the validity/construction of s 200(1)(b), and/or the directions made under that provision.

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[48] See *Kable v The Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.

[49] See ~~the Amicus's submissions in *Palmer v Western Australia*, par [44], and~~ the cases ~~there~~ cited in note 34.

[50] The Defendant was famously the first jurisdiction in the world to mandate the wearing of seatbelts in motor vehicles.

62. First, the power the Defendant purported to exercise in making the directions is a pretended but non-existent sovereign power of a State of Australia to protect People of Australia for no other reason than that the persons to whom it applies are humans present within Victoria or a defined part of Victoria, and not because of some other factor specific to the person or person's activity, eg infancy, unsoundness of mind, infection with a communicable illness, engagement of the person in an inherently dangerous activity such as being within a moving motor vehicle, etc. The reason the power is pretended but non-existent is that under Australia's constitutional arrangements, the States are not sovereign States, and have no sovereign powers.

63. Secondly, the power the Defendant purported to exercise in making the directions is a pretended but non-existent sovereign power of a State of Australia to make a law abridging the inherent right of freedom of movement of the People of Australia that is conferred upon them by either the Constitution or a valid law of a sovereign State, namely the Commonwealth. Again, the reason the power that is purportedly being exercised is a sovereign power is that the Defendant is exercising it for no other reason than that the persons to whom it applies are humans present within Victoria or a defined part of Victoria, and not because of some other factor, eg infancy, unsoundness of mind, infection with a communicable illness, engagement of the person in an inherently dangerous activity, etc. Also again, the reason the power is pretended but non-existent is that under Australia's constitutional arrangements, the States are not sovereign States, and have no sovereign powers.

64. As the Defendant simply has no sovereign powers at all, there can be no issue as to proportionality; a law created by a State in reliance on a power that, on proper analysis, is a pretended but non-existent sovereign power is simply invalid.

The result in the present proceedings

65. The Court should therefore overrule the demurrer.

The position if the impugned laws were laws of the Commonwealth

66. In the present proceedings, the impugned laws are laws of a State, and not laws of the Commonwealth. It is therefore not necessary to determine in the present proceedings whether the impugned laws would be invalid if they were laws of the Commonwealth. That said, it is clear that the Commonwealth is a sovereign State, with power to make laws with respect to citizenship, including with respect to the inherent rights of citizens, of the Commonwealth.[51]

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[51] See note 9 above.

67. The Commonwealth also has express powers under section 51 of the Constitution to make laws with respect to "quarantine" and "defence", and those powers may be relevant at times of emergency due to an actual, prospective, or threatened epidemic or pandemic or military invasion of Commonwealth territory.

68. It may be that the power of the Commonwealth to make laws in respect of the inherent rights of the People of Australia, and especially the inherent rights of constitutional non-aliens, is subject to a proportionality test.

69. So, eg, in *Davis v The Commonwealth*,[52] the plaintiff challenged the validity of a law of the Commonwealth that imposed severe restrictions on commercial use of certain words and phrases, and the defendants demurred that the law was supported by the "trademarks" power. Six members of the Court held that the law was invalid because "[t]his extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power." In a concurring judgment, Brennan J commented that "… freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom." Equally, very severe intrusions on freedom of movement can hardly be a valid activity undertaken by the Commonwealth to advance the interests of the People of Australia when the Commonwealth is a nation that boasts of such freedom.

70. However, as the impugned laws in the present proceedings are laws of a State, it is not necessary to decide in the present proceedings whether the reasoning in Davis would apply to a challenge to a law of the Commonwealth in terms similar to the impugned laws of the Defendant in the present proceedings.

Part V: Time estimate

71. The Amicus seeks leave only to make the written submissions in this document.

Dated ~~26~~ 27 October 2020

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Name: Jeremy Richard Ludlow

Telephone: 0481 145 435

Email: jeremy_ludlow@yahoo.com.au

[52] (1988) 166 CLR 79 (**Davis**).