

## 5. Freedom of Movement

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### A common law right

5.1 Freedom of movement concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.<sup>1</sup>

5.2 This chapter discusses the source and rationale of freedom of movement; how this freedom is protected from statutory encroachment; and when laws that encroach on this freedom may be justified.

5.3 The ALRC calls for submissions on two questions about this freedom.

**Question 5–1** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of movement is justified?

**Question 5–2** Which Commonwealth laws unjustifiably interfere with freedom of movement, and why are these laws unjustified?

5.4 In 13th century England, the *Magna Carta* guaranteed to local and foreign merchants the right, subject to some exceptions, to ‘go away from England, come to England, stay and go through England’.<sup>2</sup>

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1 Jane McAdam, ‘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* 27, 6. See also Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) ch 4; Harry Street, *Freedom, the Individual and the Law* (Penguin Books, 1972) ch 11.

2 *Magna Carta 1297* (UK) 25 Edw 1, c 42.

5.5 William Blackstone wrote in his *Commentaries of the Laws of England* (1765-69) that every Englishman under the common law had the right to ‘go out of the realm for whatever cause he pleaseth, without obtaining the king’s leave’.<sup>3</sup>

5.6 In 1806, Thomas Jefferson, then President of the United States, wrote that he held ‘the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken away from him even by the united will of every other person in the nation’.<sup>4</sup>

5.7 In *Potter v Minahan* (1908), O’Connor J of the High Court of Australia said:

A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary.<sup>5</sup>

5.8 However, this freedom has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not of course extend to people trying to evade punishment for a crime, and in practice, a person’s freedom to leave one country is very much limited by the willingness of other countries to allow that person to enter.

## Protections from statutory encroachment

### Australian Constitution

5.9 Section 92 of the *Australian Constitution* provides:

On the imposition of uniform duties of customs, trade, commerce, *and intercourse* among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.<sup>6</sup>

5.10 In *Gratwick v Johnson* (1945), Starke J said that the ‘people of Australia are thus free to pass to and from among the states without burden, hindrance or restriction’.<sup>7</sup> However, in *Cole v Whitfield* (1988), the High Court said that this does not mean that ‘every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom’.<sup>8</sup>

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3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765). Quoted in McAdam, above n 1, 12.

4 Thomas Jefferson, *The Works of Thomas Jefferson: Correspondence and Papers, 1803-1807* (Cosimo, Inc., 2010) 273. In this same letter, Jefferson wrote: ‘Congress may by the Constitution ‘establish a uniform rule of nationalization,’ that is, by what rule an alien may become a citizen. But they cannot take from a citizen his natural right of divesting himself of the character of a citizen by expatriation’: *Ibid* 274. McAdam notes that Jefferson drew on Blackstone’s natural rights thinking about freedom of movement: McAdam, above n 1, 13.

5 *Potter v Minahan* (1908) 7 CLR 277, 305.

6 *The Constitution 1901* (Cth) s 92. (emphasis added)

7 *Gratwick v Johnson* (1945) 70 CLR 1, 17.

8 *Cole v Whitfield* (1988) 165 CLR 360, 393.

For example, although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State.<sup>9</sup>

5.11 In *Cunliffe v The Commonwealth* (1994), Mason CJ said that the freedom of intercourse which s 92 guarantees is not absolute:

Hence, a law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end. Once again, it would be a matter of weighing the competing public interests.<sup>10</sup>

5.12 It has also been suggested that a right to freedom of movement is implied generally in the *Constitution*. In *Miller v TCN Channel Nine* (1986), Murphy J said that freedom of movement between states and 'in and between every part of the Commonwealth' is implied in the *Constitution*.<sup>11</sup> However, this view has not been more broadly accepted by the High Court.<sup>12</sup> Professors George Williams and David Hume write:

This reflects the lack of a clear textual basis for such a freedom and for the incidents of the constitutionally prescribed system of federalism which would support it, and an implicit view that the *Constitution's* federalism is not intended to protect individuals.<sup>13</sup>

5.13 In any event, a right to freedom of movement implicit in federalism would presumably only extend to movement within Australia, rather than to a broader freedom which would include the freedom to leave and return to Australia.

9 Ibid, 393. See also: *AMS v AIF* (1999) 199 CLR 160, 177–179 [40]–[45] (Gleeson CJ, McHugh & Gummow JJ).

10 *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 307–308 (Mason CJ).

11 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 581–582. 'The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society. They are necessary for the proper operation of the system of representative government at the federal level. They are also necessary for the proper operation of the Constitutions of the States (which derive their authority from Chapter V of the *Constitution*). They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest.' The freedom, Williams and Hume write, is arguably 'implicit in the system of free trade, commerce and intercourse in s 92, the protection against discrimination based on state residence in s 117 and any protection of access to the seat of government as well as in the very fact of federalism': George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 120.

12 In *Kruger v Commonwealth* (1997), Brennan J said that a constitutional right to freedom of movement and association which restricts the scope of s 122 had not been held to be implied in the Constitution and 'no textual or structural foundation for the implication has been demonstrated in this case': *Kruger v Commonwealth* (1997) 190 CLR 1, 45.

13 Williams and Hume, above n 11, 120.

### Principle of legality

5.14 The principle of legality provides some protection to freedom of movement.<sup>14</sup> When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of movement, unless this intention was made unambiguously clear. In *Potter v Minahan* (1908), O'Connor J said:

It cannot be denied that, subject to the *Constitution*, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication.<sup>15</sup>

5.15 Freedom of movement is an essential part of personal liberty, which is also protected by the principle of legality.<sup>16</sup>

### International law

5.16 Freedom of movement is widely recognised in international law and bills of rights. For example, art 13 of the Universal Declaration of Human Rights provides:

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

5.17 Article 12 of the *International Covenant on Civil and Political Rights* provides, in part:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
- ...
4. No one shall be arbitrarily deprived of the right to enter his own country.

5.18 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>17</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>18</sup>

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14 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

15 *Potter v Minahan* (1908) 7 CLR 277.

16 See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 256.

17 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

18 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

### Bills of rights

5.19 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of movement is protected in the United States Constitution,<sup>19</sup> and in the human rights statutes in Canada<sup>20</sup> and New Zealand.<sup>21</sup>

5.20 Freedom of movement is also expressly protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).<sup>22</sup> Section 12 of the Victorian Act provides:

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

### Justifications for encroachments

5.21 Freedom of movement will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for example, for reasons of public health and safety.

5.22 International instruments provide for grounds for restrictions on freedom of movement in quite general terms. For example, art 12(3) of the ICCPR provides that freedom of movement:

shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

5.23 The United Nations Human Rights Committee has said that such restrictions on the right ‘must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed’.<sup>23</sup> The Committee has also said:

The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. ... it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.<sup>24</sup>

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19 *United States Constitution* amend IV.

20 *Canada Act 1982 c 11, Sch B Pt 1* (*Canadian Charter of Rights and Freedoms*) s 6(1)–(2).

21 *Bill of Rights Act 1990* (NZ) s 18.

22 *Charter of Human Rights and Responsibilities 2006* (Vic) s 12; *Human Rights Act 2004* (ACT) s 13.

23 United Nations Human Rights Committee, General Comment No 27 (1999) on Article 12 of the Convention - Freedom of Movement [13]–[14].

24 *Ibid.* Legal and bureaucratic barriers were, for the Committee, a ‘major source of concern’: *Ibid* [17].

5.24 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.<sup>25</sup>

5.25 Some Australian Commonwealth laws that interfere with freedom of movement may be justified. The ALRC invites submissions identifying those that are *not* justified, and explaining why they are not justified.

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25 *Canada Act 1982 c 11, Sch B Pt 1* (‘Canadian Charter of Rights and Freedoms’) s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.