

SUBMISSIONS OF PLAINTIFFS IN SUPPORT OF SUMMONS

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law Division
List	Administrative Law List
Registry	Sydney
Case number	2021/00252587

TITLE OF PROCEEDINGS

First plaintiff	Natasha Henry & Ors
Defendant	The Hon. Bradley Ronald Hazzard, Minister for Health and Medical Research

FILING DETAILS

Filed for	The Plaintiffs
Filed in relation to	Plaintiffs' Summons
Legal representative	Nathan Buckley, G&B Lawyers
Legal representative reference	NSW2021
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OUTLINE OF SUBMISSIONS

The Plaintiffs' submissions in support of their summons start on the next page.

OVERVIEW

- 1 The Defendant in this case is the Minister for Health and Medical Research for the state of New South Wales ('the Minister'). The issue for adjudication concerns the legality of certain public health orders that were made by the Minister in purported reliance on his powers under s 7 of the *Public Health Act 2010* (NSW).
- 2 The power under s 7 is enlivened when the Minister '*considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.*'¹ In those circumstances, the Minister '*may take such action*', and '*may by order give such directions ... as the Minister considers necessary to deal with the risk and its possible consequences.*'²
- 3 The s 7 orders that are subject of this proceeding, are not like any other orders that have previously been made. In the name of public health, the Minister has now ordered that the Plaintiffs undergo compulsory medical treatment. That medical treatment is in the nature of a series of two Covid-19 vaccinations. If the Plaintiffs submit to this treatment, they would be subjecting themselves to an invasive medical procedure with long-term personal consequences. In layman's terms, that medical procedure may be described as follows:
 - (a) A needle is used to puncture the human subject's skin. The needle is pushed into the human subject's body (usually the muscle of the subject's upper arm);
 - (b) Attached to the needle is a syringe filled with fluid. The fluid is an artificial biochemical compound manufactured by a pharmaceutical company. This is the vaccine;
 - (c) While the needle remains inserted deep inside the human subject's body, the syringe is depressed and the vaccine is injected into the human subject's body;
 - (d) The rich supply of blood at the point of injection disperses the injected vaccine throughout the human subject's body via their bloodstream; and
 - (e) The effects of the vaccine, whatever they may be, are permanent. Vaccines cannot be removed from the human body.
- 4 If the Plaintiffs refuse to submit to this medical procedure, the Minister's orders operate to exclude the Plaintiffs from participating in a significant aspect of social life. They will

¹ *Public Health Act 2010* (NSW), s 7(1).

² *Public Health Act 2010* (NSW), s 7(2).

be denied the right to continue working in their chosen vocation at their current place of employment. They will be denied the ability to earn a living and sustain themselves and their families as they only presently know how. The Minister's orders state that they are prohibited from going to work unless they submit themselves for vaccination.

- 5 If the Plaintiffs defy the Minister's orders by attending their workplace, without having submitted themselves for vaccination, other orders are in place to ensure that their acts of defiance are exposed and duly punished. The Minister has made orders that oblige the Plaintiffs to carry documentary evidence of their vaccination status, and to produce such evidence upon their employer's request. The employers are effectively a private sector vaccination police force, conscripted by Ministerial order to ensure that workers submit themselves to compulsory vaccination treatment and prove that they have done so. If the Plaintiffs do not produce evidence of their vaccination, their defiance of the orders will be inferred as a fact and their unvaccinated status exposed for all to see.
- 6 The failure to produce vaccination evidence is incriminating conduct that will disclose a breach of the Minister's orders. The Plaintiffs will be liable to a criminal penalty.³ Their employer will send them home. They will lose their job. They will be shunned and ridiculed by the community at large for their failure to do what the majority believes is the right thing to do. The imposition of a criminal sanction will necessarily function as a mark of moral stigma for being unvaccinated and attempting to carrying on with a normal life. That majority viewpoint, and the desire to bring shame to anyone who does not subscribe to it, is spurred by the Minister's own publicly expressed view that the Plaintiffs, and others like them, are '*self-entitled and indulgent in the extreme*'.⁴
- 7 The unvaccinated will be a minority group in Australia. The Plaintiffs are members of that minority group. It is a disturbing state of affairs that this court, in 2021, is faced with the task of considering whether action taken by a government to force a minority of its citizens to undergo medical treatment, or otherwise lose their jobs, is legal. Australia's political and legal history is littered with examples of the serious mistreatment of minority groups by governments, which subsequent governments and courts have later redressed. One might have thought that the recurring pattern of mistreatment, recognition and redress would have engrained into the New South

³ Breach of a s 7 order or direction is a criminal offence that attracts a maximum penalty of a fine of 100 penalty units (\$11,000) or a term of imprisonment of six months, or both. See *Public Health Act 2010* (NSW), s 10.

⁴ Affidavit of Nathan Buckley dated 16 September 2021, [11].

Wales state government of today the good sense to refrain from using oppressive measures against minority groups in the name of the 'greater good'.

- 8 We are on the edge of a precipice, with the cycle of mistreatment of a targeted minority group about to start again. Another bleak chapter in Australia's history is about to unfold. By Ministerial order, the unvaccinated are to become the social pariahs of the state. The unvaccinated will be unemployable and excluded from meaningful participation in a major aspect of ordinary life – the workforce. There is no case in the history of Australia where a general discretionary power conferred on a public official has been used in this way. It is a shocking state of affairs in a free and democratic society such as Australia, a county which has, until now, held in such high esteem the rule of law, equality of the individual, and the protection of individual rights and freedoms.
- 9 The law has never permitted the executive arm of government to exercise a general discretionary power that places the essential needs of the many above the essential needs and fundamental rights and freedoms of the few in the manner we see happening now. The Minister has placed the needs of the majority, in having the risk of suffering the consequences of Covid-19 reduced by whatever conceivable means are available, above the needs of the few who do not wish to have their bodies, in their ordinary and natural states, compromised and subjected to medical treatment in the nature of vaccination. The Minister has demanded that they yield to the wishes of the majority. If they do not, they will be deprived of their ability to earn a living.
- 10 The rule of law and the values which Australia holds dear ought not to be compromised because there is a pandemic. The fear that a pandemic generates, and the zeal with which government authorities have scrambled to respond to this once-in-lifetime health crisis, cannot be allowed to override the inalienable human rights of any individual. The rights of the minority who remain unvaccinated cannot be sacrificed for the sake of maximising the immediate interests and needs of the majority. While that kind of government action might be morally justified in utilitarian terms, crude and brutal utilitarianism is not a component of the philosophical fabric of Australian society. As a collective, we are bound by legal rules and principles. The rule of law must be preserved. That means no government, and no government minister, can take any action against anyone unless there is clear legal authority to do so.
- 11 This case has been brought because the New South Wales government has abused its powers. The Plaintiffs have invoked the jurisdiction of this court so that it may discharge one of its most important functions in society. The court is called upon to

scrutinise the coercive actions of government. The Plaintiffs implore the impugned public health orders be set aside because they are clearly unlawful.

- 12 There is no place for fear and zeal in the arguments to be canvassed in this courtroom. This case does not in any way require the court to make a pronouncement on the wisdom or morality of having a Covid-19 vaccination. This court is simply called upon to uphold the rule of law and, in so doing, to consider and apply the rules and principles with which it is very familiar. Those principles include the principle of legality, the supremacy of parliament, and the requirement that all government decisions must be based on legally sound reasons.
- 13 The **questions to be determined** by the court in this case are as follows:
- (a) Did the Minister have the power under s 7 of the *Public Health Act 2010* (NSW) to impose a requirement, in the form of a condition attaching to a direction, that a person undergo medical treatment in the nature of a Covid-19 vaccination? (**‘First Question’**);
 - (b) If the answer to the First Question is ‘yes’, did the Minister have the power under s 7 of the *Public Health Act 2010* to give directions designed to enforce that vaccination requirement? (**‘Second Question’**);
 - (c) If the answer to either the First or Second Question is ‘yes’, was the power in each case exercised in a proper manner and in observation of the processes as required by law? (**‘Third Question’**)
- 14 The First and Second Questions are addressed in **Ground 1 (ultra vires/jurisdictional error)** and **Ground 2 (improper purpose)** of the Plaintiffs’ summons. The Plaintiffs submit that **the First and Second Questions are to be answered ‘no’** on the basis that either Ground 1 or 2 is established. Grounds 1 and 2 primarily require the court to consider relevant legislative provisions, the public health orders that were made, and undisputed evidence from which reasonable inferences can be drawn to reach legal conclusions. Consideration of these grounds does not directly concern evidence that might bear upon the safety and efficacy of the Covid-19 vaccines currently being distributed to the Australian public. Rather, these grounds are directed towards the general issue of whether s 7 empowers the Minister to impose *any* kind of requirement that a person must subject themselves to a medical procedure, and in particular to one that involves the person being injected with an artificial biochemical compound, irrespective of its perceived benefits to the individual or to the community at large.

15 The Third Question assumes that the First and Second Questions have been answered 'yes'. The Third Question is addressed in **Ground 3 (relevant considerations)**, **Ground 4 (wrong issue/wrong question/irrelevant considerations)**, **Ground 5 (breach of natural justice)** and **Ground 6 (unreasonableness)**. The Plaintiffs submit that the **Third Question is to be answered 'no'** on the basis that any of Grounds 3 to 6 are established. In relation to each of these Grounds, the following preliminary observations may be made:

- (a) In relation to **Ground 3 (relevant considerations)**, the court must make determinations that require consideration of issues involving a mix of questions of law and fact. In that regard:
 - (i) The claim that the Minister failed to give proper, genuine and realistic consideration to the lack of scientific certainty surrounding the efficacy and safety of Covid-19 vaccinations (**Grounds 3(a) and 3(b)**) requires the court to first consider whether these were mandatory considerations (a question of law). The court must then consider what material was before the Minister and which he took into account when he made the Impugned Public Health orders (a question of fact). The court must then consider whether there was relevant information available to the Minister which he failed to take into account at all, or that he otherwise failed to give proper, genuine and realistic consideration to the scientific certainty surrounding the efficacy and safety of Covid-19 vaccinations (a question involving a mix of law and fact). The 'threshold' of what amounts to proper, genuine and realistic considerations is a legal question. The application of the legal threshold requires an assessment of the evidence (including expert evidence) which is a factual issue. The court must then consider whether the failure to consider the matter was material to the decision to issue the impugned public health orders.
 - (ii) The claim that the Minister failed to give proper, genuine and realistic consideration to other health measures, alternative to vaccinations, as a means by which to address the risk to public health that Covid-19 represents (**Ground 3(c)**) requires the court to engage in a process of determination. First, were alternative health measures a mandatory consideration? Secondly, what material was actually before the Minister in this regard? Thirdly, was there other material in that regard, that was available to the Minister, that he ought to have taken into

account? Fourthly, did the Minister fail to take into account alternative measures at all, or otherwise failed to give proper, genuine and realistic consideration to the alternative measures? The 'threshold' of what amounts to proper, genuine and realistic considerations is a legal question. The application of the legal threshold requires an assessment of the evidence (including expert evidence) which is a factual issue. Fifthly, was the failure material?

(iii) In relation to the claim that the Minister failed to give proper, genuine and realistic consideration to certain individual rights, and corresponding obligations and legitimate expectations (**Grounds 3(d) to 3(u)**), the court must ask and answer the following questions in relation to each claimed right, obligation or expectation: (1) Was the Minister bound to consider it? (2) What material was actually before the Minister that might suggest he took it into account? (3) Did he give it proper, genuine and realistic consideration? The 'threshold' of what amounts to proper, genuine and realistic considerations is a legal question. The application of the legal threshold requires an assessment of the evidence which is a factual issue. Reference to the expert evidence is not required in order to assess Grounds 3(d) to 3(u). (4) Was the failure material?

(b) In relation to **Ground 4 (wrong issue/wrong question/relevant considerations)**, the court must make determinations that require consideration of issues involving a mix of questions of law and fact. In that regard:

(i) The claim that the Minister failed to identify a correct issue, identified a wrong issue, asked himself a wrong question, or took into account an irrelevant matter, requires the court to ask the following questions in relation to each matter listed in Grounds 4(a) to 4(j): (1) Was the Minister forbidden to take the matter into account? (2) Did he take the matter into account? (3) Was the matter material to the decision-making outcome of issuing the impugned public health orders?

(ii) In relation to **Grounds 4(a), and 4(d) to 4(j)**, there should be no issue as to whether the Minister took these matters into account as they are discernible from the words used in the impugned public health orders themselves. For the same reason, there should be no issue that these

matters were all material to the decision-making outcome. The issue in relation to these grounds will be whether they were matters that were *forbidden* to be taken into account. The issues here involve largely legal arguments that are closely connected to the arguments advanced by the Plaintiffs in relation to Grounds 1 and 2. That is to say, it will be submitted that the Minister was forbidden to take these matters into account because he had no power under s 7 to make public health orders that reflect these considerations and that he made these public health orders for purposes unauthorised and that were otherwise improper.

- (iii) The assessment of **Grounds 4(b) and 4(c)** requires reference to public statements made by the Minister after the impugned public health orders were made. The fact that he made the statements should not be disputed. However, the issue for the court will first be whether the matters underpinning the statements were, as a matter of inference, taken into account when the Minister made the impugned public health orders. Secondly, the court must then consider whether he was forbidden to take these matters into account as a matter of law. Thirdly, the court must consider whether these considerations, if irrelevant, were material.
- (c) In relation to **Ground 5 (breach of natural justice)**, the issue will be largely resolved with reference to legal argument. The court will need to consider the following questions: (1) Were any of the Plaintiffs' pleaded rights, interests or legitimate expectations affected by the impugned public health orders? (2) Did the common law imply a duty on the part of the Minister to afford the Plaintiffs an opportunity to respond to or comment on the proposed public health orders before they were made? (3) Has the legislature evidenced an intention to otherwise exclude the operation of any such common law duty? (4) If not, did the Minister breach the duty? The answer to question (4) is not disputed by the Minister – the Minister clearly afforded no such opportunity to the Plaintiffs. The critical question will be whether, as a matter of law, the Minister was obliged to do so.
- (d) In relation to **Ground 6 (unreasonableness)**, this is perhaps the most complex ground because it requires the court to consider questions of law and fact, all of which are complicated. These questions include the following:

- (i) Generally speaking, when are actions taken, or directions given, by the Minister pursuant to s 7 of the *Public Health Act 2010* (NSW) ‘**necessary** to deal with [a] risk and its possible consequences’? (**Note:** This issue must also be considered in relation to Grounds 1 and 2.);
- (ii) Given that the power conferred on the Minister under s 7 speaks of what the Minister himself ‘considers necessary’, to what extent is the court permitted to consider the necessity s 7 contemplates from an *objective* perspective (as compared to the *subjective* assessment of necessity from the point of view of the Minister)? This issue must also be considered in relation to Grounds 1 and 2.); and
- (iii) Would a reasonable person, in the position of the Minister exercising power under s 7, have been able to conclude the impugned public health orders were *necessary*? This question requires the court to consider the threshold test that is to be applied, including the evolution of the ground of reasonable to incorporate notions of ‘rationality’ and ‘illogicality’, and ‘proportionality’ in relation to the making of general rules subordinate to a governing statute. The question also requires the court to make a determination of the considerations that the Minister was bound to take into account, permitted to take into account, and forbidden to take into account. The court must assess what the Minister did actually take into account to be able to effectively scrutinise his reasoning process. This includes identifying all those matters which he was permitted, bound and forbidden to take into account which led the Minister to favour making the impugned public health orders. But it also requires the court to identify all those countervailing considerations, which he was bound to take into account, which might have militated against a finding that the impugned public health orders were necessary for the purposes of exercising the s 7 power. It must be emphasised that this ground does not involve the court substituting its own view for that of the Minister as to whether the impugned public health orders were necessary. Rather, it is a threshold question that must be determined. Was it reasonably open for the Minister to conclude these public health orders were necessary, having regard to the legal limits of the discretionary power under s 7, the requirement that the discretion be exercised

reasonably, rationally, logically or proportionately, and the considerations, for and against, that would necessarily be involved in exercising the discretion in the way that he did? Reference to the evidence of the experts will be required in assessing this Ground.

LEGISLATION

The *Public Health Act 2010* (NSW)

16 The legislation of principal concern in this case is the *Public Health Act 2010* (NSW). There are several aspects of this legislation that need to be properly considered, namely:

- (a) section 7, being the specific provision under which the Minister exercised discretionary power to make the public health orders that are challenged by the Plaintiffs in this case.
- (b) section 10, which prescribes the penalty for persons who fail to comply with a public health order.
- (c) the statutory context in which the discretionary power and penalty provisions occur, including:
 - (i) the objects and purposes of the legislation;
 - (ii) the subject matter and scope of the legislation;
 - (iii) the historical context in which the legislation was enacted.

The General Discretionary Power under Section 7

17 Section 7 of the *Public Health Act 2010* (NSW) confers on the Minister a general discretion to make public health orders. It is reproduced in full:

7 Power to deal with public health risks generally

- (1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.
- (2) In those circumstances, the Minister—
 - (a) may take such action, and
 - (b) may by order give such directions,as the Minister considers necessary to deal with the risk and its possible consequences
- (3) Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary—

- (a) to reduce or remove any risk to public health in the area, and
 - (b) to segregate or isolate inhabitants of the area, and
 - (c) to prevent, or conditionally permit, access to the area.
- (4) An order must be published in the Gazette as soon as practicable after it is made, but failure to do so does not invalidate the order.
- (5) Unless it is earlier revoked, an order expires at the end of 90 days after it was made or on such earlier date as may be specified in the order.
- (6) Action may not be taken, and an order has no effect, in relation to any part of the State for which a state of emergency exists under *the State Emergency and Rescue Management Act 1989*.
- (7) An application may be made to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of any of the following decisions—
- (a) any action taken by the Minister under this section other than the giving of a direction by an order under this section,
 - (b) any direction given by any such order.

18 Section 5 contains relevant definitions:

5 Definitions

(1) In this Act—

...

“**area**” means—

- (a) in relation to a council within the meaning of the *Local Government Act 1993*, the area for which the council is constituted by that Act, or,
- (b) in relation to a person appointed under section 5A, the part of the Western Division that is not within the area of a council, or
- (c) in relation to the Lord Howe Island Board, Lord Howe Island.

...

“**exercise**” a function includes perform a duty.

...

“**function**” includes a power, authority or duty

...

19 Several observations may be made about what was contemplated when the Parliament enacted s 7:

- (a) The power to make orders under s 7 is only enlivened when ‘*the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.*’ (s 7(1)).

- (b) In such circumstances, the Minister '*may take such action, and ... may by order give such directions, ... as the Minister considers necessary to deal with the risk and its possible consequences.*' (s 7(2)).
- (c) The kinds of public health order contemplated include those types of order listed (non-exhaustively) in s 7(3), namely:
 - (i) an order that declares a part of the State to be a public health risk area;
 - (ii) an order that reduces or removes any risk to public health in that area;
 - (iii) an order that segregates or isolates inhabitants of that area;
 - (iv) an order that prevents, or conditionally permits, access to that area.
- (d) An order under s 7 is intended to be a *temporary* measure only. That is because the order, and its operative effect, expires 90 days after it is made, unless it is earlier revoked (s 7(5)).

Administrative Power

- 20 An important distinction relates to decisions made within the executive arm of government and how they may be categorised as either *administrative* decisions or *legislative* decisions. The practical significance of this distinction is found in the fact that courts, in exercising its supervisory jurisdiction over actions of the executive, tend to be willing to conduct a more intensive scrutiny of *administrative* decisions, as opposed to *legislative* decisions, because of the parliamentary checks and balances that are in place in relation to legislative decisions.
- 21 The issue is raised in this case because the Impugned Public Health Orders are expressed in a way that very much resembles rules of general application, much like statutory provisions and regulations. However, the question that must be asked is not whether the Public Health Orders themselves resemble legislation in order to determine whether the Minister made an administrative or legislative decision in making the orders. Rather, the question is what kind of power does s 7 confer on the Minister – *administrative* or *legislative*?
- 22 There is no simple rule for determining whether a decision is of an administrative legislative character. A range of matters, however, can be considered:⁵

⁵ See *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 98 ALR 14; *RG Capital Radio Pty Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; 185 ALR 573; *Visa International Services Association v Reserve Bank of Australia* (2003).

- (a) whether the decisions determined rules of general application or whether there was an application of rules to particular cases;
- (b) whether there was parliamentary control of the decision;
- (c) whether there was public notification of the making of the decision;
- (d) whether there has been public consultation and the extent of any such consultation;
- (e) whether there were broad policy considerations imposed;
- (f) whether the rules could be varied;
- (g) whether there was power of executive variation or control;
- (h) whether provisions exist for merits review;
- (i) binding effect.

23 In relation to the power under s 7, the following factors demonstrate that it is an *administrative* (rather than *legislative*) power that is exercisable:

- (a) The exercise of the power is contingent on a factually specific situation, namely whether a situation has arisen that is, or is likely to be, a risk to public health.
- (b) The exercise of power in that specific situation is also contingent on the Minister for a particular view about whether particular directions are considered necessary in the particular circumstances. The Minister may issue directions of general application, but these are linked to the factually specific situation as occurring at the time.
- (c) The directions are temporary as they expire in 90 days.
- (d) There is no parliamentary oversight (public health orders cannot be disallowed, unlike regulations that can be made under s 134).
- (e) There is no express consultation process in relation to the making of public health orders.
- (f) There is a right of review in relation to the making of public health orders to the Administrative Decisions Tribunal.

24 Accordingly, the s 7 power is administrative in nature.

Penalties for Non-Compliance with a Section 7 Order

25 Section 10 of the *Public Health Act 2010* (NSW) prescribes penalties for failing to comply with a s 7 public health order:

10 Offence not to comply with Ministerial direction

A person who—

- (a) is subject to a direction under section 7, 8 or 9, and
- (b) has notice of the direction,

must not, without reasonable excuse, fail to comply with the direction.

Note: Maximum penalty—

- (a) in the case of an individual—100 penalty units, or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 50 penalty units for each day the offence continues, or
- (b) in the case of a corporation—500 penalty units and, in the case of a continuing offence, a further 250 penalty units for each day the offence continues.

26 Implications arising from section 10 include the followings:

- (a) A person who fails to comply with a section 7 order, without reasonable excuse, commits a criminal offence;
- (b) An offence alleged against a person under this section must be proved with admissible evidence in accordance with the rules of evidence;⁶
- (c) An offence alleged must be proved to the requisite standard in a criminal court, namely ‘beyond reasonable doubt’; and⁷
- (d) The penalty for committing the offence is significant. A person found guilty faces the prospect of imprisonment for up to six months.

Objects and Purposes of the Legislation

27 The long title of the *Public Health Act 2010* (NSW) states that it is ‘[a]n Act with respect to public health.’

28 The objects of the Act are contained in s 3, reproduced in full below:

3 Objects

- (1) The objects of this Act are as follows—
 - (a) to promote, protect and improve public health,
 - (b) to control the risks to public health,
 - (c) to promote the control of infectious diseases,
 - (d) to prevent the spread of infectious diseases,

⁶ See, generally, *Evidence Act 1995* (NSW).

⁷ *Evidence Act 1995* (NSW), s 141.

- (e) to recognise the role of local government in protecting public health.
 - (f) to monitor diseases and conditions affecting public health.
- (2) The protection of the health and safety of the public is to be the paramount consideration in the exercise of functions under this Act.

Subject Matter and Scope of the Legislation

29 The overall scheme of the *Public Health Act 2010* (NSW) must be considered in order to understand the statutory context in which the s 7 power operates. This, in turn, will enable a full and proper construction of the scope of the Minister's general discretionary power under s 7 such that the court may determine the legal limits of the Minister's powers under that section.

30 To this end, the following aspects of the legislation are highlighted:

- (a) The Ministerial power under s 7 to deal with public health risks *generally* is found in Part 2 of the *Public Health Act 2010*. This part of the legislation is headed 'General public health'.
- (b) Section 8 is also found in Part 2 and confers on the Minister a similar general discretionary power to make public health orders when he considers it necessary to deal with a situation giving rise to a risk to public health.⁸ However, the s 8 power provides a significant point of contrast in relation to the s 7 power. There are critical differences between the two provisions, which include the following:
 - (i) The s 8 power is enlivened only when a state of emergency exists under the *State Emergency and Rescue Management Act 1989* (NSW) and, after consultation with the Minister administering that Act, the Minister considers on reasonable grounds that the emergency is, or is likely to be, a risk to public health.⁹ The s 7 power is not restricted to situations involving a state of emergency;
 - (ii) The s 8 power can only be exercised when the Minister, with the agreement of the Minister administering the *State Emergency and Rescue Management Act 1989* (NSW), considers it necessary to make the public health order to deal with the risk to public health and its possible consequences. The s 7 power is exercisable by the Minister

⁸ *Public Health Act 2010* (NSW), subs 8(1) and 8(2).

⁹ *Public Health Act 2010* (NSW), s 8(1).

without any express obligation to consult or seek another person's agreement before the power is exercised;

- (iii) The s 8 power expressly contemplates that a s 8 order may include a direction that persons in a specified group or residing in a specified area submit themselves for medical examination.¹⁰ The s 7 power does not contemplate that a s 7 order might include any kind of direction involving medical intervention in relation to any member of the public. The only curb on the rights of individuals contemplated by s 7 is the *segregation or isolation* of individuals, and the *prevention or conditional access* to certain areas; and
 - (iv) An order made under s 8 expires when the relevant state of emergency ceases to exist, unless it is earlier revoked. A state of emergency automatically expires 30 days after it is declared by the Premier.¹¹ A state of emergency can be redeclared after 30 days.¹² There is no express power to extend the operation of a s 7 public health order.
- (c) Part 2A of the Act concerns public warnings about health matters. It provides that the Chief Health Officer may make public statements identifying and giving warnings or information about any perceived risk to the health or safety of the public.¹³ The obligations that the Chief Health Officer would have had to observe under the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) are specifically abrogated in relation to the exercise of this power.¹⁴
- (d) Part 3 concerns the administration of matters relating to environmental health. It has a range of provisions that are directed towards ensuring the safety of drinking water,¹⁵ controlling the risk of legionella,¹⁶ controlling the risk of disease in swimming pools and spas,¹⁷ and ensuring the safety of skin penetration procedures conducted by those who are not health practitioners.¹⁸ There are also a comprehensive set of provisions that confer specific and

¹⁰ *Public Health Act 2010* (NSW), s 8(3).

¹¹ *State Emergency and Rescue Management Act* (NSW), s 35(2).

¹² *State Emergency and Rescue Management Act* (NSW), s 35(3).

¹³ *Public Health Act 2010* (NSW), s 12A(1).

¹⁴ *Public Health Act 2010* (NSW), s 12A(3).

¹⁵ *Public Health Act 2010* (NSW), Division 1 (ss 13 to 16).

¹⁶ *Public Health Act 2010* (NSW), Division 2 (ss 26 to 33).

¹⁷ *Public Health Act 2010* (NSW), Division 3 (ss 34 to 37).

¹⁸ *Public Health Act 2010* (NSW), Division 4 (ss 38 to 39A).

limited powers on public officials to enforce the standards prescribed by under this Part of the legislation.¹⁹ These include:

- (i) a general power to make public health orders in relation to the use, or restriction of use, of drinking water that may be unsafe;²⁰
 - (ii) a power conferred on the Secretary to compel, on written notice, suppliers of drinking water to carry out tests in relation to water they supply, and to produce information concerning the quality of that water and how they treat it;²¹
 - (iii) a power conferred on the Chief Health Officer may to determine whether certain drinking water supplies should be issued with a 'boil water advice' to the public and to compel a drinking water supplier to issue that advice to the public;²²
 - (iv) a power conferred on the Secretary to conduct investigations in relation to suspected breaches of safety standards in relation to water heating and cooling systems in circumstances of an outbreak of Legionnaires' disease;²³
 - (v) a power conferred on an authorised officer to serve an improvement notice in relation to 'enforceable requirements' that apply to premises containing a water heating or cooling system, a public swimming pool or spa or on which skin penetration procedures are carried on, the basis that standards are not being met, and a power to prohibit the system or premises from operating in the event of non-compliance with the improvement notice;²⁴ and
 - (vi) criminal penalties for non-compliance.²⁵
- (e) Part 4 deals specifically with certain medical conditions (diseases and viruses) that are known to be a risk to the community. These are referred to as Scheduled Medical Conditions. This Part of the legislation deals specifically

¹⁹ *Public Health Act 2010* (NSW), Division 5 (ss 40 to 50).

²⁰ *Public Health Act 2010* (NSW), s 16.

²¹ *Public Health Act 2010* (NSW), ss 18 and 19.

²² *Public Health Act 2010* (NSW), ss 21 and 22.

²³ *Public Health Act 2010* (NSW), s 32

²⁴ *Public Health Act 2010* (NSW), ss 40 to 50.

²⁵ *Public Health Act 2010* (NSW), ss 17, 20, 22, 28, 29, 30 and 47.

with Covid-19 as a disease. Important aspects of this Part of the legislation include the following:

- (i) Known diseases and viruses are placed into one of five categories – ‘Category 1’, ‘Category 2’, ‘Category 3’, ‘Category 4’, or ‘Category 5’. The Categories, and the specific diseases that fall within each Category, are listed in Schedule 1 of the legislation.²⁶ A specific disease may fall within more than one Category. The gradation of Categories within the legislative scheme suggests that Category 1 medical conditions general represent the least amount of risk to public health, whereas Category 5 represents the most serious risk;
- (ii) **Covid-19** is listed in Schedule 1 as falling within **Category 2, Category 3, and Category 4**.²⁷ Covid-19 was first placed into each of these categories by the Minister, pursuant to s 51(2) of the Act, on 21 January 2020.²⁸ The only condition listed in Category 5 is Human Immunodeficiency Virus (HIV) infection;
- (iii) Section 52 creates a general obligation on a person who has a Category 2, 3, 4 or 5 condition to take reasonable precautions against spreading the condition, unless they are not aware that they had the medical condition. The obligation applies in relation to a person infected with Covid-19. Non-compliance is a criminal offence and attracts a maximum penalty of 100 penalty units, six months imprisonment, or both;²⁹
- (iv) Division 3 provides for notification procedures that are to be followed by medical practitioners and pathology laboratories when dealing with patients suspected of having certain medical conditions.³⁰ The provisions oblige medical practitioners and pathology laboratories to provide the Secretary with information about any patient who is suspected of having a Category 1, 2 or 3 condition, including offences

²⁶ *Public Health Act 2010* (NSW), s 51 and Schedule 1.

²⁷ *Public Health Act 2010* (NSW), Schedule 1.

²⁸ *Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order 2020*. This order referred to Covid-19 as ‘Novel Coronavirus 2019’. The Minister subsequently made *Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order (No 2) 2020* on 19 March 2020 to include a reference to ‘COVID-19’ having regard to the common usage of that term to describe the same disease.

²⁹ *Public Health Act 2010* (NSW), s 52(1).

³⁰ *Public Health Act 2010* (NSW), ss 54 to 59.

for non-compliance.³¹ Parliament has specifically addressed the issue of protecting the privacy in relation to HIV patients in this part.³² The Secretary may only compel a medical practitioner to disclose the name and address of a person suspected of having a Category 5 condition if they have obtained a court order;³³

(v) Division 4 confers certain coercive powers on the Secretary and authorised medical practitioners which can be exercised in relation to individuals in relation to Category 4 and 5 conditions (**Note:** Covid-19 is a Category 4 condition). The following aspects of Division 4 are relevant:

- If the Secretary knows, or suspects on reasonable grounds that a person has a Category 4 or 5 condition, and considers that the person may, on that account, be a risk to public health, and considers that the nature of the condition warrants medical examination or testing relating to the condition, the Secretary may, by notice in writing, direct that the person undergo a specified kind of medical examination or test relating to the condition conducted by a registered medical practitioner.³⁴ Any direction of this nature must have due regard to the sensitivities of the person concerned in relation to the gender, ethnicity and cultural background of the registered medical practitioner by whom the examination is to be carried out.³⁵ If the person fails to comply with that direction, they commit a criminal offence and are liable to maximum penalty of 50 penalty units.³⁶
- An **authorised medical practitioner** may make a public health order in respect of a specific person if satisfied on reasonable grounds that the person **has** a Category 4 (**Covid-19**) or 5 or has been exposed to a 'contact order condition'³⁷ (**Covid-19**) and is at risk of developing the condition, and, **because of the way the person behaves**, they may be a risk to public health

³¹ *Public Health Act 2010* (NSW), ss 54 and 55.

³² *Public Health Act 2010* (NSW), s 56.

³³ *Public Health Act 2010* (NSW), s

³⁴ *Public Health Act 2010* (NSW), ss 61(1) and 61(2).

³⁵ *Public Health Act 2010* (NSW), s 61(5).

³⁶ *Public Health Act 2010* (NSW), s 61(4).

³⁷ Contact order conditions are listed in Schedule 1A. The list includes Covid-19.

in relation to that condition.³⁸ Notice must be given to the person of the order and the grounds on which it is made.³⁹ The order may require the person to refrain from specified conduct, **undergo specified treatment**, undergo counselling, submit themselves to supervision, notify the Secretary of other persons with whom the person has been in contact, notify the Secretary if the person displays any specified signs or symptoms, and to undergo a specified kind of medical examination or test.⁴⁰ A public health order may also permit a person to be detained, including while the person undergoes specified treatment in the order.⁴¹ Before a public health order of this nature is made, the authorised medical practitioner **must take into account the principle that any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health.**⁴² The public health order must be personally served on the person who is subject to it.⁴³ Section 63 specifically contemplates that public health orders may be made in relation to the Covid-19 pandemic. A person subject to a public health order in relation to a Category 4 condition may apply to the Civil and Administrative Tribunal for a review of that order.⁴⁴ It is a criminal offence not to comply with a public health order, with the maximum penalty being 100 penalty units, six months imprisonment, or both.⁴⁵ A person may be arrested for breaching a public health order.⁴⁶ Section 71A also specifically confers a power on police officers to arrest a person if the police officer suspects on reasonable grounds that the person is contravening a public health order relating to the Covid-19 pandemic.

³⁸ *Public Health Act 2010* (NSW), s 62(1).

³⁹ *Public Health Act 2010* (NSW), s 62(2).

⁴⁰ *Public Health Act 2010* (NSW), s 62(3).

⁴¹ *Public Health Act 2010* (NSW), s 62(4).

⁴² *Public Health Act 2010* (NSW), s 62(6).

⁴³ *Public Health Act 2010* (NSW), s 62(8).

⁴⁴ *Public Health Act 2010* (NSW), s 66.

⁴⁵ *Public Health Act 2010* (NSW), s 70.

⁴⁶ *Public Health Act 2010* (NSW), s 71.

- (f) Part 5 provides for other disease control measures and notifications, including the following:
- (i) A medical practitioner treating a person suspected of having a sexually transmitted disease must provide certain information to the person prescribed in the regulations.⁴⁷ There is a specific duty on persons having sexually transmissible diseases to take reasonable precautions against spreading the disease with criminal penalties that apply for non-compliance.⁴⁸
 - (ii) Medical practitioners working at hospitals have specific duties to ensure the chief executive officer of the hospital is aware of any patient who may have a 'notifiable disease', and the chief executive officer has a duty to pass on that information to the Secretary.⁴⁹ Notifiable diseases are listed in Schedule 2, which includes Covid-19.
 - (iii) Division 5 of this Part concerns 'vaccine preventable diseases'. Vaccine preventable diseases are listed in Schedule 3, **which does not include Covid-19**. The complete list of vaccine preventable diseases in Schedule 3 is as follows:
 - Diphtheria
 - Haemophilus influenzae type b
 - Measles
 - Meningococcal type C
 - Mumps
 - Pertussis (whooping cough)
 - Poliomyelitis
 - Rubella
 - Tetanus
 - (iv) Principals of *schools* have an obligation to ask parents of children enrolled at a school to provide the principal with an immunisation certificate obtained from the childhood immunisation register that relates to the child's vaccination status in relation to vaccine preventable diseases.⁵⁰ Principals of *child care facilities* must be

⁴⁷ *Public Health Act 2010* (NSW), s 78.

⁴⁸ *Public Health Act 2010* (NSW), s 79(1)

⁴⁹ *Public Health Act 2010* (NSW), ss 82 and 83.

⁵⁰ *Public Health Act 2010* (NSW), 86.

provided with a vaccination certificate in relation to all children proposed to be enrolled at the facility and, if that vaccination is not provided or it does not cover some of the vaccine preventable diseases as it should, **the principal must not enrol the child.**⁵¹ There is no equivalent obligation to exclude unvaccinated students that is imposed on principals of schools.

- (g) Part 8 contains a comprehensive set of general enforcement provisions. These include the following:
- (i) a general power conferred on the Secretary **to inspect** a public authority's documents relating to public health;⁵²
 - (ii) a general power conferred on the Secretary **to inquire** into any matter relating to public health or any matter in relation to the Act;⁵³
 - (iii) a power conferred on public health officials **to inspect** the register of Births, Deaths and Marriages;⁵⁴
 - (iv) a power conferred on authorised officers **to enter and inspect** premises, **to inspect** documents within the premises, **to make copies** of the documents, **to take samples** of any substance found in the premises for analysis, **to examine and inspect** any apparatus or equipment on the premises, **to take photographs**, films, audio and video recordings, and **to gather evidence** for the purpose of alleging a contravention of the Act (the authorised officer must obtain a **search warrant or a certificate of authority** before any such power is exercised);⁵⁵
 - (v) a power conferred on authorised officers **to direct a person to answer questions** in relation to certain matters (written notice must first be given);⁵⁶
 - (vi) a power conferred on authorised officers **to direct a person to furnish information or documents**;⁵⁷

⁵¹ *Public Health Act 2010* (NSW), s 87(1)

⁵² *Public Health Act 2010* (NSW), s 105.

⁵³ *Public Health Act 2010* (NSW), s 106.

⁵⁴ *Public Health Act 2010* (NSW), s 107.

⁵⁵ *Public Health Act 2010* (NSW), s 108.

⁵⁶ *Public Health Act 2010* (NSW), s 110.

⁵⁷ *Public Health Act 2010* (NSW), s 111.

- (vii) a power conferred on authorised officers (including police officers) **to direct a person to state their full name and address** if the person is suspected of having contravened the Act or any regulations;⁵⁸
 - (viii) criminal penalties for failing to comply with a direction, impersonating an authorised officer, or obstructing officers from performing their functions under the Act;⁵⁹
- (h) The Act has been amended to incorporate all measures that Parliament considered necessary and appropriate to deal with the Covid-19 pandemic. These are referred to as the 'Covid-19 emergency measures provisions' and refer to amendments made to ss 63(2A) and (2B), 64(7), 71A, 112(2) and 118(6) and (7).⁶⁰ In relation to these specific provisions dealing with Covid-19:
- (i) sections 63(2A) and 2(B) provide that public health orders made by an authorised medical practitioner under s 62 based on the Covid-19 pandemic expire at the end specified by the authorised medical practitioner in their s 62 order;
 - (ii) section 64(7) provides that s 64 (which relates to the process of applying for confirmation of a s 62 order at the Civil and Administrative Tribunal) does not apply in relation to s 62 orders made in relation to the Covid-19 pandemic;
 - (iii) section 71A confers a power on police officers to arrest a person suspected of having breached a public health order relating to the Covid-19 pandemic;
 - (iv) section 112(2) confers a power on police officers to direct a person to provide their name and address if the person is suspected of contravening, or having contravened, the Act or regulations;
 - (v) these provisions all expire on 26 September 2021 or a later day, not later than 26 March 2022, prescribed by the regulations;
 - (vi) there are no Covid-19 emergency measures provisions that require a person to undergo medical treatment in the nature of a Covid-19

⁵⁸ *Public Health Act 2010* (NSW), s 112.

⁵⁹ *Public Health Act 2010* (NSW), ss 113 to 120.

⁶⁰ *Public Health Act 2010* (NSW), s 135.

vaccination, or to oblige and entitle any person to take steps to ensure a person is vaccinated at their ordinary place of work.

- (i) Section 134 empowers the Governor to ‘make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed, or that is necessary or convenient to be prescribed, for carrying out or giving effect to this Act.’ An extensive list of specific types of regulations are contemplated by the Act, and relate to:⁶¹
- (i) the prevention, mitigation and eradication of risks to public health;
 - (ii) the places at which, and the conditions subject to which, a person may be detained under a public health order;
 - (iii) regulating public health standards for public swimming pools and spa pools and premises where skin penetration procedures are carried out, including standards for cleanliness, hygiene and infection control;
 - (iv) the closure of public swimming pools and spa pools for any period during which they are a risk to public health;
 - (v) the installation, operation, maintenance and inspection of a regulated system;
 - (vi) the functions (including powers of entry and inspection) of local government authorities and authorised officers in relation to a regulated system;
 - (vii) the directions that, in relation to a regulated system, may be given by a local government authority or an authorised officer during, or as a result of, an investigation of an occurrence of Legionnaires' disease;
 - (viii) compliance with directions referred to in paragraph (vii);
 - (ix) the provision of information by the owner or occupier of premises in relation to a regulated system which is installed on the premises;
 - (x) the provision and keeping of operation manuals, and maintenance manuals, for a regulated system;
 - (xi) the keeping of records, and the making of reports, in relation to a regulated system;

⁶¹ *Public Health Act 2010* (NSW), s 134(2).

- (xii) the provision of information by the owner or occupier of premises at which a public swimming pool or spa pool is situated;
- (xiii) the provision of information by persons who carry out skin penetration procedures;
- (xiv) the cases in which, the manner in which, and the conditions under which, cremations of human remains may take place;
- (xv) matters preliminary to, and consequential on, cremations of human remains;
- (xvi) other public health matters relating to the disposal and handling of human remains;
- (xvii) the registration of cremations and burials and (with any necessary modifications) the application to the registration of cremations of the provisions of any other Act, or of any law, in force in relation to the registration of a burial of the body of a deceased person;
- (xviii) the embalming, interment, disposal and exhumation of the bodies of deceased persons;
- (xix) the preparation rooms, equipment and apparatus in mortuaries, crematories and cemeteries, and any other matter relating to mortuaries, crematories and cemeteries that is for the protection of the health of the public;
- (xx) the inspection of mortuaries, crematories and cemeteries and of premises that may reasonably be suspected of being mortuaries, crematories or cemeteries;
- (xxi) the records to be kept in relation to mortuaries, crematories and cemeteries, and the inspection of records (including the making of copies or extracts from such records by or for authorised officers and the public), equipment and apparatus in mortuaries, crematories and cemeteries or premises that may reasonably be suspected of being mortuaries, crematories or cemeteries;
- (xxii) the fees that may be charged for the cremation of human remains, for the preservation or disposal of the ashes and for related services;
- (xxiii) the payment of specified fees in relation to applications made, approvals given, improvement notices and prohibitions orders given,

and other matters arising, under this Act (including in relation to the exercise of functions by local government authorities and authorised officers.

- (j) No specific Covid-19 emergency measures regulation-making power has been conferred on the Governor.

Historical Context

31 The *Public Health Act 2010* (NSW) replaced the *Public Health Act 1991* (NSW). When the 2010 bill was introduced in the Legislative Assembly, the then Parliamentary Secretary for Health, Dr Andrew McDonald, made the following remarks when referring to the Part 4 provisions dealing with the power of authorised medical practitioners to make public health orders:⁶²

It is important to note that section 62(6)(a) of the bill provides that in making a public health order an authorised medical practitioner must take into account the principle that any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent risk to public health. Members will note that the proposed wording differs from that in the current Act, which provides that a public health order may only be made if it is the only effective way to ensure that the health of the public is not endangered. However, notwithstanding the added flexibility that the proposed wording offers, the reality is that as a practical matter the use of public health orders is unlikely to change significantly.

Strategies that seek the voluntary cooperation of individuals will always be preferred to coercive measures, as voluntary action will be the most sustainable. This is especially important where the nature of the illness requires personal behavioural change over a lifetime. Escalation of public health action to the more interventionist approaches, including the use of public health orders, will not generally be considered unless less restrictive alternatives have been tried or step by step escalation will be insufficient or too slow to appropriately address the public health risk. As these are sensitive matters requiring careful balancing, the bill provides for the development of regulations that will allow further articulation of these important principles and will provide guidance in the management of public health risk.

The *Public Health Regulation 2012* (NSW)

32 Standard penalties fixed for breaching Covid-19 public health orders made under s 7 of the *Public Health Act 2010* (NSW), in relation to which penalty infringement notices are issued, have been incorporated into Schedule 4 of the *Public Health Regulation*

⁶² Legislative Assembly Hansard 24 November 2010.

2012 (NSW). There are no other Covid-19-specific regulations that have been made pursuant to s 134 of the parent Act.

IMPUGNED PUBLIC HEALTH ORDERS

Plaintiffs' Original Summons

33 The proceeding is brought pursuant to section 69 of the *Supreme Court Act 1970* (NSW). The Plaintiffs invoke the court's supervisory jurisdiction in relation to certain public health orders made by the Minister under s 7 of *Public Health Act 2010* (NSW).

34 Relevant parts of the s 7 public health orders that are the subject of the Plaintiffs' original summons dated 3 September 2021 are reproduced below.

Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW)

35 Clauses 5 and 7 of the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) are specifically impugned in the Plaintiffs' original summons. The Plaintiffs seek to have these clauses quashed or declared unlawful.⁶³ These are reproduced in full below.

5 Direction—unvaccinated workers not to enter residential aged care facilities

- (1) The Minister directs that the following persons must not enter or remain on the premises of a residential aged care facility unless the person has received at least 1 dose of a COVID-19 vaccine—
 - (a) an employee of the operator of the facility,
 - (b) person who provides services for the facility or for 1 or more residents of the facility under a contract or arrangement with any person, but not including the following—
 - (i) a maintenance contractor,
 - (ii) a person who provides services to a resident of the facility under a contract or arrangement with the resident,
 - (iii) a student

Note— This direction has effect from the commencement of the Order at 9am on 17 September 2021.

- (2) Subclause (1) does not apply to a person who enters a residential aged care facility to respond to—
 - (a) a medical emergency, or
 - (b) a non-medical emergency, for example, a fire, flooding or a gas leak.

...

⁶³ Plaintiffs' Summons dated 3 September 2021, Orders Sought, [1(a)].

7 Directions—evidence of vaccination

- (1) The Minister directs that the operator of a residential aged care facility must take all reasonable steps to ensure that a person subject to a direction under clause 5 or clause 6 complies with the direction.
- (2) The Minister directs that a person subject to a direction under clause 5 or clause 6 must, if required to do so by the operator of a residential aged care facility, provide the operator with vaccination evidence.

36 Clause 8 provides that exemptions may be granted in relation to the general requirement that a person be vaccinated if that person ‘is unable, due to a medical contraindication, to be vaccinated against Covid-19’.⁶⁴

37 The following expressions are defined in the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW):

- (a) *COVID-19 vaccine* means ‘a vaccine approved by the Therapeutic Goods Administration of the Commonwealth for use as a vaccine against COVID-19’;⁶⁵
- (b) *operator*, of a residential aged care facility, means ‘a person who controls or operates the facility’;⁶⁶
- (c) *residential aged care facility* means ‘a facility at which the following services are provided to a person in relation to whom a residential care subsidy or flexible care subsidy is payable under the *Aged Care Act 1997* of the Commonwealth — (a) accommodation, (b) personal care or nursing care.’⁶⁷
- (d) *vaccination evidence* means ‘evidence from the Australian Immunisation Register kept under the *Australian Immunisation Register Act 2015* of the Commonwealth that the worker has had 1 or more doses of a COVID-19 vaccine’ (Example — An online immunisation history statement or COVID-19 digital certificate from the Australian Immunisation Register);⁶⁸

38 The object of the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) is contained in an ‘Explanatory Note’ on the cover page of the order, which states:

The object of this Order is to provide that from 9am on 17 September 2021 persons employed at residential aged care facilities and contractors providing health and

⁶⁴ *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW), cl 8(1)(a).

⁶⁵ *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW), cl 3(1).

⁶⁶ *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW), cl 3(1).

⁶⁷ *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW), cl 3(1).

⁶⁸ *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW), cl 3(1).

personal care services in those facilities may only enter the facility if they have received at least 1 dose of a COVID-19 vaccine.

39 Clause 4 of the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) contains the Minister's specified grounds for concluding that there is a risk to public health and, accordingly, his reasons for making the order:

4 Grounds for concluding that there is a risk to public health

It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—

- (a) public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, which is a condition caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),
- (b) COVID-19 is a potentially fatal condition and is highly contagious,
- (c) a number of cases of individuals with COVID-19 have recently been confirmed in New South Wales and other Australian jurisdictions, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales, including by means of community transmission,
- (d) the risk of transmission, including by means of community transmission, of COVID-19 in New South Wales will remain significant and ongoing unless

Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW)

40 Clauses 4.3(3) and 4.3(3A) the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) are specifically impugned in the Plaintiffs' original summons. The Plaintiffs seek to have these clauses quashed or declared unlawful.⁶⁹ Clause 4 is reproduced in full below.

4.3 Leaving area of concern for work

- (1) A person who lives in an area of concern must not leave the area of concern for the purposes of work unless the person is an authorised worker..
- (2) An authorised worker must not leave the area of concern for work without a permit issued by Service NSW.

Note— See clause 6.4.

- (2A) An authorised worker does not require a permit for the provision of an emergency service.

⁶⁹ Plaintiffs' Summons dated 3 September 2021, Orders Sought, [1(b)].

- (3) An authorised worker who is at least 16 years of age must not leave the area of concern for work unless the worker—
 - (a) has had at least 1 dose of a COVID-19 vaccine, or
 - (b) has been issued with a medical contraindication certificate.
- (3A) The authorised worker, when leaving the area of concern for work must—
 - (a) carry the required evidence, and
 - (b) produce the required evidence for inspection if requested by—
 - (i) the worker’s employer, or
 - (ii) the occupier of the worker’s place of work, or
 - (iii) a police officer, or
 - (iv) an authorised officer.

(3B), (3C) (Repealed)

(3D) This clause does not apply to a person if the person has not been in the area of concern during the previous 14 days.

(4) In this clause—

authorised worker means a person who is authorised to work outside the area of concern because of an exemption under Part 7.

Note 1— A list of authorised workers is published on the NSW government website www.nsw.gov.au.

Note 2— See clause 5.8 for additional restrictions for workers who reside in an area of concern and who work on a construction site in Greater Sydney.

required evidence means—

- (a) evidence showing the worker’s name and place of residence, and
- (b) the worker’s vaccination evidence; and
- (c) a permit issued by Service NSW, if required.

41 The following expressions are defined in Schedule 4 (Dictionary) of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW):

- (a) **area of concern** means an area identified as an area of concern in Schedule 1 (which lists Bayside, City of Blacktown, Burwood, City of Campbelltown, Canterbury-Bankstown, Cumberland, City of Fairfield, Georges River, City of Liverpool, City of Parramatta, Strathfield and certain parts of the City of Penrith as areas of concern);
- (b) **medical contraindication certificate** means a certificate issued by a medical practitioner—(a) in a form approved by the Chief Health Officer, and (b) certifying that because of a specified medical contraindication, the person to whom the certificate has been issued cannot have a COVID-19 vaccine.

- (c) **vaccination evidence** for a person means— (a) evidence from the Australian Immunisation Register that the person has had 1 or 2 doses of a COVID-19 vaccine (Example— An online immunisation history statement or COVID-19 digital certificate from the Australian Immunisation Register.), or (b) a medical contraindication certificate issued to the person.

42 Clause 1.8 of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) contains the Minister’s specified grounds for concluding that there is a risk to public health and, accordingly, his reasons for making the order:

1.8 Grounds for concluding that there is a risk to public health

It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—

- (a) public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, which is a condition caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),
- (b) COVID-19 is a potentially fatal condition and is highly contagious,
- (c) a number of cases of individuals with COVID-19 have recently been confirmed in New South Wales and other Australian jurisdictions, including by means of community transmission, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales.

Anticipated Public Health Order in Relation to Teachers

43 The Third Plaintiff is a teacher and is employed by the Department of Education (NSW).⁷⁰ At the time of filing the Summons, there was no specific public health order in force that related to her profession which sought to impose a requirement that teachers be vaccinated. However, she had been informed by her employer on 27 August 2021 that ‘by 8 November all NSW public school and preschool staff will be required to be fully vaccinated’.⁷¹ The Third Plaintiff does not consent to being vaccinated.

44 On the basis of this clear, unequivocal statement of the Minister’s intentions, and on the basis that public health orders imposing vaccination requirements on certain classes of people had already been made, the Third Plaintiff sought in the Plaintiffs’ original summons an order in the nature of prohibition expressed in the terms that the

⁷⁰ Affidavit of Julie Ramos dated 3 September 2021, [4].

⁷¹ Affidavit of Julie Ramos dated 3 September 2021, [8], Exhibit JR-1.

Minister 'be prohibited from making any such further order under section 7 of the *Public Health Act 2010* (NSW), of a similar nature to the Impugned Public Health Orders, that is to apply to a person who works in a school.⁷²

Plaintiffs' Proposed Amended Summons

45 The Plaintiff seeks leave to amend their summons on the basis that the Minister made the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) made on 23 September 2021, as had been contemplated originally by the Third Plaintiff and by the Plaintiffs' original summons. The proposed amended summons was filed and served on 24 September 2021. The proposed amendments seek to impugn clause 4 of the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW), which is reproduced in full below:

4 Education and care workers must be vaccinated

- (1) The Minister directs that an education and care worker must not carry out relevant work on or after 8 November 2021 unless the worker has—
 - (a) had 2 doses of a COVID-19 vaccine, or
 - (b) been issued with a medical contraindication certificate.
- (2) The Minister directs that an education and care worker must provide the worker's vaccination evidence if requested by—
 - (a) a responsible person, or
 - (b) a person authorised by a responsible person.
- (3) The Minister directs that each responsible person for an education and care worker must take all reasonable steps to ensure that the education and care worker complies with the directions of this clause.
- (4) This clause does not apply to an education and care worker who carries out relevant work in an emergency.
- (5) In this clause—

vaccination evidence for an education and care worker includes, until the beginning of 8 November 2021—

 - (a) evidence from the Australian Immunisation Register that the worker has had 1 dose of a COVID-19 vaccine, and
 - (b) evidence of an appointment to receive a COVID-19 vaccine.

46 The object of the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) is contained in an 'Explanatory Note' on the cover page of the order, which states:

⁷² Plaintiffs' Summons dated 3 September 2021, Orders Sought, [3].

The object of this Order is to require certain education and care workers to be vaccinated against COVID-19.

47 Clause 3 of the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) contains the Minister's specified grounds for concluding that there is a risk to public health and, accordingly, his reasons for making the order:

3 Grounds for concluding that there is a risk to public health

It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—

- (a) public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, which is a condition caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),
- (b) COVID-19 is a potentially fatal condition and is highly contagious,
- (c) a number of cases of individuals with COVID-19 have recently been confirmed in New South Wales and other Australian jurisdictions, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales, including by means of community transmission,
- (d) the risk of transmission, including by means of community transmission, of COVID-19 in New South Wales will remain significant and ongoing unless more COVID-19 vaccines are administered,
- (e) there is a risk of transmission of COVID-19 among children at government schools, non-government schools and early education and care facilities because the COVID-19 vaccine is currently not available for children of certain ages.

48 The Minister opposes the Plaintiffs' application for leave to amend their summons on the basis that the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) raises different issues falling within the scope of the Plaintiffs' original summons. It is submitted that the Plaintiffs should be given leave for the following reasons:

- (a) The Minister has been on notice that the Third Plaintiff raised issue with the anticipated *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) since the Plaintiffs filed their original summons on 3 September 2021;
- (b) The *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) takes form as anticipated and is expressed in largely

similar (if not identical) terms as the Impugned Public Health Orders specified in the Plaintiffs' original summons;

- (c) The issues raised in the Plaintiffs' claim have in no way materially altered now that the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) is in operation. The proposed amendments to the Plaintiffs' summons merely set out that which was originally contemplated;
- (d) The Plaintiffs' claims do not depend on, and do not raise any issue in relation to, a point of distinction that may be made in relation to the *type* of worker in relation to whom the impugned public health orders, including the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW), apply;
- (e) There is no evidence before the court, adduced by either the Plaintiffs or the Minister, that suggests that there are material points of distinction between *types* of workers who are subject to various public health orders that impose vaccination requirements in the work place such that the potential outcomes of this litigation in relation to each set of public health orders will possibly be different;
- (f) The *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) purports to apply to teachers in both government and *non-government* schools. In that regard, no point of distinction can be made in relation to the legality of this public health order on the basis that it is restricted to the application of government employees only;
- (g) If leave is not granted, the Third Plaintiff would be put in the position of having to argue in relation to the legality of an anticipated hypothetical public health order that is now no longer anticipated nor hypothetical – it has manifested into reality. It would be an absurd state of affairs for the Third Plaintiff now to press with her claim on the original basis in these circumstances;
- (h) The Third Plaintiff should not be prejudiced by the unilateral action of the Minister in issuing the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW), such that the Minister, by making that public health order *after* the prohibition order, can end the Plaintiffs' proceedings on a technicality; and

- (i) It would be unfair for the Minister to require the Third Plaintiff to discontinue her claim and issue a fresh summons that will raise issues that are in substance no different to what was originally contemplated.

49 Accordingly, it is submitted that leave ought to be granted to the Plaintiffs to amend their summons as proposed.

EVIDENCE RELIED UPON

50 There are seven lay witness affidavits and three expert witness affidavits relied upon. They are:

- (a) Affidavit of Natasha Henry, first plaintiff, sworn 3 September 2021;
- (b) Affidavit of Selina Crowe, second plaintiff, sworn 3 September 2021;
- (c) Affidavit of Julie Ramos, third plaintiff, sworn 3 September 2021;
- (d) Affidavit of Hohepa Waapu, fourth plaintiff, sworn 3 September 2021;
- (e) Affidavit of Kamran Khan, fifth plaintiff, sworn 3 September 2021;
- (f) Affidavit of Sandi Greiner, sixth plaintiff, sworn 3 September 2021;
- (g) Affidavit of Nathan Buckley, solicitor, sworn 16 September 2021;
- (h) Affidavit of Dr Christina H Parks sworn 16 September 2021;
- (i) Affidavit of Dr Geert Vanden Bossche sworn 16 September 2021; and
- (j) Affidavit of Christina H Parks sworn 26 September 2021.

The First Plaintiff

51 The First Plaintiff has worked as an aged care worker for over 30 years. She was employed by Ferros Care Residential Village in Byron Bay, NSW. She and her partner have 9 children, one of whom is dependent upon her income. She made an informed choice not to submit to a COVID-19 vaccination as she is concerned about possible side effects on her short term and long-term health. On 13 August 2021 her employer told her that COVID-19 vaccines would be mandatory for aged care workers from 17 September 2021.

52 The threat of losing her job if she chose not to be vaccinated caused her anxiety, distress and grief which affected her health adversely. She does not know how she will survive financially as she is a New Zealand citizen and ineligible for Centrelink. Her family are entirely dependent upon her income as her partner was stood down due to Covid. She suffered depression following her daughter's suicide and fears a relapse

if she loses her job. She takes Covid-19 restrictions seriously, complying with social distancing and masking etc.

- 53 Given her previous mental health issues, two heart attacks and high blood pressure, she does not want to take the vaccine when the long-term side effects are unknown. She is concerned about taking the vaccine due to her medical history. She does not believe she will find alternative employment due to the length of time she has worked in the aged care sector. She believes she has the right to informed consent to medical treatment without the threat of losing her employment if she declines the medical treatment. She was not consulted by her employer or government representatives prior to the Minister making the *Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW)* which required at least one dose of vaccination by 17 September 2021 for aged care workers. Had she been consulted about the mandatory vaccination order, she would have said that she does not want the vaccine due to her medical history, as she is concerned about a heart attack or blood clot. She can no longer work in an aged care facility.

The Second Plaintiff

- 54 The Second Plaintiff was employed by Uniting (NSW.ACT) ASNC as an aged care worker and team leader at an aged care facility in Nambucca Heads in NSW. She is a single parent widow with two daughters. She lives in rented premises with her eldest daughter. She made an informed choice not to submit to a COVID-19 vaccination and wishes to wait before making a decision to take the vaccine until the long-term effects of the vaccination are known. She is concerned by the fact the Government says vaccination is voluntary but at the same time, she will lose her job if she doesn't take the vaccine. She asked her employer what will happen to her employment if she doesn't take the vaccine and was informed that her employment would be terminated.
- 55 The threat of losing her job if she is not vaccinated caused her anxiety, distress and grief. She does not know how she will pay for her rent and bills. At 48 years of age, she does not know how she will find alternative comparable employment. She obtained casual employment at Coles Supermarket, but her income is substantially reduced. She was not consulted by her employer or government representatives prior to the Minister making the *Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW)* which required at least one dose of vaccination by 17 September 2021 for aged care workers. Had she been consulted about the mandatory vaccination order, she would have said that she does not want the vaccine because she is concerned about

its effect on her immediate and long-term health. She can no longer work in an aged care facility.

The Third Plaintiff

56 The Third Plaintiff is a teacher employed by the NSW Department of Education and holds a Bachelor of Teaching degree. She is married with 3 dependent children who rely on her income. She made an informed choice not to submit to a COVID-19 vaccination, is concerned about the short and long-term effects of the vaccination and the fact that no long-term safety data exists in respect of the vaccine. As a child, she experienced an allergic reaction to a vaccine.

57 The threat of losing her job if she is not vaccinated has caused her significant distress. At 42 years of age, she does not believe she will be able to obtain the same level of income without significant retraining. On 27 August 2021, she heard the Premier and the Education Minister announce that it will be mandatory for teachers to be fully vaccinated by 8 November 2021. She informed her employer in writing about her mental health decline following the announcement about mandatory vaccination. She was not consulted by her employer prior to this announcement, nor offered alternatives to vaccination like Rapid Antigen Testing. Had she been consulted, she would have said that she does not want to take the vaccine because of the specific risk it may pose to her health given her previous allergic reaction. At the time the proceeding was issued on 3 September 2021, she sought an order prohibiting the making of any further orders pursuant to s 7 of the *Public Health Act 2010* (NSW) of a similar nature to the Impugned Public Health Orders as applicable to a person who works in a school. On 23 September 2021, the Minister issued the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) the effect of which means that if she is not fully vaccinated by 8 November 2021, she cannot work as a teacher at a school.

The Fourth Plaintiff

58 The Fourth Plaintiff was employed as a cleaner by the City of Sydney Council. He is separated, has 5 children including a stepson, none of whom are dependent upon him. He is an authorised worker who lives in a local government area of concern. His employer told him that he had until 6 September 2021 to take the Covid-19, or he cannot come to work.

59 He does not want to take the vaccine. He made the decision not to be vaccinated. He is concerned that there is no long-term safety data as to its long-term side effects and

that no one is willing to accept liability if he suffers an adverse reaction and or is injured by the vaccine.

60 He is concerned that at the age of 59 years, he will not find alternative employment, will have to use his leave benefits and then he may be at risk of starvation and homelessness.

61 He was not consulted by his employer or government representatives prior to the Minister making the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) which required at least one dose of vaccination by 30 August 2021 (amended to 6 September 2021) for authorised workers who live in a local government area of concern. Had he been consulted about the mandatory vaccination order, he would have said that he does not want the vaccine because he is concerned about unknown risks.

The Fifth Plaintiff

62 The Fifth Plaintiff was employed as an apprentice mechanic by Autosports Group Ltd. He is married with two children and his family are solely dependent upon his income.

63 On 30 August 2021 his employer told him that because he lives in an area of concern and is an authorised worker who has not had the Covid-19 vaccine, he will be stood down without pay. He chose not to submit to a COVID-19 vaccination because he is a healthy young man, there is no long-term safety data regarding the vaccine, no one is willing to accept liability if he suffers an adverse reaction and or becomes ill and he believes he shouldn't be forced into a medical procedure under threat of removal of his livelihood.

64 The threat of job loss has caused him serious distress and he fears starvation and homelessness as a result. If he is unable to work, he will not be able to complete his training to be a licensed technician. He has no other skills and fears he won't be able to find another job because he lives in the Fairfield local government area, which is a local government area of concern.

65 He was not consulted by his employer or government representatives prior to the Minister making the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) which required at least one dose of vaccination by 30 August 2021 for authorised workers who live in a local government area of concern. Had he been consulted about the mandatory vaccination order, he would have said that he does not want the vaccine because he is concerned about its side effects.

The Sixth Plaintiff

- 66 The Sixth Plaintiff has been employed as an aged care worker by Mission Australia at the Annie Green Court aged care facility for the last 9 years. He is married with one daughter. His family are solely dependent on his income as his wife is currently on maternity leave. He was stood down from his job on 31 August 2021 and physically escorted from the building where he worked. His employer told him that if he didn't take the vaccine, he'd lose his job. He does not want to take the vaccine in circumstances where there is no long-term clinical data as to its side effects and when no one has to compensate him if he is injured by the vaccine. He believes vaccines are voluntary and is very concerned about taking a vaccine that doesn't prevent him from catching the disease or passing it onto other people.
- 67 He considers himself to be a healthy person who is not in a 'high risk' category likely to be severely affected by Covid-19. He was not consulted by his employer or government representatives prior to the Minister making the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) which required at least one dose of vaccination by 17 September 2021 for aged care workers. Had he been consulted about the mandatory vaccination order, he would have said that he does not want the vaccine because he is concerned about the risk it poses to his immediate and long-term health. He can no longer work in an aged care facility.

Mr Buckley

- 68 Mr Buckley is the instructing solicitor for the Plaintiffs. He deposes to a number of matters and exhibits a number documents relevant to this proceeding, including the following evidence:
- (a) During a press conference on 31 August 2021, the Minister made comments in relation to the Covid-19 pandemic and the need for people to get vaccinated. Included in those comments were the Minister's words '*if we fail to get vaccinated, then we're putting our families at risk, we're putting our community at risk, we're putting front line health staff at risk ... Not getting vaccinated is actually self-entitled and indulgent in the extreme in the middle of a pandemic. Go and get vaccinated and be fair to the rest of your community.*'
 - (b) During an interview on live television, the Premier said, in relation to Covid-19 vaccinations, '*...we weren't able to make the vaccines mandatory. It was actually not in our power to do that.*'

- (c) The Department of Health (Cth) has issued vaccine information fact sheets for recipients and caregivers about Covid-19 vaccines.
- (d) The Australian Immunisation Handbook produced by the Commonwealth of Australia for health service providers advises such providers in relation to the meaning of what constitutes valid consent by a patient in relation to whom vaccinations are proposed to be administered. It states that *'valid consent is the voluntary agreement by an individual to a proposed procedure, which is given after sufficient, appropriate and reliable information about the procedure, including the potential risks and benefits, has been conveyed to the individual'*. It further states that amongst the criteria for valid consent is a specific requirement that consent to vaccination *'must be given voluntarily in the absence of undue pressure, coercion or manipulation'*.
- (e) The *Code of Conduct for Doctors in Australia*, published by the Medical Board of Australia, contains rules relating to how doctors are to treat their patients. Included in that Code is a section that prescribes professional conduct that must be observed when dealing with patients. Clause 4.5 of the Code relates to 'informed consent'. It states that informed consent *'is a person's voluntary decision about medical care that is made with knowledge and understanding of the benefits and risks involved'*. It further states that good medical practice involves *'[o]btaining informed consent from the patient ... before you undertake any examination, investigation or provide treatment...'*.
- (f) During an interview with MSNBC, Dr Anthony Fauci, Chief Medical Advisor to the President of the United States stated, among others, *'the data were clear, now that we have a delta variant that has changed the entire landscape because when you look at the level of virus in the nasal pharynx of a vaccinated person who gets a breakthrough infection with delta, it is exactly the same as the level of virus in an unvaccinated [person].'*
- (g) The *Australian Immunisation Handbook*⁷³ provides that there is insufficient evidence to ensure the safety of live vaccines during pregnancy and advises that women ought not become pregnant within 28 days of receiving live viral vaccines.

⁷³ Exhibit NB-10.

Dr Bossche (Expert)

69 A summary of the evidence of Dr Bossche, as outlined in his report dated 16 September 2021, is provided in the table below.

Excerpts	Report Page	Affidavit Page
The vaccinated are currently as likely as the unvaccinated to become infected by the Delta variant	8	11
Expansion of mass vaccination campaigns will eventually breed viral variants that resist vaccinal anti-S antibodies and cause a sharp rise in morbidity and mortality rates in vaccinated persons	5	8
The Covid-19 vaccines cannot generate herd immunity	8	11
<i>Mass</i> vaccination will even enable the population to promote the expansion of these more infectious variants in the community	8	11
The vaccinated part of the population increasingly serves as a breeding ground for more infectious variants, thereby enabling their fast and dominant propagation in the population (e.g., Delta variant)	8	11
The Delta variant of SARS-CoV-2, (B.1.617.2), now accounts for essentially all cases worldwide including NSW	17	20
Delta is more infectious than the Alpha strain (B.1.1.7) that prevailed in the UK from January to May 2021 (and in the US from March to June 2021), meaning that Delta is passed more readily from person-to-person than the previous dominant strain	17	20
In countries where the Delta variant has become dominant, the C-19 vaccines are no longer sufficiently effective in preventing mild or moderate infection and even cases of severe disease have been on the rise despite high or increasing vaccine coverage rates (e.g., Israel, UK, USA, and in several European countries). Claims on the vaccine have steadily been flawed as a result of the evolutionary dynamics of the virus.	8	11
Widespread deployment of current Covid-19 vaccines in large-scale vaccination campaigns is far and foremost to be considered highly experimental and empirical, both from an effectiveness and safety viewpoint as well as from a viewpoint of both individual and public health safety viewpoint.	12	15
Because the experimental use of current Covid-19 vaccines raises serious concerns with regard to their effectiveness and are highly likely of causing serious harm to both public and individual health, one can only conclude that mandated vaccinations are completely unreasonable.	12	15

Excerpts	Report Page	Affidavit Page
The ongoing mass vaccination campaigns are, therefore, exposing the population to a high risk for contracting severe Covid-19 and dying of the disease.	12	15
Excellent scientific research papers published or posted in August 2021 clearly demonstrate that current vaccines do not prevent transmission of SARS-CoV-2.	17	20
Vaccines aim to achieve two purposes: a. To protect the vaccinated person against the illness; and b. To keep people from carrying the infection and transmitting it to others. If enough people are vaccinated or otherwise become immune, it is hoped that viral transmission will decrease strongly enough for the disease to stop circulating. We call this herd immunity.	17	20
Unfortunately, purpose b. will no longer be achievable under the Delta variant of SARS-CoV-2.	17	20
Prior to the start of this universal vaccination program, no single publication existed that came even close to suggesting that mass vaccination campaigns using non-transmission-blocking vaccines could be successful in extinguishing a pandemic of a highly mutable virus, let alone if several more infectious variants had already expanded in prevalence.	10	13
Under Delta, natural immunity is much more protective than vaccination.	23	26
Natural immunity from previous COVID-19 infection confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2 compared to the BNT162b2 two-dose vaccine-induced immunity.	23	26
Those who were vaccinated but never had COVID-19 disease were 13 times more likely to develop a new SARS-CoV-2 infection than those made naturally immune by COVID-19 disease.	23	26

Dr Parks (Expert)

70 A summary of the evidence of Dr Parks, as outlined in her report dated 16 September 2021, is provided in the table below.

Excerpts	Report Page	Affidavit Page
Not all vaccines are designed to prevent transmission	5	8
The currently available Covid vaccines were not designed to prevent transmission of SARS CoV-2. The claim of 95%	5-6	8-9

Excerpts	Report Page	Affidavit Page
effectiveness does not apply to preventing transmission but at attenuating symptoms and only for the first variant		
Vaccine effectiveness against any symptomatic disease is considerably lower against the delta variant and may wane over time	7	10
Currently available vaccines do not contribute to herd immunity	7	10
Those who contracted the first SARS virus still have natural immunity 17 years after infection	7	10
Those who have contracted and recovered from infection with SARS CoV-2, have durable immunity against current variants incubating and all future variants as well	8-9	11-12
The study from Israel showed that persons who were vaccinated were 13 times more likely to catch the delta variant than those already naturally immune	9	12
In a highly vaccinated population, variants that are able to escape the vaccine will quickly become the predominant variants	9	12
Vaccinated people infected with the delta variant carry 251 times the viral load of those infected with previous variants. The unintended consequence of the vaccine is that the vaccinated may become super spreaders when they contract new variants	9	12
New data suggests that the delta variant may be in the process of mutating into an escape variant that the vaccine is not effective against	9-10	12-13

GROUND 1

Jurisdictional Error and Ultra Vires

71 The concepts of *ultra vires* and *jurisdictional error* are now used interchangeably. An allegation that a person purporting to exercise public power acted *ultra vires*, or that their decision was affected by *jurisdictional error*, effectively involves the same allegation that the person acted without legal power. As Aronson, Groves and Weeks state:⁷⁴

⁷⁴ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Act and Government Liability* (2017, Lawbook Co, 6th ed) 19, citing *Enfield City Corp v Development Assessment Commission* (2000) 199 CLR 135 at 145; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 91 [16]; *David Jones Finance & Investments Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 484 at 499; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*

Most judgments today either use *ultra vires* and jurisdictional error interchangeably, or else differentiate between the two only on grounds of common usage. Any distinction has become purely semantic, and since *Kirk v Industrial Court (NSW)*, we can expect “jurisdictional error” to become the dominant conclusory term.

72 In *Craig v South Australia* (1995) 184 CLR 163, the High Court held:⁷⁵

Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers. An inferior court would, for example, act wholly outside the general area of its jurisdiction in that sense if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge. Such a court would act partly outside the general area of its jurisdiction if, in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach. Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the

(2002) 123 FCR 298 at 426; *Koulaxazov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 79 at 104.

⁷⁵ *Craig v South Australia* (1995) 184 CLR 163 at 176-180. The same notion of jurisdictional error is equally applicable to administrative decision-makers sitting within the executive arm of government, such as a government minister. See, for example, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.

- 73 In relation to Ground 1, the Plaintiffs' claim is put on the basis that, in making the Impugned Public Health Orders, the Minister acted wholly or partly outside the general area of his jurisdiction that is conferred by s 7 of the *Public Health Act 2010* (NSW). That is to say, the Minister, by entertaining issues and making orders that imposed vaccination requirements, and further orders that were designed to enforce those vaccination requirements, acted outside his general discretionary power under s 7. By necessary implication, the Minister must have misconstrued s 7 and misconceived the nature of the function he was performing, and the extent of his power, when making the Impugned Public Health Orders.

Legality

- 74 A public official, including a government Minister, has no power to make any kind of decision which impacts on the rights, interests and legitimate expectations of private citizens unless permitted to do so by the law.⁷⁶
- 75 There is no such thing as 'unfettered power' in the exercise of administrative discretion conferred by law. Even if the discretion is expressed very generally, with reference to the subjective views of the decision-maker, the discretion will be constrained by the operation of legal principle.⁷⁷ In particular, the law will always imply an obligation that the decision-maker exercise the power reasonably. In *Kruger v Commonwealth* (1997) 190 CLR 1 at 36, Brennan J held:⁷⁸

[W]hen a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

- 76 Broad discretions conferred by parliament must be interpreted to determine their legal limits. Principles of statutory interpretation require the court to determine the legal limits of the discretionary power not only by reference to the plain and ordinary language used (which might suggest a very wide discretion) but with reference to:

⁷⁶ *Entick v Carrington* [1765] EWHC KB J98.

⁷⁷ *Wotton v Queensland* (2012) 246 CLR 1 at 10

⁷⁸ See also *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 532; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 447; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [54]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 645; and *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348–350, 362–364, and 370–371; *Sharp v Wakefield* [1891] AC 173 at 179.

- (a) the objects, purposes, subject matter and scope of the statute under which the power is conferred (limitations may be placed on the exercise of the discretion, and the sorts of decisions that can be made, when regard is had to the legislation as a whole);⁷⁹
- (b) the presumption that parliament would not have intended for a general discretion to be exercised in a manner that violates fundamental rights and interests, unless parliament's intention to confer such a power is unmistakably clear.⁸⁰

77 Clear words are needed to take away the right to silence, the privilege against self-incrimination, freedom of movement, the right to bodily integrity, security of property, and other fundamental rights and privileges. In *Coco v R*, the High Court held:⁸¹

The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

78 In *R v Secretary for State for Home Department v Simms*, Lord Hoffman held:⁸²

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept

⁷⁹ *R v Secretary for State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131; *Sharp v Wakefield* (1965) 113 CLR 177, 189 ('a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself'); *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368; *Li* (2013) 249 CLR 332, 366 [72].

⁸⁰ *Coco v R* (1994) 179 CLR 427 at 418-419; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 and 592-593; *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at 591-592; and *Momcilovic v R* (2011) 245 CLR 1 at 46-47 and 177-178; *X7 v Australian Crime Commission* (2013) 248 CLR 92; and *Lee v New South Wales Crime Commission* (2013) 251 CLR 196;

⁸¹ *Coco v R* (1994) 179 CLR 427 at 418-419.

⁸² [2000] 2 AC 115, 131-2.

the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

79 And in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, Gleeson CJ held:⁸³

The presumption is not merely a common-sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

Construing the Legal Limits of Section 7

80 The ordinary and natural meaning of the language used in s 7(2) of the *Public Health Act 2010* (NSW) appears to suggest that Parliament intended to confer a wide discretion on the Minister to deal with situations involving a risk to public health in that he *may* make directions *as [he] considers necessary* to deal with the risk to public health that a particular situation represents.

81 The discretion appears to be expressed as depending on the *subjective* viewpoint of the Minister. However, the law will 'read in' to the legislative provision an obligation to act *reasonably* in the exercise of that discretion. That means the concept of *necessity* must be considered with reference to objective considerations.

82 The word *necessary* is not defined in the *Public Health Act 2010*. The *Oxford English Dictionary* states that *necessary* is an adjective that means '[i]ndispensable, vital, essential; requisite'.⁸⁴ Directions contained in public health orders under s 7 must therefore be reasonably necessary, or indispensable, vital, essential or requisite, to deal with the risk to public health that a particular situation represents.

⁸³ (2004) 221 CLR 309, 329. See also *DPP v Kaba* [2014] VSCA 52 ('Under the ancient traditions of the English common law, the freedom of the individual has been protected against infringements by public officials under the twin doctrines that every citizen is free to carry on any activity not expressly limited or prohibited by law, and that public officials may only interfere with a citizen's personal liberty and property where authorised by the common law or by statute.')

⁸⁴ "necessary, adj. and n." *OED Online*, Oxford University Press, September 2021, www.oed.com/view/Entry/125629. Accessed 26 September 2021.

- 83 The expression *necessary*, even when constrained by the requirement of *reasonableness*, and informed by a standard dictionary definition, remains inherently vague and ambiguous. There is, potentially, an endless amount of directions that could be conceived of as falling within the general ambit of the discretion.
- 84 Section 7(3) elucidates the meaning of the general discretion by specifying contemplated situations in which the discretion could properly be exercised. Although the list of specified situations does not purport to be exhaustive, the specific types of direction that Parliament has listed in that subsection suggests that Parliament intended to limit the power to similar kinds of situation. In that regard, the following observations may be made:
- (a) Section 7(3) contemplates *any part* of the state to be a *public health risk area* and that directions of a general nature may need to be given that apply to people going about their ordinary business in that area. A disease outbreak in a particular area is the most obvious example having regard to the subject matter of the current proceedings. However, situations involving a toxic spill or other kind of unexpected environmental catastrophe affecting a discrete area are also clearly contemplated situations.
 - (b) A direction to ‘reduce or remove any risk to public health in the area’, contemplated under s 7(3)(a), might involve the Minister issuing a direction to public officials or private citizens to assist in removing something that appears to be contributing to the ongoing risk to the public (e.g. a contaminated water tank, or decaying animal carcasses).
 - (c) A direction to ‘segregate or isolate inhabitants of the area’, contemplated under s 7(3)(b), might involve the Minister directing persons to remain in their houses, or segregate themselves from others, on the basis that some people might have been exposed to a disease or some kind of toxic chemical and others were not.
 - (d) A direction to ‘prevent, or conditionally permit, access to the area’, contemplated under s 7(3)(c), suggests a situation where the area of sufficient concern is so exposed to a risk that the Minister must prevent access to the area completely (e.g., in the case of a toxic spill where exposure to chemical fumes may be lethal, whether in a particular geographical area or a building), or may instead permit limited access if certain conditions are met (e.g. by creating an ‘exceptional circumstances’ exception that permits certain people temporary access to the affected area for specified reasons).

(e) The proposition that s 7(3)(c) enables the Minister to impose a condition that a person undergo medical treatment, in the nature of vaccination, before they can access a certain area, may appear, at first glance, to fall literally within the scope of the words. However, it is a strained application of s 7(3)(c) and has no intuitive appeal. That is because the general discretionary power appears to have been conferred to enable the Minister to issue directions that allow for the swift execution of directions designed to immediately limit the movements and access of people to 'at risk' areas during the immediacy of a short-lived contemplated public health crisis. What it does not obviously contemplate is a situation where the Minister can use the power to issue directions requiring persons, over a protracted period of several weeks, to undergo medical treatment in the nature of vaccinations so that those persons will present as less of a risk to others because they are vaccinated.

85 The objects of the Act, as contained in s 3, suggest that the discretion under s 7 must be used to promote, protect and improve public health, to control the risks to public health, to promote the control of infectious diseases and to prevent the spread of infectious diseases. Section 3(2) suggests that health and safety to the public is to be the paramount consideration in exercising the discretion. Those objectives are certainly reflected in the language of the s 7 discretionary power itself – the discretionary power can only be exercised to reduce the risk to public health that a situation represents.

86 Having regard to the above, it is reasonable to infer, without more, that placing restrictions on the individual liberties of persons, with respect to their freedom to move to and from specific areas, was obviously contemplated and intended by the conferral of the s 7 power. However, such restrictions would appear to have only ever been intended to be temporary in nature having regard to the 90-day time limit of orders contained in s 7(5). There is no scope for exercising the power in a manner that imposes a requirement that a person undergo medical treatment, permanent in nature, by way of vaccination and further orders that would enforce a vaccination requirement.

87 That conclusion of the limited scope of operation of s 7 is reinforced when regard is had to s 8. Whereas s 7 does not expressly contemplate powers being exercised that involve coercive medical interventions being deployed, s 8 clearly does. A situation involving the exercise of the s 8 discretion is clearly more grave because it occurs in a state of emergency. Only in that situation did Parliament intend for the Minister to exercise powers that might require a person to be subjected to medical intervention. But even in that scenario, Parliament stopped short of empowering the Minister under

s 8 to direct that a person undergo medical *treatment*. The only coercive power in the nature of medical intervention is to direct that a person undergo medical *examination*. Medical *examination* does not include injecting a person with a vaccine.⁸⁵

88 Having regard to the comprehensiveness of the Act in other respects, and the matters it deals with, the only sensible conclusion that can be drawn is that the Impugned Public Health Orders are not within the scope of the s 7 discretionary power. In particular, regard should be had to the following:

- (a) Covid-19 is specified as a Category 2, 3 and 4 disease. The risks that certain people might represent to the community in relation to Covid-19, and how such people might be dealt with, are matters addressed in Part 4 of the Act.
- (b) Under s 61, the Secretary has the power to direct a person suspected of having Covid-19 to undergo a medical examination or testing in relation to the condition. Parliament has refrained from conferring a power on the Secretary to direct a person to undergo medical *treatment* for a Category 4 disease.
- (c) The only person under the Act who is reposed of any kind of power to direct that a person under medical *treatment* is an authorised medical practitioner. An authorised medical practitioner has the power under s 62 of the Act to make a public health order in relation to a person who has Covid-19. Such a public health order can include a requirement that the person to whom the order is directed under 'specified treatment'.⁸⁶ One may presume that this may include any kind of medical treatment. However, Parliament has been very clear in specifying the limited circumstances in which these kinds of public health order can be made. In that regard:
 - (i) a precondition for the valid exercise of the power is that the person *has* Covid-19 or *has been exposed* to it, and the person is, because of their behaviour, a risk to public health;
 - (ii) the Parliament refrained from conferring a power on the authorised medical practitioner to impose such an order on a person who does not have Covid-19 but, by their mere existence in an unvaccinated state, represent a risk to public health;

⁸⁵ *Fernando v Commissioner of Police* (Supreme Court of New South Wales Court of Appeal, CA 40761 of 1994, 29 March 1995).

⁸⁶ *Public Health Act 2010* (NSW), s 62(3)(b).

- (iii) there is an express obligation on the part of the authorised medical officer to place significant consideration on a persons' fundamental right to liberty before making such an order;
- (iv) there is a right of appeal conferred on any person who is made subject to a s 62 order.

89 There is no scope for the Minister to use his s 7 discretionary power to impose a vaccination requirement:

- (a) It is not necessary for a human being, free of disease and disability, to be subjected to any kind of medical treatment.
- (b) It defies common sense to conclude that Parliament has reposed in the Minister a general discretion that would allow him to direct large cohorts of the public, by reason of their vocation, to subject themselves to a certain kind of medical procedure. The Minister lacks the necessary qualifications to make such a decision. Medical intervention must be carefully tailored to each and every person by a qualified medical practitioner, as Parliament clearly contemplated when it reposed such power in an authorised medical practitioner. That power is to be exercised without reference to any political considerations. There is no scope for the Minister to give any kind of direction under any provision of the Act, least of all under s 7, that involves the imposition of a requirement that a person undergo a certain kind of medical intervention.
- (c) The Minister has acted in defiance of Parliament's intention. He has usurped the authorised medical practitioner's function contemplated by the Act. He has usurped the role of Parliament in deciding who is conferred such coercive power.

90 There is no scope for the Minister to use his s 7 discretionary power to make directions that are designed to enforce a vaccination requirement. These directions include all those relating to the gathering and producing of vaccination evidence:

- (a) Enforcement orders of this nature are not, on any basic interpretation, *necessary* to reduce the risk that Covid-19 represents to the public. At most, they are *incidental* or *convenient* to a vaccination requirement. Section 7 does not repose in the Minister a general discretion to make *incidental* or *convenient* orders attached to *necessary* orders (cf. the regulation making power under s 134).

- (b) The enforcement provisions relating to s 7 orders are dealt with comprehensively in other parts of the Act. The general enforcement provisions throughout the Act are comprehensive. There is no scope for the Minister to create his own enforcement provisions.

Rights Violations

- 91 The Impugned Public Health Orders violate a number of fundamental individual rights and interests, which go well beyond the temporary violations of the rights of liberty and freedom of movement obviously contemplated and intended by parliament under s 7. Parliament has not expressly abrogated these rights in clear, unambiguous language in relation to the exercise of the s 7 discretionary power.

Bodily Integrity, Liberty and Security

- 92 The common law right of the individual to decide what happens to their own body is arguably the most important human right that exists.⁸⁷ That right is reflected in international law.

- 93 Article 9(1) of the *International Covenant on Civil and Political Rights* provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

- 94 Article 10(1) of the *International Covenant on Civil and Political Rights* provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

- 95 There are very limited situations in which the law has ever allowed the coercive power of the state to be exerted over individual citizens' bodies. These situations include powers of punishment that involve significant restrictions on liberty for those who commit criminal offences against the community (e.g., imprisonment for murder, theft or fraud), and the powers to detain citizens involuntarily as mental health patients, and to administer medical treatment against their consent. In such situations, Parliament has always carefully and meticulously set out in clear and unequivocal terms the circumstances in which such coercive powers can be exercised in relation to an individual.

⁸⁷ See the discussion in *DPP v Kaba* [2014] VSC 52.

96 As a matter of ethical medical practice, and as a matter of law, it is unequivocally repugnant to require a person to subject themselves to any kind of medical treatment without that person's informed consent. Even if there are no alternative measures to curb the risk that a virus represents, the law cannot be used to impose the majority's will on a vaccination-resistant minority to force them to undergo such medical treatment. Covid-19 vaccinations constitute both medical and experimental medical interventions.

97 The burden of addressing a virulent disease should never involve the forced vaccination of perfectly healthy individuals. Their mere existence, in their natural and unvaccinated state, should not, as a matter of law, be regarded as 'a risk' that the Minister is empowered to deal with in this manner.

98 Any medical treatment, whether preventive, diagnostic or therapeutic, or experimental, can only be applied with the free, fully informed consent of the patient. The requirement that a person undergo vaccination, under threat of being deprived of their ordinary income, denies anyone, including the Plaintiffs, the ability to freely consent to the vaccination treatment if they have any reservations about having such treatment.

99 Article 7 of the *International Covenant on Civil and Political Rights* provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

100 Article 6 of the Universal Declaration of Bioethics and Human Rights states:

Article 6 – Consent

- (1) Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.
- (2) Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent. Consent may be withdrawn by the person concerned at any time and for any reason without any disadvantage or prejudice. Exceptions to this principle should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in this Declaration, in particular in Article 27, and international human rights law.

- (3) In appropriate cases of research carried out on a group of persons or a community, additional agreement of the legal representatives of the group or community concerned may be sought. In no case should a collective community agreement or the consent of a community leader or other authority substitute for an individual's informed consent.

101 Covid-19 vaccinations constitute *medical* treatment that is *experimental*. There is no scope for the s 7 power to be used to impose vaccination requirements because the general discretionary power is not accompanied by provisions that clearly abrogate the individual's rights in this respect.

Earning a Living

102 The common law has long recognised the right to earn a living in Australia, Great Britain and the United States of America.⁸⁸ The High Court of Australia has long recognised the common law right to work.⁸⁹ In *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd*, O'Connor J stated that the right of a citizen to carry on his or her business in his or her own way within the law is plainly recognised.⁹⁰

103 The right is also reflected in international law. Article 6 of the *International Covenant on Economic, Social and Cultural Rights* provides:

- (1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
- (2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

⁸⁸ See s 41 of the *Magna Carta* (1215); *John Dier's Case* 2 Y.B Henry V 26 [1415]; *Darcy v Allen* 77 Eng. Rep 1260 [1602]; *Chamberlain of London's Case* 77 Eng. Rep. 150 [1592]; *Walter v Hanger* 72 Eng. Rep. 935 [1602]; *Beall v Beck* 2 F.Cas. 1111 [1829]; *Dent v West Virginia* (129 U.S. 114 [1889] at 121); *Butcher's Union Co v Crescent City Co* (111 U.S. 746 [184]); *Connecticut v Gabbert* 526 US 826 [1999] at 292-293. See also Timothy Sandefur, *The Common Law Right to Earn a Living*, *The Independent Review*, v. III, n.1 Summer 2002 pp 69-90.

⁸⁹ *Hepples v Federal Minister of Taxation* (1992) 173 CLR 492; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Buckley v Tutty* (1971) 125 CLR 353; *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242.

⁹⁰ *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1909) 10 CLR 457.

- 104 The effect of the Impugned Public Health Orders requires the Plaintiffs to submit to Covid-19 vaccinations failing which they will be denied the ability to attend their current places of employment and thereby be deprived from earning a living.
- 105 There is no scope for the s 7 power to be used in this manner as the general discretionary power is not accompanied by provisions that clearly abrogate the individual's rights in this respect.

Discrimination

- 106 The Impugned Public Health Orders discriminate between those members of the public belonging to a particular class or group who are vaccinated and those who are not vaccinated. They impute a disability upon those members of the public who belong to a particular class or group who are not vaccinated.
- 107 Article 27(1) of the *Convention on the Rights of Persons with Disabilities* states:

Article 27 – Work and employment

- (1) States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
- (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
 - (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
 - (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
 - (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
 - (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

- (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- (g) Employ persons with disabilities in the public sector;
- (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
- (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
- (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

108 The *Disability Discrimination Act 1992* (Cth) gives effect to the Convention.⁹¹

109 Section 4 of the *Disability Discrimination Act 1992* (Cth) provides that *disability*, in relation to a person, means 'the presence in the body of organisms causing disease or illness' and includes a disability that 'may exist in the future'.⁹² The Plaintiffs, and anybody else who is capable of contracting Covid-19, fall within the ambit of this definition.

110 The objects of the *Disability Discrimination Act 1992* (Cth) include an intention on the part of the Parliament of Australia to:⁹³

- (a) eliminate discrimination against individuals on the grounds of disability including in the areas of 'work' and 'access to premises';
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community;
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

111 In *Beatty (on behalf of Kiro and Lewis Beattie) v Maroochy Shire Council* [1996] HREOCA 40, the applicant on behalf of his children contended that the children had been refused entry to a child care centre conducted by the local Council on the ground that 'they were not medically immunised'. The Hon William Carter QC found that the lack of vaccinations of the applicant children meant that they had a disability due to the

⁹¹ *Disability Discrimination Act 1992* (Cth), s 12(8).

⁹² *Disability Discrimination Act 1992* (Cth), s 4.

⁹³ *Disability Discrimination Act 1992* (Cth), s 3.

fact that they may have an infectious disease in the future. In this case, it was ultimately found that due to the operation of s 48 of the Act⁹⁴ and the expert evidence adduced by the Council, it was reasonably necessary for the protection of public health to exclude the unvaccinated children from the day care centre. The Hon William Carter QC stated (emphasis added):⁹⁵

It is clear that s 48 imposes a test of 'reasonableness' when the decision has to be made as to whether the particular discrimination is necessary to protect public health. I understand 'public health' in this context to be a reference to the general health and well being of a total community. The health of any particular individual is a personal matter and may be quite idiosyncratic. Public health, on the other hand, refers to the widespread state or level of health throughout a whole community. Whilst the health of any individual may be determined by individualistic matters of lifestyle and personal characteristics, the public or general health of a community will almost invariably be determined by matters of public hygiene and other features of life in a society which will determine the level or quality of health in that community, irrespective of the personal characteristics of the individual.

The incidence of serious infectious disease in a community is a matter relevant to public health. From experience one knows that an individual or a group of persons may fall victim to some ailment which by its very nature is said to be infectious. The illness in one person may be the source of infection in another. The seriousness of the illness and the virility of the process of infection may be such as to affect the health and well being of the wider community. On the other hand, the level of morbidity in the case of a less serious infectious illness may be seen not to raise public health issues because it is within the capacity of the individual to take appropriate remedial or preventative action.

Again, public health, as distinct from matters of private health, will raise issues of social responsibility which have to be grasped and addressed by government and semi-governmental authorities, as well as by individuals. Whilst the state of one's own health will to some extent be the responsibility of the individual and within his or her own control, matters of illness and disease may arise in a community in epidemic proportions which can only effectively be addressed by the so-called health authorities in the community and will, as a matter of community responsibility, need to be addressed because of the

⁹⁴ Section 48 provides: It provides: This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability if: (a) the person's disability is an infectious disease; and (b) the discrimination is reasonably necessary to protect public health.

⁹⁵ *Beatty (on behalf of Kiro and Lewis Beattie) v Maroochy Shire Council* [1996] HREOCA 40 at 8-12.

widespread and serious consequences for the good of the whole community. The possibility of the spread of serious infectious illnesses and diseases fall into this category, and is a matter which raises issues of public health which need to be addressed in the best interest of the community as a whole. ***Such illnesses as diphtheria, pertussis, measles and poliomyelitis are described as infectious diseases. So, too, was smallpox before it was largely eradicated. It is in this context of protecting the public health of a community that vaccination as a health measure becomes relevant and, so far as the Council is concerned, it has rightly or wrongly perceived its public duty to be to protect the public health of all children, particularly those who attend its child care centre by insisting on their vaccination against infectious diseases before admitting them.***

It is again a matter of general relevance that the spread of infectious diseases which impact on the public health of a community is facilitated by gathering people, particularly children, together in congregations such as in schools or in child care centres. ***The onset of a serious infectious disease in a community such as poliomyelitis immediately raises matters of widespread concern.*** Not only is the individual at a greater risk of infection, the likelihood of widespread infection has implications for the public health of the whole community. Because of the nature of the disease and its disabling consequences, and because of the infectious character of it, the risk that the infection may assume epidemic proportions is seen to give rise to public - in addition to private - health concerns, and so those whose statutory or other responsibilities it is to address matters of public health are required to responsibly address it by appropriate remedial and preventative action.

It is for these reasons that vaccination has been proposed as a public health measure and the advocates of vaccination, by publicity and education programmes, are intent on raising the so-called 'herd immunity' level of a community in relation to the various potential infections. ***The required level of herd immunity would be defined by experts in the medicine of infectious diseases and public health as the percentage of the target population which must be vaccinated in order to develop and so block the transmission of the target disease.***

For each infectious disease which gives rise to public health concerns there is an accepted critical level of vaccination coverage required to block transmission. For measles and pertussis this is set at 92-95% of the target population; for poliomyelitis and diphtheria, the desirable herd immunity level is 80-85%.

I am comfortably persuaded by the evidence, particularly that of the Council's witnesses, that a proper regime of vaccination will in most cases protect children against the onset of vaccine preventable illnesses and diseases, that any risks associated with side effects are heavily outweighed by the protection which vaccination affords, **and that the only practical and effective means of raising the herd immunity in any community so as to block the transmission of vaccine preventable disease is by a widespread programme of immunisation.** It follows that any measure which results in increasing vaccination levels above the critical threshold **necessary to block the transmission of disease** within the community is one which is reasonably necessary to protect public health.

- 112 The decision in *Beattie* is distinguishable from the facts in the current proceeding in one **critical** respect – there is no expert evidence before the court in this proceeding that contends that a particular *level* of Covid-19 vaccination amongst the population **will** create *herd immunity* and thereby *block transmission of the virus*.
- 113 Section 5 of the *Disability Discrimination Act 1992* (Cth) provides that a ‘person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.’ Furthermore, a person will be found to discriminate against another person on the ground of disability if:
- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person;
 - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, *because of* the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
- 114 There are two aspects to establishing direct discrimination, namely, that the applicant is treated less favourably than a person in circumstances that are not materially different and that the cause of the less favourable treatment was because of the disability.⁹⁶:

⁹⁶ See *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92 at [213]; *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; (2017) 245 FCR 247 at [33].

115 In *Purvis v State of New South Wales (Department of Education and Training)* one of the questions before the High Court was what was meant, in the context of the Act, by the proposition that there was less favourable treatment ‘because of’ a disability.⁹⁷ Although their Honours did not need to decide the point, having dismissed the appeal on other grounds, Gummow, Hayne and Heydon JJ gave guidance about the construction of the expression *because of*. Having noted differences of judicial opinion about the role of intention or motive in relation to the expression *on the ground of* their Honours stated:⁹⁸

“For present purposes, it is enough to say that we doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed “because of” disability. Rather, the central question will always be – why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it ‘because of’, ‘by reason of’, that person’s disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression ‘because of’.”

116 Section 15 of the *Disability Discrimination Act 1992* (Cth) provides that it is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person’s disability. Section 23 provides that it is unlawful for a person to discriminate against another person on the ground of the other person’s disability by refusing them access to the use of any premises.

117 The Impugned Public Health Orders amount to the Minister discriminating, and engaging third parties to discriminate, against the Plaintiffs on the basis of their unvaccinated status, in breach of sections 15 and 23. The Impugned Public Health Orders are in a form of direct discrimination because they have the effect of requiring the unvaccinated Plaintiffs to be treated less favourably than vaccinated people, by denying them access to their workplace and/or access to premises, because of their unvaccinated status. There is no applicable exemption pursuant to section 48 of the Act as contemplated by the decision in *Beattie*.

⁹⁷ *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92.

⁹⁸ *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92, [236].

118 There is no scope for the s 7 power to be used in this manner as the general discretionary power is not accompanied by provisions that clearly abrogate the individual's rights in this respect.

Conscription

119 Section 51(xxiiiA) of the *Constitution* of the Commonwealth of Australia contains an implied guarantee that no person will be subject to any legislation that purports to authorise any form of civil conscription in relation to medical or dental services. This must be taken to mean that no person, including those subject to the vaccination requirements in the Impugned Public Health Orders, can be conscripted to take part in a vaccination program amounting to a medical service provided to the public.⁹⁹ This is what the Impugned Public Health Orders purport to do.

120 There is no scope for the s 7 power to be used in this manner as the general discretionary power is not accompanied by provisions that clearly abrogate the individual's rights in this respect.

Privacy

121 A person's vaccination status is 'health information' which is *personal information* under the *Health Records and Information Privacy Act 2002* (NSW).

122 A person's vaccination status is 'sensitive information' which is health information under the *Privacy Act 1988* (Cth).

123 There are no legislative provisions in the *Privacy Act 1998* (Cth) or the *Health Records and Information Privacy Act 2002* (NSW) that compel a person to obtain, retrieve, or access their health information or personal information from the Australian Immunisation Register.

124 There is no legislative provision in the *Australian Immunisation Register Act 2015* (Cth), which compels a person to obtain/retrieve/access their personal information (which has the same meaning as in the *Privacy Act 1988* (Cth)).

125 There is no legislative provision in the *Privacy Act 1998* (Cth), or the *Health Records and Information Privacy Act 2002* (NSW) or the *Australian Immunisation Register Act 2015* (Cth) which compels a person (absent their free consent) to provide 'health information', 'sensitive information' or 'personal information' to an employer, a police officer, an occupier of a person's place of work or an authorised officer upon demand.

⁹⁹ See *British Medical Association v Commonwealth* (1949) 79 CLR 201, 253, 283.298, 293, 295.

- 126 There is no legislative provision in the *Privacy Act 1998* (Cth), or the *Health Records and Information Privacy Act 2002* (NSW) or the *Australian Immunisation Register Act 2015* (Cth) which arms a third party (employer, a police officer, an occupier of a person's place of work or an authorised officer) with the authority to demand from or compel a person to provide 'health information', 'sensitive information' or 'personal information' to the third party, when it would otherwise not be compellable at law.
- 127 The *Privacy Act 2008* (Cth) and the *Health Records and Information Privacy Act 2002* (NSW) each proscribe the manner in which organisations/entities may collect, use and disclose health information or personal information. The matters contemplated by the Impugned Public Health Orders do not fall within the purview of permitted disclosures/dealings with health information.¹⁰⁰
- 128 The Impugned Public Health Orders purport to arm the private sector (and/or police officers and various public servants) with the power to compel the provision of health information absent consent of the individual, in circumstances where health privacy legislation (referred to above) expressly sets out a statutory regime for the collection, use and disclosure of health information which is not consistent with such health privacy legislation. The Impugned Public Health Orders are inconsistent with this legislation as they seek to compel production of private health information about unvaccinated persons without the consent of such persons.
- 129 The privacy and health legislation referred to above were enacted in recognition of the right to privacy under Article 17 of the *International Covenant of Civil and Political Rights* which protects the right to privacy.

Self-Incrimination, Silence and Innocence

- 130 The privilege against self-incrimination 'deeply ingrained in the common law' is recognised by the High Court as a human right.¹⁰¹ The privilege is 'based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself'.¹⁰² The privilege prevents a person being compelled to provide documents or

¹⁰⁰ See *Privacy Act 1988* (Cth), s 16B; Health Privacy Principles as set out in Schedule 1 to the *Health Records and Information Privacy Act 2002* (NSW).

¹⁰¹ *Sorby v Commonwealth* [1983] HCA 10 at [14]; (1983) 152 CLR 281 at 309; *Rochfort v Trade Practices Commission* (1982) [1982] HCA 66; 153 CLR 134.

¹⁰² *Environmental Protection Authority v Caltex Refining Co Pty Limited* [1993] HCA 74 per Deane, Dawson and Gaudron JJ at [23]; (1993) 178 CLR 477 at 532.

answer questions if the documents or answers may tend, either directly or indirectly, to incriminate the person.

- 131 There is no obligation to answer questions asked by an executive agency or to produce documents requested by an executive agency for any reason.¹⁰³ This is the common law right to remain silent.
- 132 The Impugned Public Health Orders seek to abrogate these rights in that:
- (a) They seek to compel an unvaccinated person to produce evidence that proves that they are not in breach of the vaccination requirement if they were to attend their ordinary place of work;
 - (b) They seek to engage third parties to require an unvaccinated person to produce such evidence; and
 - (c) A failure to produce such evidence (silence) will disclose a breach of s 10 of the *Public Health Act 2010* (NSW) and constitute evidence of a criminal offence perpetrated by the unvaccinated person.
- 133 There is no abrogation of that privilege, express or implied, in relation to the exercise of the s 7 discretionary power. On the contrary, the comprehensive enforcement provisions contained elsewhere in the *Public Health Act 2010* (NSW), clearly suggest that the Parliament did not intend to abrogate the privilege. Accordingly, the Impugned Public Health orders fall outside the scope of the lawful exercise of the s 7 discretion.

GROUND 2

Improper Purpose

- 134 Under a statutory provision conferring administrative power, the nature and extent of the power must be inferred from a construction of the Act read as a whole. A statutory power may be exercised only for the purposes for which it is conferred.¹⁰⁴
- 135 In the case of a statute conferring a general discretion to make orders or give directions, such as that discretionary power conferred on the Minister under s 7 of the *Public Health Act 2010* (NSW), if it can be seen from the words of the orders themselves that they go beyond the purposes of the statute, they will be invalid.¹⁰⁵ However, even if an order bears a semblance of propriety on its face, evidence can be

¹⁰³ *Pyneboard Proprietary Limited v Trade Practices Commission* [1983] HCA 9 per Brennan J at [6]; (1983) 152 CLR 328.

¹⁰⁴ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

¹⁰⁵ *Ibid.*

adduced which might show that the order was in fact designed for an improper purpose.

136 The purposes of the Impugned Public Health Orders can be discerned from the words of the orders themselves. Those purposes include:

- (a) to introduce a public vaccination program;
- (b) to compel members of the public belonging to a particular class or group to undergo medical treatment in the nature of vaccination;
- (c) to deprive members of the public belonging to a particular class or group of the ability to earn a living in their chosen vocation if they fail to undergo medical treatment in the nature of vaccination;
- (d) to discriminate between those members of the public belonging to a particular class or group who are vaccinated and those who are not vaccinated;
- (e) to punish members of the public belonging to a particular class or group who are not vaccinated;
- (f) to compel a person belonging to a particular class or group to disclose to others the personal and sensitive information about the person as to whether the person has undergone medical treatment in the nature of vaccination;
- (g) to inform others as to whether a person belonging to a particular class or group has undergone medical treatment in the nature of vaccination, without the person's consent;
- (h) to enforce the requirement that members of the public belonging to a particular class or group to undergo medical treatment in the nature of vaccination;
- (i) to enforce discrimination between those members of the public belonging to a particular class or group who are vaccinated and those who are not vaccinated;
- (j) to impute a disability upon those members of the public who belong to a particular class or group who are not vaccinated;

137 There is evidence, in the form of public statements made by the Minister, that also lead to the inference that the purposes of the Minister making the Impugned Public Health Orders were to:

- (a) give effect to the Minister's personal belief that a person who chooses not to be vaccinated puts others at risk; and

- (b) give effect to the Minister's personal belief that a person who chooses not to be vaccinated is self-entitled and indulgent in the extreme.

138 Such purposes were unauthorised and improper for the reasons that have been set out in the submissions relating to Ground 1 above, and furthermore because the personal beliefs referred to above are inconsistent with the *Public Health Act 2010* (NSW), the rights and interests of the Plaintiffs and the legitimate expectation that the Minister in exercising his power under s 7 would pay proper and due regard to those rights and interests.

GROUND 3

Relevant Considerations

139 The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is an abuse of discretion. Furthermore:¹⁰⁶

- (a) The ground can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account;
- (b) What factors a decision-maker is bound to consider is determined by construction of the statute conferring the discretion (they may be expressly stated or otherwise they may be implied by the subject matter, scope and purpose of the Act);
- (c) Not every failure to take into account a relevant consideration is fatal. A relevant factor may be so insignificant that it could not materially have affected the decision;
- (d) The court's role in judicial review is limited (legality/merits distinction). Issues of "weight" are for the decision-maker; and
- (e) In the case of Minister of the Crown, allowance must be made for the taking into account of broader policy considerations.

140 A decision-maker exercising a discretionary power is also required to give proper, genuine and realistic consideration to all relevant material.¹⁰⁷

141 In this case, the Plaintiffs allege that the Minister was bound to take into account the following matters before he made the Impugned Public Health Orders:

¹⁰⁶ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 (Mason J).

¹⁰⁷ *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586.

- (a) the lack of scientific certainty surrounding the efficacy and safety of Covid-19 vaccinations in relation to all variants of the Covid-19 virus;
- (b) the lack of scientific certainty surrounding the efficacy and safety of Covid-19 vaccinations in relation to the delta variant of the Covid-19 virus;
- (c) other health measures, alternative to vaccinations, as a means by which to address the risk to public health that Covid-19 represents;
- (d) the individual's common law right to bodily integrity;
- (e) the individual's common law right not to be subject to medical or scientific experimentation or treatment without the person's consent;
- (f) the individual's common law right to liberty and security;
- (g) the individual's common law right to earn a living;
- (h) the individual's implied right under section 51(xxiiiA) of the Constitution of the Commonwealth of Australia not to be conscripted to take part in a vaccination program amounting to a medical service provided to the public;
- (i) the individual's right not to be discriminated against under Part 2 of the *Disability Discrimination Act 1992* (Cth);
- (j) the obligations of healthcare professionals to do no harm to their patients;
- (k) the need for individuals to maintain confidence and trust in their healthcare professionals;
- (l) the individual's rights to anonymity and privacy under the *Privacy Act 1988* (Cth);
- (m) the individual's rights to anonymity and privacy under the *Personal Information Protection Act 1998* (NSW);
- (n) the individual's rights to anonymity and privacy under the *Health Records Information Privacy Act 2002* (NSW);
- (o) the foreseeable long-term dangers and risks to an individual's rights and liberties in conferring an entitlement to third parties to access and retain personal and sensitive information concerning the individual's health and medical profile;
- (p) the individual's common law right to the presumption of innocence;
- (q) the individual's common law right to remain silent;

- (r) the individual's common law privilege against self-incrimination.
- (s) the International Covenant on Civil and Political Rights;
- (t) the International Covenant on Economic, Social and Cultural Rights;
- (u) the Convention on the Rights of Persons with Disabilities.

142 Although the *Public Health Act 2010* (NSW) does not expressly state that the Minister has to take such matters into account, they are matters which he was necessarily bound to take into account as implied by the statute in light of its subject matter, scope and purpose. Specifically:

- (a) In relation to the matters referred to in paragraphs 141(a) to 141(c), they are impliedly mandatory considerations having regard to:
 - (i) the fact that the Impugned Public Health Orders impose a requirement that a person be injected with a Covid-19 vaccine;
 - (ii) vaccinations are an artificial biochemical compound that do not occur naturally;
 - (iii) the vaccinations have no established safety and efficacy 'track record';
 - (iv) the persons to whom the vaccination requirement applies are otherwise healthy citizens free from disease or disability;
 - (v) there are known (and unknown) health risks associated with any medical treatment, including vaccinations;
 - (vi) the objects of the *Public Health Act* (2010) are targeted towards protecting the health of individuals.
- (b) In relation to the other alleged relevant matters, they are impliedly mandatory considerations having regard to:
 - (i) the fact that the Impugned Public Health Orders are apt to affect an unvaccinated person's rights, interests and legitimate expectations as explained above;
 - (ii) the fact that the exercise of power under s 7 involves the exercise of a *discretion* and may only be exercised if it is *necessary* to do so and, therefore, the exercise of power necessarily contemplates taking into account countervailing factors that are likely to militate against the exercise of that discretion;

- (iii) the fact that the most and immediate and obvious countervailing factors will be the rights, interests and legitimate interests of those persons in relation to whom the Impugned Public Health Orders are to apply (i.e., the unvaccinated);
- (iv) the fact that vaccinations are permanent and cannot be undone; and
- (v) the exercise of power elsewhere in the *Public Health Act 2010*, by an authorised medical practitioner, involving compulsory treatment', expressly obliges the authorised medical practitioner to give significant consideration to the liberty of the person.

143 There is no evidence that the Minister gave proper, genuine or realistic consideration to any of these matters.

GROUND 4

Wrong Question/Wrong Issue/Irrelevant Considerations

144 A repository of administrative decision-making power must not be influenced by something extraneous and extra judicial which ought not to have affected their decision.¹⁰⁸ The legislature only confers discretionary powers that are to be used to promote the policy and objects of the Act, and nothing more.¹⁰⁹ They should only take into account those things that justice and common-sense demand.¹¹⁰

145 The Plaintiffs claim that the following matters were taken into account by the Minister which were impermissible considerations:

- (a) whether a person is vaccinated or unvaccinated;
- (b) that a person who chooses not to be vaccinated puts others at risk;
- (c) that a person who chooses not to be vaccinated is self-entitled and indulgent in the extreme;
- (d) whether there is a need for a compulsory vaccination program;
- (e) whether a person should be compelled to undergo medical treatment in the nature of vaccination;
- (f) whether a person should be obliged to carry evidence that they have undergone medical treatment in the nature of vaccination;

¹⁰⁸ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

¹⁰⁹ *Ibid.* See also *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

¹¹⁰ *Roberts v Hopwood* [1925] AC 578.

- (g) whether a person should be obliged to disclose to others that they have undergone medical treatment in the nature of vaccination;
- (h) whether a person should be deprived of the ability to work if they are unvaccinated;
- (i) whether a person should be deprived of the ability to access certain premises if they are unvaccinated; and
- (j) whether third parties, including the police, authorised officers, and private individuals and entities, should be enlisted to enforce the Impugned Public Health Orders.

146 None of these matters are expressly prohibited considerations in the Act. However, it is submitted that all were prohibited from being taken into account as a matter of statutory implication having regard to the submissions made above in relation to the legal limits of the s 7 discretionary power. Furthermore, it is submitted:

- (a) The Act does not in any way contemplate that an individual person should be subject to a s 7 Public Health Order on the basis that they are an inherent risk to the community because of their unvaccinated status, in circumstances where they are perfectly healthy and have not behaved in a manner that places anybody else at risk other than going about their ordinary daily routine;
- (a) The Act does not contemplate in any way that its powers can be used to implement a public vaccination program within the context of a pandemic;
- (b) The Minister's personal beliefs underpinning the Impugned Public Health Orders, as expressed in his public statements, are inherently discriminatory and amount to moral condemnation of the unvaccinated and demonstrate a flagrant disregard of the rights, interests and legitimate expectations of the unvaccinated; and
- (c) The Act makes no provision for the moral condemnation or punishment of perfectly healthy people going about their daily lives.

The matters referred to above were material considerations having regard to:

- (d) the content of the Impugned Public Health Orders themselves; and
- (e) the manner and tone in which the Minister made his public statements about the unvaccinated.

GROUND 5

Natural Justice

- 147 The Impugned Public Health Orders were apt to affect the rights, interests or legitimate expectations of the Plaintiffs as explained above.
- 148 In these circumstances, the Minister owed a duty to afford the Plaintiffs procedural fairness in the nature of an opportunity to comment on or respond to the Impugned Public Health Orders before they were made.
- 149 That duty has not been impliedly excluded by legislative intent in relation to the operation of s 7 in these circumstances.

GROUND 6

Unreasonableness

- 150 A repository of administrative decision-making power must exercise a discretion reasonably, logically and rationally.

- 151 In *Minister for Immigration and Citizenship v Li*, the High Court held:¹¹¹

As to the inferences that may be drawn by an appellate court, it was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion “if upon the facts [the result] is unreasonable or plainly unjust”. The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

- 152 In *Minister for Immigration and Border Protection v Stretton*, the Federal Court of Australia (full court) held:¹¹²

[9] The conclusion that a decision is legally unreasonable by reference to the outcome, whether or not there are reasons therefor, is assisted by reference to expressions taken from cases such as those mentioned in [5] above. Any

¹¹¹ (2013) 249 CLR 332 at [76].

¹¹² [2016] FCAFC 11, at [9]-[13]

criticism that these explanations are circular and vague is to be met by attending to the terms, scope and policy of the statute and the values drawn from the statute and the common law that fall to be considered in assessing the decision. The terms, scope and policy of the statute and the fundamental values that attend the proper exercise of power – a rejection of unfairness, of unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual – will inform the conclusion, necessarily to a degree evaluative, as to whether the decision bespeaks an exercise of power beyond its source.

[10] This concept of legal unreasonableness is not amenable to minute and rigidly defined categorisation or a precise textual formulary. For instance, in argument, the submission was put that [76] of Li in the judgment of Hayne, Kiefel and Bell JJ contained two (different) “tests”: (1) if upon the facts the result is unreasonable or plainly unjust and (2) if the decision lacks an evident and intelligible justification. The submission reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation. The plurality’s discussion of unreasonableness at [63][76] in Li should be read as a whole – as a discussion of the sources and lineage of the concept: [64][65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been described: [68][71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]-[74] (as to which see also French CJ at [30] and see also *McCloy v New South Wales* [2015] HCA 34; 325 ALR 15 at [3] (French CJ, Kiefel, Bell and Keane JJ)), of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion: [75]-[76].

[11] The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking

common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

[12] Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

[13] The relationship between the conclusion or outcome and the reasoning process revealed by reasons to reach it is one that should not be rigidly set. Reasons may fail to disclose an evident and intelligible justification or may not be sufficient to outweigh the inference that the decision is so unjust as to be (in the context of the statutory source of the power) beyond a lawful exercise of the power.

- 153 Courts are entitled to quash decisions because they are unreasonable if they were made for *some* good reasons but where countervailing considerations, objectively, are sufficiently stronger.¹¹³
- 154 Where fundamental rights are affected by the decision, *anxious scrutiny* requires a court to look more closely at the reasonableness of the decision to determine the range of eligible views that might make for a reasonable decision.¹¹⁴
- 155 The reasonableness of a decision is to be assessed by reference to the evidence available at the time.¹¹⁵
- 156 In this case there is no evidence that the Minister took into account any countervailing considerations that a reasonable person in the position of the Minister exercising power

¹¹³ *West Glamorgan CC v Raggerty* [1987] 1 WLR 457; *Wheeler v Leicester CC* [1985] AC 1054; *R (A) v Lord Saville of Newdigate (Bloody Sunday Inquiry)* [2002] 1 WLR 1249; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453.

¹¹⁴ See, generally, Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

¹¹⁵ *R (Mott) v Environment Agency* [2016] EWCA Civ 562 (upheld by the Supreme Court on appeal in *R (on the application of Mott) v Environment Agency* [2019] UKSC 10).

under s 7 would have taken into account, and on which appropriate weight could be placed, before making the decision.

157 Having regard to the evidence adduced by the Plaintiffs, including the expert evidence, and the matters of submission in relation to the law raised herein, it was not reasonably open to the Minister that it was necessary to make the Impugned Public Health orders.

DATE: 27 SEPTEMBER 2021

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POST-SCRIPT

At about the time that these submissions were due to be filed, the Fair Work Commission (Full Bench) published a decision in the case of *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015 in which Deputy President Dean delivered a dissenting decision. The Deputy President made instructive observations about Covid-19 vaccinations being compulsory in New South Wales. The dissenting decision is **attached** to these submissions.