HIGH COURT OF AUSTRALIA

10 December 2020

GERNER & ANOR v THE STATE OF VICTORIA
[2020] HCA 48

Today the High Court published unanimous reasons for allowing the defendant's demurrer to the plaintiffs' claim in this proceeding on 6 November 2020. The demurrer concerned whether the *Constitution* implicitly guarantees a freedom of movement.

The *Public Health and Wellbeing Act 2008* (Vic) ("the Act") empowers authorised officers to exercise emergency powers when a state of emergency has been declared by the Minister for Health. A state of emergency was declared to exist in the whole of Victoria by reason of the serious risk to public health posed by the COVID-19 pandemic. Directions restricting the movement of people within Victoria ("the Lockdown Directions") had been made from time to time in exercise of emergency powers conferred by s 200(1)(b) and (d) of the Act, and remained in force on 6 November 2020.

The plaintiffs sought declarations that s 200(1)(b) and (d) of the Act and the Lockdown Directions made thereunder were invalid as an infringement of a guarantee of freedom of movement said to be implicit in the *Constitution*. The defendant demurred to the plaintiffs' claim on the ground that the *Constitution* does not imply the freedom of movement for which the plaintiffs contended.

The High Court held that no freestanding guarantee of freedom to move wherever one wishes for whatever reason is implicit in the *Constitution* on any of the three grounds contended for by the plaintiffs. First, the Court held that such a limitation on the legislative and executive power of the Commonwealth and States could not be implied from the fact of federation. Rather, the legal nature and effect of the federation established by the *Constitution* can be known only from the terms and structure of the *Constitution* itself; those terms and that structure provide no support for the limitation on power for which the plaintiffs contended. Secondly, the Court held that while legislated limits on movement that burden political communication may infringe the implied freedom of political communication, a limit on movement which does not have a political character will not. Thirdly, the Court held that s 92 of the *Constitution* does not imply a freedom of movement of the kind for which the plaintiffs contended. Such an implication would render otiose the delineation clearly drawn by the text of s 92 between protected interstate intercourse and intrastate intercourse which it does not purport to protect. It would also attribute to the text a meaning rejected by the framers of the *Constitution*.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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