AL-MUNIR KASSAM AND ORS

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THE HON BRADLEY RONALD HAZZARD MLA AND ORS

[CLD 2021/ 24960]

[COR BEECH-JONES, CHIEF JUDGE AT COMMON LAW]

WRITTEN SUBMISSIONS OF PLAINTIFFS

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Section 1: INTRODUCTION

1. In the *Case of Prohibitions* [1607] EWHC J23, King James I counsel put to Coke CJ that "*In cases where there is not express authority in law, the King may himself decide in his royal person; the Judges are but delegates of the King*". Coke responded "*the King in his own person cannot adjudge any case, either criminal – as treason, felony etc, or betwixt party and party; but this ought to be determined and adjudged in some court of justice,*

according to the Law and Custom of England". The contention of the executive that the conferral upon its members of broad statutory powers is unfettered or beyond the control of courts of law has been as resoundingly rejected by Australian common lawyers as English. The words of Mason J to that effect in *FAI Insurances Ltd v Winneke* [1982] 151 CLR 342 at 368 resonate alongside those of Lord Upjohn to the same effect in *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 at 1060[1].

2. In this case, some matters adduced in the evidence in this Honourable Court by the Defendants breathtakingly assume, in the cause of public health, that the Court has no effective supervisory jurisdiction to review, intervene and determine the legality of the actions and omissions of the Minister for Health, the First Defendant the Hon Brad Hazzard MLA. A particular example is the decision of the First to Third Defendants' evidenced in the correspondence and affidavits and announced last week without explanation, to refuse to produce documents before the Minister on 20 August 2021; more particularly those parties have resiled from their assurances to Mr Nikolic notwithstanding two expressions of concern from the Court about it, that they make available at the hearing in this Court the material that was before the Minister when he made *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) ('Order No 2') on 20 August 2021.
3. No pandemic, no more than a war, justifies departure in the resolution of disputes in the courts from common law principles. Parliament may direct the courts to disregard usual protections but even if it does the underlying foundations of the law do not change. Significantly in respect of this matter the *World Health Organisation* ['WHO'] Database on Covid 19 State responses reflects the need for balanced measures by all nations without dictating outcomes. It proposes to nation States, on this topic, '*However, these measures can have a profound effect on individuals, communities, and societies by bringing social and economic life to a near stop. Such measures disproportionately affect disadvantaged groups, including persons in poverty, migrants, internally displaced people and refugees, who most often live in overcrowded and under resourced settings, and depend on daily labour for subsistence….WHO is hopeful that countries will use targeted interventions where and when needed, based on local situation.*'

[1] See the discussion as to relevant principles of interpretation in *Judicial Review of Administrative Act* 5th Ed Aronson, Dyer and Groves 3.35 to 3.45.

4. Another concerning practical aspect of the Defendants' case, worthy of note, is the decision by each State party not to disclose to the Court any information which exposes the reasoning and evidentiary basis of the science relied on by the public health professionals involved, particularly as to the public health model assuming it exists adopted in making key decisions. The court and the parties must then fall back on first principles, which in this case it is submitted do not assist the Defendants. Further, no evidence from leading medical practitioners as to available treatments, or even as to the known causes and nature of the public health risks have been demonstrated. A virus, unlike bacteria, as most school students know is inert, and like every virus by definition has an antigen which once identified confers an immunity if utilised with informed consent as a preventative vaccination.
5. The Court and the parties are accordingly left to guess at the bases for admittedly draconian measures, which include prevention of access to and use of private property, loss and termination of gainful employment, closure of some but not other businesses and professions on indistinguishable foundations, community lockdowns, mandatory vaccination by a civil conscription, and criminal and arrest provisions to enforce the measures. It is the Plaintiffs' case that the First Defendant has exceeded the scope of his power in the present matter in making and implementing Order No 2 dated 20 August 2021.

Section 2. THE PROCEEDINGS

6. The Plaintiffs challenge Order No 2 and the amendments on three grounds:
   - First that the scope of the power relied on does not support the Order;
   - Second that in any event the State legislative provision and the Order made under it impair the constitutional guarantee against a civil conscription provided in Constitution section 51(xxiiiA) and give effect to a joint scheme between the Commonwealth and the State of NSW to the same effect;
   - Third the exercise of power is inconsistent with overriding State and Federal statutes.
7. The relief sought comprises declaratory and injunctive relief: similar relief was granted in analogous circumstances in *Attorney-General (Vic) v Commonwealth* [1945] HCA 30; 71 CLR 237 [the PBS case] and *British Medical Association v Commonwealth* [1949] HCA 44; 79 CLR 210 [the BMA case].
8. As to the amended particulars in paragraphs 4 and 11 of the SOC the Commonwealth has consented to the amendments. The State has sought further and better particulars which have been supplied but it has not formally responded at the time this Submission was

lodged. The amendments to the particulars should be granted because each deletes or revises particulars within the scope of the existing pleaded case. As in *PBS* and *BMA* where statements of claim were also filed, the Defendants have elected not to file a defence. However whilst demurrer is no longer available in this Court the effect of the Rules of Court are similar, ie there is no joinder of issue [r 14.27(4)] but the Defendants are technically in default having elected not to file a timely defence entitling the Plaintiffs to judgment unless the Defendants have a just response in law [rr 16.10 and 23.9(1)] ie to the questions postulated on the facts set out in the statement of claim [r 6.12(2)]. In short the Plaintiffs say that the Defendants have no defence to the action and judgment should be granted accordingly.

9. As to the relief sought, the declarations that the Court is asked to make have adequate content and indicate the gist of findings made reflected in the statement of claim: *Rural Press Ltd v Australian Consumer and Competition Commission* [2003] HCA 75; 216 CLR 53 at [89-90] per Gummow, Hayne and Heydon JJ. Further each declaration sought gives sufficient indication about how and why the conduct in question contravened the applicable or constitutional statutory norm: *BMW Australian Ltd v ACCC* [2004] FCAFC 167; 267 ALR 452 at [35] per Gray, Goldberg and Weinberg JJ; and *Ethicon Sarl v Gill* [2021] FCAFC 29 at [816] per Jagot, Murphy and Lee JJ. It is submitted that, subject to the Court being satisfied on the balance of probabilities that the Defendants have a case at law that calls for dismissal of the Plaintiffs' case, each Order sought in the statement of claim should be made, for the reasons which follow.

Section 3: EVIDENCE

10. Evidence has been exchanged in accordance with the Court's directions made on 9 September 2021. The Plaintiffs' case is contained in the lay and expert affidavits set out in the Court Book. The Defendants' case also comprises certain lay affidavits as to the statutory processes involved, and in the report of Dr Macartney, to which the Plaintiffs have replied.

11. In addition documents marshalled by notice to produce form part of the Tender Bundle also contained in the Court Book. This includes correspondence recording admissions by the Defendants made on the basis that it was unnecessary for the Plaintiffs to seek further production.

12. Factual issues concern evidence as to the exercise of the ministerial function, the content of informed consent in relation to medical procedures, the Commonwealth State joint

scheme as to civil conscription, relevant public health risks, and the legal unreasonableness of Order No 2.

13. A summary of the Plaintiffs' evidence including an analysis of the expert evidence is an attachment to this Submission and is provided separately.
14. Certain objections to the evidence of the Defendants are also furnished separately.

Section 4: SCOPE OF THE ENABLING POWER

15. Section 7 *Public Health Act 2010* [NSW] entitled '*Power to deal with public health risks generally'* is as follows:

    '*(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….'.

16. Some other provisions of the Act should be noticed. Section 8 of the Act provides for power to deal with public health risks during a state of emergency if declared by authorising the Minister to declare a state of emergency including the making of an "*order"* directing '*all persons in a specified group, or all persons residing in a specified area to submit themselves for medical examination in accordance with the order.*' Unlike Victoria where

a state of emergency has been declared under the *Public Health and Wellbeing Act* 2008, no state of emergency to date has been declared in NSW in similar circumstances.

17. Section 11 provides for power in the Department Secretary and not the Minister to close public premises on public health grounds, if he or she '*considers that access to any premises on which the public, or sections of the public, are required, permitted or accustomed to congregate should be restricted or prohibited in order to protect public health …as specified in the order'*.
18. Section 62 provides for the making of public health orders by an authorised medical practitioner relating to persons with Category 4 or 5 conditions. The defined Category 4 condition expressly includes 'Covid 19' in Schedule 1 to the Act. With respect to such conditions section 62(1) specifically provides that *'(1) An authorised medical practitioner may make a public health order in respect of a person if satisfied, on reasonable grounds, that (a) the person has a Category 4 or 5 condition…*'
19. Under subsection 3 '*A public health order may require the person subject to the order to do any one or more of the following … (b) to undergo specified treatment (whether at a specified place or otherwise)'*. This includes an express power to give a direction for a person to be vaccinated. It may also include power to direct a person '(*g) to undergo a specified kind of medical examination or test*.' This includes a direction to be tested for Covid 19 as part of a preventative measure. None of these specific measures have been used to make Order No 2 or support its provisions. Significantly, it will be submitted, under subsection 6 the public officer issuing such specific orders '*must take into account (a) 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.*' In short Parliament has shown its intention to have regard, where appropriate, to the principle of legality in the construction by courts, and the understanding by citizens, of its legislative intention.
20. The objects of the Act set out in section 3 are subject to an overriding duty of those exercising functions under the Act including the Minister as follows:

    '*Section 3(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.'*

    Section 5 provides that the "exercise" of a function includes perform a duty, and "function" includes a power, authority or duty. The word "area" has in the context of the Act's objects focussed on delivery of public health services by local governments by adopting an extended meaning for the word in this statute including *(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 …'

A. The Minister's Function – Plaintiffs' First Contention:

21. For present purposes the initial issue concerning the scope of Section 7 focusses on the words '*if the Minister considers…the Minister [may]…*': see section 7(1) and (2) *Public Health Act*.
22. In short a condition of the exercise of the power provided by the Parliament under section 7 is that it is a function exercised by the Minister. The Minister purported to exercise that function on 20 August 2021 by Order No 2 the terms of which are incorporated into the statement of claim by reference.
23. It is of course normal where a challenge is made to the exercise of the executive power of a Minister or other relevant official that the material before the official at the time is produced. The Rules of Court assume such a course and it can reasonably be assumed that the Defendants at all material times anticipated a requirement for reasons and the evidence of the bases of the decision and the need to produce such material assuming Order No 2 was challenged in the manner and on the bases that it has been: see eg UCPR r 59.9(3)(b); *Administrative Decisions Review Act 1997* [NSW] section 49(3)(a).
24. The Plaintiffs in this matter after filing their initiating process served a notice to produce for specifically the material that was before the Minister when he made made Order No 2 on 20 August 2021. This was reinforced by observations from the Court, referred to in the Plaintiffs' correspondence to the Defendants on the issue: see Court Book [TB].
25. In correspondence the Minister's solicitor assured the Plaintiffs that this material would be produced, and as a result the Plaintiffs withdrew their notice to produce to NSW on the faith of that assurance. However no such document was produced. There is nothing in the Court Book as to anything before the Minister other than a draft of the Order dated 20 August 2021. There is no affidavit of the Minister. Instead in the affidavit of Ms Boyd a senior public servant in the Government of the Third Defendant there is produced the draft of Order No 2, attached to an email that she sent to the Minister on the date the Order was purportedly signed by him the inference being that is what he had before him when making the Order.
26. The First Defendant has not adduced any evidence to say what if anything else he had regard to, or what was before him other than the draft Order that Ms Boyd says she sent to him on 20 August 2021, or asserting that it was a real exercise of his discretion, or that he

honestly considered the exercise of his large power, or even that he had any personal specialised knowledge to which he had regard in the making of the Order. There is no evidence he made any independent decision nor has he explained his reasoning, rather the evidence is that he deferred to others the considerations whatever they were for the making of the Order. In the circumstances both in the absence of any affidavit from the decision-maker and any such documentary material a strong inference under *Jones v Dunkel* arises that that testimony and documentary evidence would not have assisted his case. Also see *Blatch v Archer*.

27. In the circumstances it is the straightforward proposition of the Plaintiffs that the Minister's Order No 2 is invalid because he failed to have anything before him other than an email on the day from a senior public servant attaching a draft Order as to public health risks referred to in the Act and in section 7 in particular. Thus there is no evidence that in exercising his function, as referred to in the objects provisions under section 3(2) of the Act [see above], that he had regard to the overriding consideration there set out or actively engaged in any intellectual decision-making process [see below]. He did not consider, as he should have before making the Order, particular or even general public health risks in one or more specific areas of the State as the section contemplates. In short others not him exercised the substance of the power, and the Court is left in the dark as to who if anyone exercised the function or what the considerations for its making were, what the nature of the exercise of the function entailed, and that in doing so he delegated the decision to make Order No 2 to Ms Boyd or someone else. However this involved no 'consideration' by him of the basis for the exercise of his broad power. In substance on the evidence he has accepted another's direction as to the way in which the discretion should be exercised: *R. v. Stepney Corporation* (1902) 1 KB 317 ; *Simms Motor Units Ltd. v. Minister of Labour and National Service* (1946) 2 ALL ER 201 , cf. *Evans v. Donaldson* [1909] HCA 46; (1909) 9 CLR 140; *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* [1947] HCA 21; (1947) 74 CLR 492, at p 505 per Dixon J; *R v Anderson; Ex parte Ipec-Air Pty Ltd* [1965] HCA 27; (1965) 113 CLR 177 at 189 per Kitto J; *Telstra Corporation Ltd v Kendall* [1994] FCA 1265 at [51] per Spender J; [1995] 55 FCR 221, at 231-32 per Black CJ, Ryan and Hill JJ.

28. A decision-maker also must not act under dictation. As Gibbs CJ said in *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404, 'a statutory authority must not, in the purported exercise of its discretion, act under the dictation of some other

person'.[2] This means that it cannot 'give automatic effect' to the decision of another.[3] While, a decision-maker may take account of other bodies, they must form an independent view. As Kirby P, Priestley, Clarke JJA stated in *Rendell v Release on Licence Board* (1987) 10 NSWLR 499:

> 'The primary rule is that the extent to which an independent body may reflect established government policy depends upon the charter of the body, the nature of its functions and the relevance to that charter and functions of the policy in question. There is no absolute rule that the body must ignore known government policy. On the other hand, *it must not be so influenced by that policy that it fails to perform its own functions, as the statute contemplated*. (emphasis added)'[4]

29. Here, the same can be said for the recommendations of a committee. The Minister, under the Public Health Act, must 'consider' what is 'necessary',[5] not an advisory committee. If the committee forms an opinion, the Minister cannot simply adopt that opinion. He must *himself* form an opinion as a precondition to the exercise of his discretionary power.

30. There must be active intellectual engagement. For instance, Griffiths, White and Bromwich JJ in *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 stated that:

> 'In our view, however, the ordinary meaning of the word "consider" in this judicial review context requires the Minister to engage in an "active intellectual process" in assessing the merits of a case when contemplating the possible exercise of the power….'[6]

31. Furthermore, while '*it may be accepted that, despite the personal nature of the power, the Minister was entitled to obtain assistance from departmental officers and members of his private staff*',[7] the Minister must clearly still engage in an active intellectual process with regard to the material his staff have assisted him with. Upon the plain evidence of the State parties he did not do so. He must do more than simply assent to what is put in front of him.

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[2] *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404, 418 (Gibbs CJ).
[3] *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404, 418 (Gibbs CJ).
[4] *Rendell v Release on Licence Board* (1987) 10 NSWLR 499, 505 (Kirby P, Priestley, Clarke JJA).
[5] Public Health Act s 7.
[6] *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, 364 [46] (Griffiths, White and Bromwich JJ).
[7] *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, 367 [61] (Griffiths, White and Bromwich JJ).

32. Order No 2 should be set aside. The issue is pleaded in paragraph 11 of the statement of claim particular (k). The exercise of his power is not merely a box-ticking function or a power the First Defendant can give to another or delegate, but it is a highly significant public function which both the Parliament and the Court expects is a positive duty to be exercised by the First Defendant personally in accordance with the large power conferred on him which did not occur.
33. Conclusion: the Order is invalid.

B. Scope of Power – Plaintiffs Second Contention:

34. The Order is invalid because the Minister failed to have regard to the relevant constraints upon the exercise of power conferred upon him under section 7, with the consequence his decision and the Order are invalid as outside the scope of power. The Order on its face does not conform to the requirements that it comprise directions of the Minister to inhabitants within specified areas nor is it in conformity with the statutory purpose properly construed informed by the principle of legality called by Gleeson CJ the working hypothesis of the Legislature, but is legally unreasonable.
35. The issue is pleaded in paragraphs 5, 6, 7, 8 and 11 of the statement of claim.
36. Before turning to canons of construction it is submitted that the ordinary and natural meaning of the text, before examining context and purpose, does not assist the Defendants. The key point is whether section 7 authorises the mandating of vaccines ie requiring people in certain categories to have vaccinations, in distinction to prohibiting or restricting persons who are not vaccinated from doing certain things. The general power in subsection 2 confers power on the Minister to take action himself and to give directions to others but does not authorise any unfettered over-reach of basal common law principles, and whilst subsection 3 does do so in limited respects it is conditioned upon a declaration that the part of the State concerned is a public health risk area and with respect to such areas further limited to matters of segregation and access to property and the like. This reflects a measured if not balanced approach of the type contemplated in the WHO observation above about State responses. Other provisions of the Act eg relating to situations of a declared emergency, or conferring the power to mandate vaccinations, are not replicated in section 7.
37. The blanket nature of Order No 2 treating the State as one area and particular intrusive provisions including mandatory vaccinations make the point. In particular clauses 4.3, 4.24 and 5.8 of Order No 2 for the reasons which follow violate an individual's fundamental

right to bodily integrity. Putting it another way, for reasons which will appear, they implement a civil conscription in NSW, which section 7 does not authorise. That is not to say, subject to the point put below as to the proper interpretation of *Constitution* section 51(xxiiiA), that a civil conscription under the laws of this State is not constitutionally possible. Rather it is to submit that any State law that confers such a large and intrusive power must do so expressly. The provisions in question and the Order as a whole accordingly constitute an unauthorised exercise of power under s 7.

38. To determine whether a regulation exceeds power, it is first '*necessary to consider the proper construction of the section conferring [the] power in light of the scope and objects of [the] Act*', and then to evaluate whether the regulation, on its proper construction, falls within that statutory authority.[8]

39. Under section 7, once, on '*reasonable grounds'*, a situation has arisen that is, or is likely to be, a risk to public health,[9] the Minister '*may by order give such directions… as the Minister considers necessary to deal with the risk and its possible consequences'*.[10] This power—to make orders under section 7 of the Public Health Act—is conditioned on the *opinion* of the Minister. As such, '*it is the existence of the opinion, and not its correctness, which satisfies the condition*'.[11] While a power conditioned on the opinion of a decision-maker imputes a wide discretion to exercise it, it is subject to a notable qualification recently brought into focus by the High Court. As stated by Hayne, Kiefel and Bell JJ in *Li*, *'[t]he legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably*'.[12] Thus, if it can be shown that the power has been exercised in a way that is legally unreasonable, that exercise of power will be invalid.[13]

40. On current authorities, there are two strands of legal unreasonableness. The first, and more recently developed, type is where the reasoning process of the decision-maker is unreasonable; and the second, and more traditional, type is where the outcome of a decision is unreasonable.[14] Both are raised here.

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[8] *Evans v New South Wales* (2008) 168 FCR 576, 591 [60] (French, Branson and Stone JJ).
[9] Public Health Act s 7.
[10] Public Health Act s 7(2)(b).
[11] *Foley v Padley* (1984) 154 CLR 349, 353 (Gibbs CJ).
[12] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 362 [63] (Hayne, Kiefel and Bell JJ).
[13] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (Lord Greene MR).
[14] See *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, 958 [122] (Edelman J); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 445 [44] (Allsop CJ, Robertson and Mortimer JJ).; *Minister for Immigration v Stretton* [2016] FCAFC 11 [6] (Allsop CJ).

41. In *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, Kiefel CJ, Bell, Gageler and Keane JJ gave a succinct explanation of legal unreasonableness as it relates to the first approach—unreasonableness in the *reasoning process* of the decision-maker:

> '*The answer is to be found in recognising that "[t]he implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made" such that "[j]ust as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course".*
>
> *'Compliance with the implied condition of reasonableness in the performance by the Authority of its duty to review the decision of the delegate necessitates not only that the decision to which the Authority comes on the review has an "intelligible justification" but also that the Authority comes to that decision through an intelligible decision-making process.'*[15]

42. The second approach relates to whether the *outcome* of a decision is unreasonable. In determining whether an outcome is unreasonable, one must first acknowledge that '*within the boundaries of power, there is an area of "decisional freedom" within which a decision-maker has a genuinely free discretion'*.[16] A decision within that free discretion is '*within the bounds of legal reasonableness'*.[17] On the other hand, '*if the outcome falls outside the area of decisional freedom*' it will be '*legally unreasonable'* and invalid because it exceeds the scope of the power[18]. For example, an outcome of a decision will be held to be unreasonable where it is '*arbitrary or capricious'*.[19] In determining as such, the '*material before the decision-maker*' *may* be relevant to a finding that the decision was one '*which no reasonable person could [take]'*,[20] as to which see the Plaintiffs' first contention. In

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[15] *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, 936 [19]-[20] (Kiefel CJ, Bell, Gageler and Keane JJ).
[16] *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420, 444 [134] (Wigney J).
[17] Ibid
[18] Ibid.
[19] *Elliott v Minister Administering Fisheries Management Act* 1994 (2018) 97 NSWLR 1082, 1102 [85] (Basten JA).
[20] *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, 936 [19] (Kiefel CJ, Bell, Gageler and Keane JJ).

determining whether a decision to exercise a discretionary *rule-making* power is unreasonable, it is foremost a question of statutory construction. As Lockhart J stated in *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381:

> 'Delegated legislation may be declared to be invalid on the ground of unreasonableness if it leads to manifest arbitrariness, injustice or partiality; but the underlying rationale is that legislation of this offending kind cannot be within the scope of what Parliament intended when authorising the subordinate legislative authority to enact laws.'[21]

43. Moreover, this approach—using the statutory context as the primary determinant of where the boundaries of legal reasonableness lie—has been explicitly adopted by the majority of the High Court since *Li*:

> '[*I*]*n order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the provisions of the statute which confer the relevant power. The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope, and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making.*'[22]

44. Importantly, as the standard of legal reasonableness is a '*standard indicated by the true construction of the statute'*,[23] it must take into account principles of statutory construction. Hence, unreasonableness should be informed by a key interpretative principle as pleaded by the Plaintiffs in paragraph 6 and 11—the principle of legality.

45. <u>*The principle of legality*</u>**.** Recognition of the principle of legality in Australia can be traced to a statement made by O'Connor J in *Potter v Minahan* (1908) 7 CLR 277, where he said:[24]

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[21] *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381, 384 (Lockhart J).
[22] *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420, 445 [135] (Wigney J).
[23] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel and Bell JJ).
[24] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

> '*It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'*.

46. In *Coco v The Queen* (1994) 179 CLR 427, the High Court framed the principle of legality as follows:[25]

> '*The insistence on express authorization 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 unmistakeable and unambiguous language (emphasis added).*'

47. Thus, there exists a presumption that Parliament does not intend for statutes to operate to curtail fundamental rights, freedoms or immunities. That is not to say there will not be cases where the Parliament makes its intention plain in that respect. Gageler and Keane JJ, with whom Kiefel, Hayne and Bell JJ disagreed in the result, in *Lee v New South Wales Crime Commission* [2013] HCA 39; 251 CLR 196 at [313]- [314] observed that the principle of legality "*can at most have limited application in the construction of legislation which has amongst its objects or purpose the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked*". That of course as intended begs the question, particularly in a contentious context, and requires examination of the *'particular right'* the subject of the alleged '*abrogation or curtailment'* and the purported exercise of power[26].

48. <u>*Is bodily integrity a fundamental right?*</u> Bodily integrity is a fundamental right under the common law. It has a long history in our legal system and forms the foundation of the law of tort. In *Collins v Wilcock* [1984] 1 WLR 1172, Robert Goff LJ made its centrality very clear:[27]

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[25] *Coco v The Queen* (1994) 179 CLR 427, 437.
[26] In *Athavle v New South Wales* [2021] FCA 1075, freedom of religion was recently invoked; it is further distinguishable from the present matter as being an urgent interlocutory matter raising different issues.
[27] *Collins v Wilcock* [1984] 1 WLR 1172, 1177 (Robert Goff LJ).

> '*The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. …The breadth of the principle reflects the fundamental nature of the interest so protected. (emphasis added)*'

49. In his discussion of the principle, Robert Goff LJ went on to quote Blackstone's '*Commentaries*, 17th ed. (1830), vol. 3, p. 120' and, in doing so, highlights the longevity and durability of the principle as a fundamental common law right:[28]

> '"[*T]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner." The effect is that everybody is protected not only against physical injury but against any form of physical molestation.*'

50. This above passage, from *Collins v Wilcock* [1984] 1 WLR 1172*,* is discussed by Brennan J in *Marion's Case*:[29]

> '*Blackstone declared the right to personal security to be an absolute, or individual, right vested in each person by "the immutable laws of nature". Blackstone's reason for the rule which forbids any form of molestation, namely, that "every man's person [is] sacred", points to the value which underlies and informs the law: each person has a unique dignity which the law respects and which it will protect. Human dignity is a value common to our municipal law and to international instruments relating to human rights. (emphasis added)*'

51. In modern times, this principle has predominantly been invoked in connection with the defence of consent to bodily interference, which may be sufficient to negative an action for battery.[30] Of particular relevance to our case are the authorities pertaining to the question of consent to medical procedures. This was the subject of *Marion's Case*, in which the parents of a mentally disabled girl applied to the Family Court to have her sterilised by a hysterectomy. In *Marion's Case*, the Court made it clear that there is a fundamental right, arising from the common law, to personal inviolability:[31]

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[28] *Collins v Wilcock* [1984] 1 WLR 1172, 1177 (Robert Goff LJ).
[29] Secretary, Department of Health & Community Services (NT) v JWB and SMB (1992) 175 CLR 218 ("*Marion's Case*").
[30] *Marion's Case*, 233 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[31] *Marion's Case*, 253 (Mason CJ, Dawson, Toohey and Gaudron JJ).

> '*One more thing should be said about the basis upon which we have concluded that sterilization is a special case with respect to parental powers. As we have indicated, the conclusion relies on a fundamental right to personal inviolability existing in the common law, a right which underscores the principles of assault, both criminal and civil, as well as on the practical exigencies accompanying this kind of decision which have been discussed.*'

52. Vitally, to overcome the protection which the principle of personal inviolability grants, such that a medical practitioner will not be liable for a procedure conducted on an individual, the individual receiving the medical procedure must *consent* to it, or some other exception must arise. Hence, the majority in *Marion's Case* held that:[32]

> '*Consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact. … The factor necessary to render [a medical] treatment lawful when it would otherwise be an assault is, therefore, consent.*'

53. In *Bropho v Western Australia* (1990) 171 CLR 1, the majority stated that it is 'improbable that the legislature would overthrow *fundamental principles*, infringe rights, or *depart from the general system of law*, without expressing its intention with irresistible clearness' (emphasis added).[33] The principle of bodily integrity is '*immutable'*,[34] and forms the basis of essential components of the 'criminal and civil' law.[35] Bodily integrity is, therefore, a '*fundamental principle'* of our law.[36] Moreover, any attempt to circumvent it, by removing an individual's ability to consent to a medical procedure, would constitute a departure from the '*general system of law'*.[37]

54. For these reasons, bodily integrity is to be included under the umbrella of fundamental rights, freedoms or immunities, referred to in *Coco*, which Parliament is assumed not to derogate from, unless it is clearly manifest as the intention of the legislature. This is quite

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[32] *Marion's Case*, 233-4 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[33] *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[34] Secretary, Department of Health & Community Services (NT) v JWB and SMB (1992) 175 CLR 218 ("*Marion's Case*").
[35] *Marion's Case*, 253 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[36] *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[37] *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

a strict criterion. To quote Kiefel J as her Honour then was in *Lee v NSW Crime Commission* (2013) 251 CLR 196:[38]

> '[*The principle of legality] recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in [X7 v Australian Crime Commission (2013) 248 CLR 92], it is not sufficient for such a conclusion that an implication be available or somehow thought to be desirable. The emphasis must be on the condition that the intendment is "necessary", which suggests that it is compelled by a reading of the statute. Assumptions cannot be made. It will not suffice that a statute's language and purpose might permit of such a construction, given what was said in Coco v The Queen.*'

55. Kiefel J rightly emphasises that, to abrogate the principle of legality, a construction which infringes fundamental rights must be a '*necessary*' one, or '*compelled'* by the statute,[39] and a construction which is simply 'a*vailable*' or '*desirable*' will not be sufficient to abrogate the principle.[40] Importantly, where the principle of legality is not abrogated, it is operative and effective in confining the scope of the Act. In this sense, until it is abrogated, it is alive, or as Gleeson CJ put it in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, '*it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted*'.[41] Therefore, where the principle of legality is operative, unless it is abrogated by necessary intendment, it forms a part of the statutory context from which the boundaries of legal unreasonableness will be assessed.

56. As alluded to above, if unreasonableness is defined by its statutory context,[42] and the statutory context is informed by the principle of legality,[43] then *prima facie*, the principle of legality must inform the threshold of unreasonableness. The effect of this is that, where a decision-maker exercises a discretionary power in a way that violates fundamental rights, and legality has not been abrogated by the clear intention of the Act, that exercise of

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[38] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J).
[39] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J).
[40] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J).
[41] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).
[42] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel and Bell JJ).
[43] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

discretionary power '*is so absurd that no sensible person could ever dream that it lay within the powers of the authority*'.[44]

57. This conclusion follows from legality's underlying rationale. If Parliament is presumed not to intend to violate fundamental rights when it passes a statute, it must also be presumed that Parliament does not intend, under such an enactment, to empower a decision-maker to exercise a discretionary power in a way which would violate fundamental rights. This position was supported in *R v Humphrys* (2018) 131 SASR 344, where the South Australian Court of Criminal Appeal examined the scope of the Court's discretionary power in sentencing. Kourakis CJ stated that this discretionary power had to be exercised in accordance with the principle of legality:[45]

> '*In enacting ss 23 and 24 of the Sentencing Act, Parliament eschewed those alternatives and chose instead to confer a judicial discretion on this Court. By so doing,* ***Parliament must be taken to have intended that the courts would exercise the discretion consistently with the principle of legality,*** *because that principle is fundamental to the exercise of judicial power. That principle requires this Court, subject to clear legislative direction to the contrary, to have regard to common law rights and liberties… (emphasis added)'.*

58. Accordingly, the principle of legality limits the scope of discretionary power. An exercise of discretion outside of the scope afforded by legality constitutes legal unreasonableness.

59. Firstly, there is clear authority for the proposition that interference with fundamental rights as already put amounts to legal unreasonableness. This can be traced back to a statement made by Lord Russell of Killowen CJ in *Kruse v Johnson* [1898] 2 QB 91, where, in reference to whether delegated legislation would be considered unreasonable, he stated:

> '*But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give*

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[44] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR).
[45] *R v Humphrys* (2018) 131 SASR 344, 349 [12] (Kourakis CJ).

authority to make such rules; they are unreasonable and ultra vires." (emphasis added)'.[46]

60. This passage has been restated several times as being, at the very least, illustrative of the principles of unreasonableness in Australian law with respect to subordinate legislation. For instance, see *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 34 [48] (French CJ), *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 365 [70] (Hayne, Kiefel and Bell JJ), and *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 4 [5] (Allsop CJ). Given the Court's change of focus toward using statutory construction to assess the limits of reasonableness,[47] rather than being a distinct basis for a finding of unreasonableness, it would seem that the principle asserted by Lord Russell of Killowen CJ in *Kruse v Johnson* (relating to '[*an] oppressive or gratuitous interference with [rights]*'[48]) must be understood—in light of *Li*—as giving effect to the proposition that the principle of legality will be a determinant of the threshold of unreasonableness.

61. Secondly, a basic requirement of reasonableness is that '*a decision-maker understand[s] his or her statutory powers and obligations*'.[49] Where a decision-maker's discretionary power is subject to the principle of legality, if the decision-maker does not exercise that power in accordance with the obligations of legality, the decision-maker cannot be said to have understood their statutory powers and obligations. Latham CJ states the principle in an alternative form:[50]

> *'...where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man* ***who correctly understands the meaning of the law under which he acts.*** *If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist (emphasis added)'.*

62. The '*meaning of the law under which [the decision-maker] acts'* incorporates principles statutory construction,[51] including the principle of legality. Therefore, a decision-maker

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[46] *Kruse v Johnson* [1898] 2 QB 91, 99-100 (Lord Russell).
[47] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel and Bell JJ).
[48] *Kruse v Johnson* [1898] 2 QB 91, 99-100 (Lord Russell).
[49] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 365 [71] (Hayne, Kiefel and Bell JJ).
[50] *R v Connell* (1944) 69 CLR 407, 430 (Latham CJ).
[51] *R v Connell* (1944) 69 CLR 407, 430 (Latham CJ).

who exercises their discretion in a way that violates fundamental rights cannot be said to have formed an opinion which has considered the "*meaning of the law"*, because that meaning includes their obligation to exercise discretion in accordance with the principle of legality. In these circumstances, by violating fundamental rights, the decision-maker has shown their ignorance of the law under which they have acted, and thus, has acted unreasonably. Hence, reasonableness requires that decision-makers act in accordance with the principle of legality (where legality is not abrogated), otherwise such acts will be invalid for legal unreasonableness.

63. <u>*Is legality abrogated in section 7 of the Public Health Act?*</u> In *Lee v NSW Crime Commission* (2013) 251 CLR 196, Kiefel J (commenting on *Coco v The Queen*) stated that *'[g]eneral words will rarely be sufficient to show a clear manifestation of [an intention to abrogate the presumption of legality] because they will often be ambiguous on the aspect of interference with fundamental rights'*.[52] The relevant question is whether the infringement of the right to bodily integrity is '*compelled*' by section 7 of the Public Health Act.[53] It is plain in the present case that the presumption—that Parliament does not intend to authorise laws which violate bodily integrity unless it does so expressly—is not abrogated within that section.

64. As Garde J sitting as President of VCAT observed recently '*The existence of an emergency, extreme circumstances or haste confirms, not obviates, the need for proper consideration to be given to relevant human rights*.': *Certain Children (by their Litigation Guardian, Sister Marie Brigid Arthur) v Minister for Families and Children* [2016] VSC 796; (2016) 51 VR 473, 508 at [188] . It is submitted the considerations on this issue are as follows.

65. Firstly, section 7 of the Public Health Act states that the Minister '*may take such action'* or '*may by order give such directions as the Minister considers necessary to deal with the [public health risk] and its possible consequences'*.[54] Here, the Minister is permitted to do what he considers necessary to deal with general public health risks. This is a broadly stated power, expressed in general language, with no clear indication as to whether it permits interference with the right to bodily integrity. Applying Kiefel J's reasoning in *Lee v NSW Crime Commission*, which with respect authoritatively reflects the canon of construction

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[52] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [172] (Kiefel J).
[53] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J).
[54] Public Health Act s 7(2).

involved, due to the generality of the section, its operation is '*ambiguous*',[55] and the principle of legality likely remains operative.

66. Secondly, it is important to contrast the generality of section 7(2) with section 7(3), which explicitly evinces an intention to infringe freedom of movement. Section 7(3) states that an Order under section 7 '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'. Importantly, in the context of section 7 of the Public Health Act, where Parliament has wished to manifest its intention to abrogate particular fundamental rights, *it has done so explicitly*. Hence, in section 7(3), Parliament has made it clear that the Minister's discretionary power could be used to infringe freedom of movement if the Minister considers it necessary to deal with a public health risk. In contrast, no such clear statement has been made with respect to bodily integrity. Given that Parliament expressly manifests its intention to abrogate other rights, its silence on whether it wishes to abrogate the right to bodily integrity supports the contention that this right has not been abrogated.

67. Thirdly, section 7 only makes sense in the context of Part 2 of the Public Health Act if it has a more limited operation than section 8. Subsection (2) of section 8 mirrors the language in subsection (2) of section 7 of the Public Health Act. They both empower the Minister to do what he or she '*considers necessary to deal with the risk and its possible consequences*'.[56] However, the power in section 7 is enlivened '*on reasonable grounds'* of there being a public health risk,[57] whereas section 8 is enlivened during a '*state of emergency*'.[58] A state of emergency is declared under the *State Emergency and Rescue Management Act 1989* (NSW) and refers to an '*emergency due to an actual or imminent occurrence*', such as an '*epidemic*', '*which endangers… the safety or health of persons… in the State*'.[59] Notably, section 8(3) refers to the Minister having a specific power to compel an individual or group to '*submit themselves for medical examination in accordance with the order'* during a state of emergency.[60]

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[55] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [172] (Kiefel J).
[56] Public Health Act ss 7(2) and 8(2).
[57] Public Health Act s 7(1).
[58] Public Health Act s 8(1).
[59] *State Emergency and Rescue Management Act 1989* (NSW) s 4(1)(a).
[60] Public Health Act s 8(3).

68. The language in section 8(3) is clear enough in that it compels a construction which requires the section to operate to allow breaches to an individual's right to bodily integrity. Section 62(6) cited above makes it even more clear that Parliament had in mind the limits of the powers it was conferring. Importantly, no equivalent provision exists in section 7. The only basis for there being two distinct sections dealing with public health risks (one '*generally*' and the other '*during a state of emergency'*),[61] is if one has a larger field of operation than the other with regards to what it can regulate. Either section 7 of the Public Health Act has the same scope as section 8, or section 8 has a wider scope, in which case, the likely explanation is that section 7 remains subject to the limits placed upon it by the principle of legality, which are clearly abrogated in section 8 of the Public Health Act.

69. Notably, the concept of '*emergency management'* was dealt with in the recent authority of *Palmer v Western Australia* [2021] HCA 5, dealing with the legality of border closures due to the Covid-19 pandemic.[62] In obiter dicta, Edelman J referred to '*the usual implication of reasonableness*' to '*confine the discretion of the authorised officer to make directions that are reasonable in light of the purpose of emergency management*'.[63] He goes on to say:

> '*Nevertheless, the nature of this usual implication, and the extreme nature of the circumstances in which the power is being exercised, might require the threshold for a finding of legal unreasonableness of any direction to be higher than that which might be conveyed by an express condition of being "reasonably required" for the purpose of emergency management.*'[64]

70. In this passage, Edelman J suggests that the "*extreme nature*" of the circumstances (relating to "*emergency management*" during a pandemic) might, in some way, heighten the threshold for a finding of legal unreasonableness. This analysis reinforces the dichotomy between sections 7 and 8 of the Public Health Act. Section 8 allows the Minister to deal with risks to public health during a '*state of emergency'*. Following Edelman J's reasoning, because section 8 deals with emergency management, it is likely to be interpreted as having a heightened threshold of legal reasonableness relative to section 7, such that under section 8 of the Public Health Act the principle of legality is abrogated, whereas, under section 7 of the Act, legality remains operative and limits discretionary power.

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[61] Public Health Act ss 7 and 8.
[62] *Palmer v Western Australia* [2021] HCA 5 [286] (Edelman J).
[63] *Palmer v Western Australia* [2021] HCA 5 [286] (Edelman J).
[64] *Palmer v Western Australia* [2021] HCA 5 [286] (Edelman J).

71. This construction—creating a dichotomy between sections 7 and 8 of the Public Health Act—is consistent with the objects of the Public Health Act, including controlling '*risks to public health'*,[65] and preventing '*the spread of infectious diseases'*.[66] It gives effect to these objects in a way that accords with the underlying rationale of the principle of legality. As Lord Hoffman put it in *Ex parte Simms*, '*the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost'*.[67] A construction of the Public Health Act—that requires a declaration of a state of emergency before fundamental rights, freedoms and immunities can be violated—accords strongly with the principle's purpose of political accountability. Therefore, section 7 of the Public Health Act is subject to the principle of legality, and any order, made by the Minister under that section, which violates the right to bodily integrity will be legally unreasonable.

72. <u>*Is the Order authorised by the Act*</u>*?* Clause 4.3 of the Order does not allow an authorised worker, whose residence is in an area of concern, to leave the area for work, unless the worker has had '*at least 1 does of a COVID-19 vaccine'*,[68] or '*has been issued with a medical contraindication certificate*'.[69] Clause 4.24 of the Order requires a '*relevant care worker whose place of residence or place of work is in an area of concern*' to '*not enter or remain*' at their place of work unless they have had '*at least 1 dose of a COVID-19 vaccine*',[70] or '*has been issued with a medical contraindication certificate'*.[71] Clause 5.8 requires that a person '*whose place of residence is in an area of concern must not enter or remain on a construction site in Greater Sydney'* unless they have had two doses of a COVID-19 vaccine,[72] one dose at least 21 days ago,[73] or one dose of a COVID-19 vaccine within the previous 21 days and '*has been tested for COVID-19 within the previous 72 hours*',[74] or '*has a medical contraindication certificate issued to [them] and has been tested for COVID-19 within the previous 72 hours'*.[75] Applying the reasoning of the High Court in the PBS case and in the MBA case the practical and plain effect of provisions such as clauses 4.3, 4.24 and 5.8 mandates individuals, who are subject to these provisions which

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[65] Public Health Act s 3(1)(b).
[66] Public Health Act s 3(1)(d).
[67] *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman).
[68] Order cl. 4.3(3)(a).
[69] Order cl. 4.3(3)(b).
[70] Order cl. 4.24(2)(a).
[71] Order cl. 4.24(2)(b).
[72] Order cl. 5.8(1)(a).
[73] Order cl. 5.8(1)(b).
[74] Order cl. 5.8(1)(c).
[75] Order cl. 5.8(1)(d).

includes the Plaintiffs, to become vaccinated or forfeit their livelihood, right to work and right to access to premises otherwise available to them by the owner.

73. *Does vaccination violate a person's right to bodily integrity?* Requiring a person to receive a vaccine constitutes a violation of a person's right to bodily integrity. In *Hart v Watt* (2015) A Crim R 221, Pritchard J held that '[a] requirement for a person to undergo a blood test, or to provide a mouth swab, constitutes an interference with that person's right to bodily integrity'.[76] If this is accepted, then an injection of a vaccine being analogous to a blood test, and more invasive then a mouth swab, it would seem that a requirement that an individual receive a vaccine would constitute a violation of a person's right to bodily integrity. Vaccination is a medical procedure. Removing an individual's ability to consent to such a procedure is a departure from the general system of law. Therefore, a requirement that an individual be vaccinated breaches a person's fundamental right to bodily integrity, and therefore, cannot be a reasonable exercise of a discretionary power.

74. *Are the provisions unreasonable?* For those who are subject to these provisions, their effect is to prohibit a person, who is not able to receive a medical contraindication certificate, from being able to work in their relevant profession, unless they receive a COVID-19 vaccine. The extreme threat of prohibiting an individual from undertaking work, unless they become vaccinated, has the effect of requiring an individual—in circumstances where they may not have otherwise given their consent to be vaccinated—to receive a dose of a Covid-19 vaccine. By effectually compelling individuals to be vaccinated, their right to bodily integrity is violated. The Order and inter alia clauses 4.3, 4.24 and 5.8 in particular are legally unreasonable.

75. As to a possible defence argument that the inclusion of a contraindication exemption in some way alleviate the unreasonableness of the Order, this misapprehends the nature of the alleged unreasonableness. The '*medical contraindication certificate'* is a certificate issued to an individual by a medical practitioner because the individual has been assessed as unable, for medical reasons, to receive a Covid-19 vaccine.[77] Individuals with such a certificate will not be required to be vaccinated to work in their relevant profession.[78] This exemption applies only to a narrow sub-set of individuals. In contrast, all people, whether medically able or unable to receive a Covid-19 vaccine, have a right to bodily integrity. As

[76] *Hart v Watt* (2015) A Crim R 221, 229 [34] (Pritchard J).
[77] The Order Schedule 4.
[78] The Order cls 4.3, 4.24 and 5.8.

discussed above, it is the position of our common law that no person can be forced to undergo a medical procedure without their consent.[79] The contraindication exemption does not negate the true thrust of the alleged unreasonableness, that individuals (including those who may medically be able to receive a Covid-19 vaccine) have a common law right not to be compelled to undergo a medical procedure without their consent. This right exists whether or not an individual is medically able to receive a Covid-19 vaccine. It, furthermore, is presumed that Parliament does not wish to negate this right unless it manifests a clear intention to do so. The inclusion of a contraindication exemption does nothing to alleviate the effect of clauses 4.3, 4.24 and 5.8, which is to require persons—who may medically be able to receive a Covid-19 vaccine—to undergo a medical procedure against their consent. Thus, the contraindication exemption does nothing to alleviate the unreasonableness of the relevant provisions.

76. Secondly, the exemption under clause 7.2 of the Order similarly does not negate the alleged unreasonableness of the relevant provisions. Clause 7.2 states that *'[t]he Minister may… grant an exemption to this Order or specified provisions of this Order'*. Vitally, the provision contains no criteria under which, or indication as to how, the Minister may choose to exercise the power. The power is discretionary. The Minister may choose to exercise the power to exempt individuals who do not consent to be vaccinated, or the Minister may choose not to, in which case clauses 4.3, 4.24 and 5.8 will remain in full operation. The exemption power would only alleviate the unreasonableness of these provisions if the Order made it necessary for the Minister to use it to do so. There is no assurance or requirement that the Minister will use the exemption in such a way. Therefore, given the power is discretionary, it cannot be guaranteed that the exemption power, contained in clause 7.2, would be used to negate the unreasonable effect of clauses 4.3, 4.24 and 5.8.

77. In summary the Minister's exercise of the rule-making power exceeds the scope of that power, whilst the statutory text and the caselaw supports the Plaintiffs' case.

78. Conclusion: The Order is invalid for the above reasons and should be set aside.

C. Scope of Power / Effects – Plaintiffs' Third Argument

[79] *Marion's Case*, 253 (Mason CJ, Dawson, Toohey and Gaudron JJ).

79. The second, and more traditional, type of legal unreasonableness referred to above and also raised by paragraph 11 of the statement of claim is where the outcome of a decision is unreasonable.[80]

80. The Order on the evidence does not conform to the requirements of legal reasonableness in that the Minister's conduct is relevantly blameworthy because he disregarded significant information that addressed the key issues, and secondly failed to have regard to the effects of his proposed order.

81. A requirement of legal reasonableness in the exercise of a decision-maker's power is derived by implication from the statute including an implication of the required threshold of unreasonableness, *Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 at 367 [76].

82. The power is subject to the usual implication that it must be exercised within the bounds of legal reasonableness.

83. The Plaintiffs' evidence demonstrates the Minister or those advising him was aware that the Plaintiffs were making available significant new information about available treatments and alternative measures. As the Defendants were aware, this was the only opportunity that the Plaintiffs would have to provide such new information, which could be of considerable importance. On their case, the consequences of refusal to have regard to, or to otherwise independently seek, this information leaves in place far-reaching draconian Orders, which go so far as to breach the fundamental right to bodily integrity of many residents of NSW. A request from the Minister for the correct submissions and all correct expert opinion would have been a very simple matter. These circumstances reflect the observation of six members of this Court in *Minister for Immigration and Citizenship v SZIAI*: "*The failure of an administrative decision-maker to make inquiry into factual matters which can readily be determined and are of critical significance to a decision made under statutory authority, has sometimes been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it.*"

84. The legal unreasonableness of the failure to get new information is plain when the alternative approach taken by the Minister is considered. The Defendants treated the generic information obtained by the AHPPC, Ms Boyd and others as though the

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[80] See *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, 958 [122] (Edelman J); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 445 [44] (Allsop CJ, Robertson and Mortimer JJ).; *Minister for Immigration v Stretton* [2016] FCAFC 11 [6] (Allsop CJ).

information had been correctly provided. On no view in the circumstances could that have been a reasonable course to take.

85. It might be submitted that a consideration that militates against a conclusion of unreasonableness for a failure to inquire is the lack of any possibility of a useful result. As in CHK16 there are two reasons which indicate that the Defendants might reasonably have expected a useful result. First, the standing of the expert opinion being offered. Secondly, the international context with other comparable countries in front of and behind Australia in dealing with the issues affording a measure of rational comparison: cf *Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 at 367.

86. In *Peko-Wallsend*[155], Mason J, having observed that there was considerable diversity in the application by the courts of the test of manifest unreasonableness, suggested that "guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion". *House v The King*[156] holds that it is not enough that an appellate court would have taken a different course. What must be evident is that some error has been made in exercising the discretion, such as where a judge acts on a wrong principle or takes irrelevant matters into consideration. The analogy with the approach taken in an administrative law context is apparent.

87. The decision in question is the exercise of the rule making power in s 7. The purpose of s 7 is different from s 8 – which like the power in Palmer is focussed on an emergency power, whereas s 7 is focussed on specific public health directions to particular areas. There was no evident or intelligible justification for a one size fits all response to the whole State when there was evidence that public health risks existed in some areas but not others with available measures having been brought to the attention of the Defendants. The failure to make inquiries into which areas were exposed to public health risks in the context of the purpose of the provision is of critical significance to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it. [DUA 16].

88. Apart from the unreasonableness of the process leading up to the Order its content and its effects are relevant. As to this the Plaintiffs rely on the conclusions in their expert evidence as both the risks in adopting the measures contained in the Order but also the adverse effects set out in the analysis of the expert material in the separate schedule. In particular then her evidence is examined Dr Macartney's material, apart from being of doubtful utility having regard to her areas of expertise being more limited than those of the Plaintiffs' experts, it is apparent that Dr Tyson and Professors McCullough and Battachayra present a firm

factual foundation for addressing the public health risks by a path not taken which is more than just preferable or reasonable.

89. For the above reasons this second basis of unreasonableness is made out.

Section 5: CONSTITUTIONAL ARGUMENTS

90. The Order is invalid because it impairs the express constitutional guarantee against a civil conscription in Constitution section 51(xxiiiA). The argument is put two ways. First [as to which see A below] the Order on its face is a civil conscription to which Constitution s 51(xxiiiA) applies. Second [as to which see B below] if as a matter of construction section 51(xxiiiA) does not of its own force apply to State laws, nonetheless on the facts of this case the Order was made in furtherance of a joint scheme between the State and the Commonwealth having the effect of imposing a civil conscription on State citizens to which Constitution s 51(xxiiiA) applies on the principle in *Magennis* and *ICM Agriculture* [see below].

91. **A: <u>Constitution section 51(xxiiiA)</u>:** It is submitted that the prohibition upon laws of civil conscription affects State laws.

92. The "no conscription" requirement in s 51(xxiiiA) amounts to a limitation on the provision of medical services, for example compulsory vaccination, which must be governed by the contractual relationship between patients and doctors. This important limitation is extended to the Australian states because on its proper construction and in context it takes effect also as an implied constitutional right of individual patients to reject unless consented to vaccination[s].

93. This view is supported by the *Nuremberg Code* - an ethics code relied upon during the Nazi doctors' trials in Nuremberg. This Code has as its first principle the requirements of fully informed consent by the individual to receive medical treatment or to participate in an experiment [see above the discussion in the High Court in *Maison]*. Hence, people's refusal to be vaccinated may be based on the ground, which even the companies Pfizer and AstraZeneca acknowledge, that the Covid vaccines are still experimental and their long-term effects and safety on its recipients are largely unknown.

94. In 2009, in *Wong v Commonwealth; Selim v Professional Services Review Committee* Kirby J opined that the purpose of prohibiting civil conscription is to ensure that the relationship between medical practitioner and patient is governed by contract and hence be subject to informed consent where that reflects the intention of the parties. For him, the test whether civil conscription has been imposed is "*whether the impugned regulation, by its details and burdens, intrudes impermissibly into the private consensual*

arrangements between the providers of medical and dental services and the individual recipients of such services." - at [151]. These are words of general application not just limited to laws of the Commonwealth.

95. Finally, *in British Medical Association v Commonwealth* Williams J stated: "*the expression [civil conscription] invalidates all legislation which compels medical practitioners to provide any form of medical service" (emphasis added).* –(1949) 79 CLR 201, at 287 (Williams J). Accordingly, an Australian law Federal or State that mandates the use of particular medical services, such as vaccinations, is constitutionally valid.
96. To conclude, no government, either federal or state, can impose compulsory vaccination in this country, or prevent medical practitioners from remaining free to choose whether or not to provide certain medical services, including vaccination. Also see the recent article by Professors Moens and Zimmerman a copy of which is provided separately.
97. For these reasons the Order in providing for a civil conscription is invalid or invalid to the extent of the impairment [see Interpretation Act 1987 section xx].
98. This conclusion is supported by other relevant considerations. *A Constitution in the [traditional] sense limits the powers of rulers by subordinating them to enduring rules that they themselves cannot abrogate. Such a constitution is inextricably associated with the ideal of the 'rule of law', which seeks to ensure that people are not at the mercy of the momentary will of a ruler or a ruling group, but enjoy stability of life, liberty and property.* Thus in *Nationwide News* the first of the implied constitutional guarantee cases, the High Court held that the protection extended to State laws, and invalidated them if they impaired the guarantee which would otherwise be ineffectual: *"Where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of government" Nationwide News Pty Ltd v Wills* (1992) m177 CLR 1, Brennan J, at 48. A good example is *Coleman v Wright* cited above.
99. Further, the Australian constitution must be interpreted in a manner that promotes its purposes, values, and principles, advancing the 'rule of law' and the fundamental rights of the citizen. To implement the 'rule of law' and 'constitutionalism', the Australian Constitution expressly limits the exercise of governmental powers. Thus in the PBS case Webb J noted: *"When parliament comes between patient and doctor and makes the lawful continuance of their relationship as such depend upon a condition, enforceable by fine, the doctor shall render the patient a special service, unless that service is waived by the patient, it creates a situation that amounts to a form of civil conscription"* [at 295].

100. *Likewise in Bowater v Rowley Regis Corp* [1944] KB 476 at 479, Lord Justice Scott said: *".... A man cannot be said to be truly 'wiling' unless he is in a position to choose freely, and freedom of choice predicates , not only full knowledge off the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but in the absence from his mind of any feeling of restraint so mths nothing shall interfere with the freedom of his will".*

101. Again, Chief Justice French and Justice Gummow held in *Wong v Commonwealth; Selim v Professional Services Review Committee (2009) 2*36 CLR 573 at 62 held that civil conscription is a *"compulsion or coercion in the legal and practical sense, to carry out work or provide [medical] services". Justice Webb in British Medical Association v Commonwealth* (1949) 79 CLR 201 at 293 also noted: *"If parliament cannot lawfully do this [mandate vaccines] directly by legal means it cannot lawfully do it indirectly by creating a situation, as distinct from merely taking advantage of one, in which the individual is left no real choice but compliance".*

102. This reflects what Justices Deane and Toohey said in *Leeth v Commonwealth* (1992) 174 CLR 455 at 8 referring to the Preamble to the Constitution to support their view that the principle of equality is embedded impliedly in the Constitution. They argue that *"the essential or underlying theoretical equality of all persons under the law and before the courts is and has been fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government".* Also see per Lord Justice Mustill in *Airdale National Health Service Trust v Bland [*1993] AC 789 at 889 where His Lordship stated: " *If the patient is capable of making a decision on whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right mto proceed in the face of objection, even if it is plain to all, including the patient, that adverse consequences and even death may ensue".*

103. In another landmark judgment in this area Gaudron J in *Australian Capital Television Ltd v Commonwealth* (1992) said to the same effect: *"the notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and .... Freedom of speech generally".*

104. Apart from textual matters human rights considerations and international obligations affect the exercise of executive functions and powers. Indeed even the Australian Government Immunisation Handbook consistently with the Act states "*[vaccines] must be given voluntarily in the absence of undue pressure, coercion or manipulation".* Article 6,

Universal Declaration on Bioethics and Human Rights (2005) states: *"Any preventative, diagnostic and therapeutic medical intervention is only to be carried out with the proper, free and informed consent of the person concerned, based on adequate information"*.

105. Also the *International Covenant on Civil and Political Rights* Article 4, annexed to the *Australian Human Rights Commission Act* [Cth] provides '*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, ...*' That is consistent with the Plaintiffs' principled case.

106. Articles 5.2, 10.1 and 12.1 are also relevant.

107. Likewise the *International Covenant on Economic, Social and Cultural Rights* Article 6.1 provides relevantly, '*The States Parties to the present Covenant recognise 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*.' Article 6.2 speaks to the needs of States to educate and assist those left behind or concerned. Whilst these provisions which are part of Australian law are not constitutionally protected they may inform where applicable the content of constitutionally protected rights.

108. For the above reasons the Order impairs the constitutionally protected guarantee against a civil conscription, which is intended to confer a national protection, is invalid to the extent of the inconsistency: *Acts Interpretation Act 1901* section 15A.

109. **B: <u>Joint Scheme</u>:** This submission applies if point A is rejected. As to the evidence of this issue the material on the topic is contained in the Plaintiffs' summary of the Court Book evidence which is attached in the Schedules. It demonstrates the joint scheme or as it is more usually called today a cooperative arrangement to bring about a civil conscription and that the provisions of Order No 2 being part of and made in furtherance of the scheme for that reason is invalid.

110. At the outset an issue of evidence is raised. The admissions made by the Premier, as recorded on Media Monitors and evidenced in the affidavit of Mr Nikolic sworn 13 September 2021 are relevant because they assist proof of the Plaintiffs' case of a joint scheme. Counsel in the Henry case put at the directions hearing in this Court on 24 September 2021 that these statements comprise an admission of law. Rather with respect the Plaintiffs contend that, when read in context, the preferable view is that the admission is one of mixed law and fact, that on the ground that Order No 2 is made in furtherance of the cooperative arrangement with the Commonwealth the Order under the National Plan

in that it mandates a vaccination programme of State citizens under State law at least to that extent it is invalid.

111. In *Re Le Meilleur Pty Ltd* [2011] NSWSC 1115 at [293] Ward J as her Honour then was, citing Handley JA in *Pitcher v Langford*, concluded an informal admission was admissible relevantly as follows:

> *An admission or acknowledgement as to the state of the parties' rights at the time (as contemplated in Sasson & Partners Pty Ltd v Fahevu [1999] NSWCA 400), may involve an admission as to matters of mixed law and fact. There is a dispute as to whether admissions of matters of mixed law and fact are admissible as evidence. In Pitcher v Langford (1991) 23 NSWLR 142 at 160, Handley JA considered the question whether admissions of law or of mixed facts and law were admissible:*
>
> > *In my opinion these admissions were admissible and entitled to considerable weight. In Grey v Australian Motorists & General Insurance Co Pty Ltd [1976] 1 NSWLR 669 at 684, Mahoney JA said: "An admission may provide material from which a court may find a question of law, a question of fact, or a question being a conclusion from a mixture of fact and law." See, also, Jones v Sutherland Shire Council [1979] 2 NSWLR 206 at 231. The authorities his Honour referred to as establishing that admissions involving conclusions of mixed fact and law are receivable, and in a proper case may be given considerable weight, included Allen v Roughley [1955] HCA 62; (1955) 94 CLR 98 at 142 per Kitto J.*

112. Her Honour applied that decision, and admitted the material which was a written submission to her as an admission of fact, but not its legal effect. Thus the concession here means there is an admission by the Premier of what the Plaintiffs say is glaringly obvious, namely the existence of a cooperative arrangement between the State and the Commonwealth to give effect to a civil conscription to meet a perceived health epidemic. Further here the Premier stands in a very different position to the Court and the parties and the Court should give the material '*considerable weight'* to use Handley JA's phrase. The Premier was a party to and active participant in the COAG, National Cabinet and National Plan arrangements with first hand knowledge of those matters. Similarly, see per Kitto J in *Allen v Roughley* [1955] 94 CLR 98 at 142 where the issue was an admission as to title to land. Not only is the Premier the chief officer of NSW the Third Defendant but can also be expected to know the facts upon which the admission depends.

113. Turning then to the arrangement, the *National Plan to Transition Australia's National Covid-19 Response* ('the National Plan') includes Commonwealth and State orders made in conformity with adopted by COAG initially and implemented by the National Cabinet, the Commonwealth and NSW. The permissibility of what may conveniently called the *National Plan* measure, although it has different names, is challenged on three grounds.

114. First, the cooperative arrangement is a measure which by its terms operation or effect provides for a civil conscription through the funding, milestones, other cooperative provisions and targets [and see especially clauses 4.3, 4.24 and 5.8] thereby impairing the constitutionally protected guarantee in Constitution section 51(xxiiiA): *Attorney-General (Vict.) v. Commonwealth* [1945] HCA 30; (1945) 71 CLR 237; and also see *British Medical Association v Commonwealth* [1949] HCA 44; (1949) 79 CLR 201. Latham CJ's views as to the liberal and beneficial meaning of this constitutional guarantee in section 51(xxiiiA) remains authoritative. A review of the authorities is set out in the Schedules to this Submission.

115. Second, the *National Plan* is a cooperative arrangement of the type discussed in *Patterson* and referred to by Twomey *Constitutional Law of NSW* 2004 Fed Press at page 28, and is invalid for that further reason as purporting to indirectly achieve what cannot be done directly: *PJ Magennis Pty Ltd v Commonwealth* [1949] HCA 66; 80 CLR 382; *Gilbert v Western Australia* [1962] HCA 7; 107 CLR 494; *Spencer v Commonwealth* [201] HCA 28; 139 CLR 118. Such an arrangement may be either formal, eg where the intergovernmental agreement is Scheduled to statutes of both polities, or informal where there is merely an exchange of letters or agreements in the exercise of executive power, which is the present case: see esp *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51 at [38] to [40] per French CJ, Gummow and Crennan JJ.

116. Third, it is submitted that the operation and effect of the principle of responsible and representative government which Spigelman CJ held *Egan v Chadwick* [1999] 46 NSWLR 563 at 569-570 is relevantly part of the constitutional law of NSW. For present purposes it has two relevant aspects:

- Firstly Minister Hazzard is accountable as head of the executive department of the State administering *Public Health Act 2010* to the NSW Parliament of which he is a member according to law and is subject in that respect to the jurisdiction of this Court should he exceed his jurisdiction or power;
- Secondly having regard to the nature of Australia's Federation of which the State forms part Minister Hazzard is also accountable to the Parliament of the Commonwealth for the implementation of the national health laws under the cooperative or joint scheme called the *National Plan* conferring executive power through funding and other arrangements on the NSW executive.

117. The Plaintiffs submit that the constitution of NSW comprises the following sources in law which the above two aspects form a core part:

1. The NSW Constitution at Federation – principally set out in *Constitution Act 1902*;

2. The overriding effect of the *Commonwealth of Australia Constitution Act* and the *Commonwealth Constitution* - by operation of section 106 the States are '*not only constituent elements of the federation but constituent elements of a federal democracy'*: Gaudron J in *Muldowney v South Australia* [1996] 186 CLR 352 at 377;

3. Modifications or other limits to *NSW Constitution* by Imperial legislation and by any manner and form provision of the NSW Constitution

- Relevantly MLAs are accountable to the people of NSW because they are 'elected' [Constitution ss 7A,7B, 11A and 17]; as to the right to vote [ss11B and 22; and see Twomey at 32];

4. The *Australia Acts 1986* incl the principles of repugnancy set out

5. The implication in the NSW Constitution of responsible and representative government referred to above enforced by equitable and prerogative relief in this Court:

- Per Spigelman CJ in *Egan v Chadwick* [1999] 46 NSWLR 563 at 569-570; and at 592 per Priestley JA;
- Per McHugh J *in Egan v Willis* [1998] 195 CLR 424 at 475
  - Refer also Gleeson CJ in *Egan v Willis* [1996] 40 NSWLR 650 at 659 -660;
- Per Gaudron J at [64] and at [212] per Gummow and Hayne JJ *in Re Patterson; ex part Taylor* [2001] 207 CLR 391;
- Per Dixon J *NSW v Bardolph* [1934] 52 CLR 455 at 509;
- *P*er Dawson J in *McGinty v WA* [1996] 186 CLR 140 at 182 [the 'irreducible minimum requirement'];
- Refer also Twomey *The Constitution of NSW* 2004 Fed Press pp 25-32.

6. Relevantly the existence of a State and Commonwealth joint scheme has the consequence that one Parliament may refer to or repose on Ministers of another the implementation of its laws: see Twomey at page 28

- per Gaudron, Gummow and Hayne JJ *Egan v Willis* at 451;
- *McGinty v WA* [1996] 186 CLR 140 at 172-3 in Brennan CJ.

118. Accordingly, the *National Plan* in this case is alleged to be a scheme or arrangement which renders State laws subject to the same constitutional restrictions as the Commonwealth, and that Minister Hazzard was responsible for the reasons explained by Twomey to both the NSW and Federal Parliaments [assuming the Commonwealth authorised the joint scheme] as otherwise the States might do indirectly through an informal or formal arrangement with the Commonwealth, what cannot be done directly: *PJ*

Magennis Pty Ltd v Commonwealth [1949] HCA 66; 80 CLR 382; *Gilbert v Western Australia* [1962] HCA 7; 107 CLR 494; *Spencer v Commonwealth* [201] HCA 28; 139 CLR 118; *Re Patterson; ex part Taylor* [2001] 207 CLR 391 per Gaudron J at [64] and at [212] per Gummow and Hayne JJ *in* and per Dixon J in *NSW v Bardolph* [1934] 52 CLR 455; *Coleman v Power* [2004] HCA 39; 220 CLR 1. ; *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51 at [38] to [40].

119. As the documents produced to the Court demonstrate there has been and is a joint scheme or cooperative arrangement between the Commonwealth and [inter alia] NSW regarding the National Covid 19 Response in furtherance of which Order No 2 of Minister Hazzard is part.

120. It follows that Order No 2 is constitutionally invalid by direct operation of Constitution section 51(xxiiiA) or by reason of the operation and effect of a joint scheme between the Commonwealth and the State to give effect to a civil conscription.

Section 6: THE LEPRA ARGUMENT

121. On the evidence the Order clause 2.8 contravenes Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).

122. Clause 2.8 of the Order purports to grant to a NSW police officer powers which exceed the functions or powers of a police officer as provided for in the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) [LEPRA] as to disclosure of identity, disclosure of personal information, detention and arrest. To the extent that clause 2.8 or any other part of the Order the stop and detain provisions are inconsistent with LEPRA, LEPRA section 6(2) provides that LEPRA prevails.

123. Section 6(1) provides this section applies to a provision of another Act or regulation that confers functions on a police officer or other person (other than a provision of an Act or regulation referred to in section 5(1)). Under section 6(2) to the extent of any inconsistency, LEPRA prevails over an Act or regulation to which this section applies.

124. The Minister's health order confers powers upon the NSW Police Service that greatly exceed those conferred by LEPRA. For example officers need to have reasonable suspicion that an indictable offence has been committed and that the person is materially involved. Because the health order exceeds those powers it is invalid and in particular although not limited by operation of clause 2.8.

125. The Order should be set aside having regard to the operation of LEPRA.

Section 7: CONSTITUTION SECTION 109 ARGUMENT

126. The Order is invalidated by Constitution s 109 on the ground of inconsistency with the *Australian Immunisation Register Act* [AIR Act] of the Commonwealth. Vaccination information that has been civilly conscripted may under the Order No 2 may not be imported into and onto the Australian Immunisation Register. That is because the only information that my lawfully registered is information which has not been obtained through a civil conscription or circumstances amounting to civil conscription such as economic duress and coercion, as experienced by the Plaintiffs.

127. The statutory text and the caselaw supports the Plaintiffs' case. The Defendants' argument does not meet that case,

128. The AIR Act is Commonwealth legislation that covers the field in regards to recording of an individuals' vaccination status. The legislative head of power enabling the Commonwealth to enact the AIR Act is s51(xxiiiA) of the Constitution. S51(xxiiiA) provides that the Commonwealth can legislate for medical and dental services but not so as to authorise any form of civil conscription. Case law shows that coercion and practical compulsion amounts to a form of civil conscription.

129. Accordingly restricting a person's ability to earn a living is such coercion. Latham CJ in BMA made it clear that practical as well as legal compulsion was protected under the guarantee.

130. The Public Health Order forcing the Plaintiffs and other people to be show evidence of having a Covid 19 vaccine in order to be able to work – and people are being summarily dismissed from their jobs for not complying with this Health Order. Accordingly there is an inconsistency between the objects and terms of the corresponding laws with the result that the Order is void and of no effect.

131. [Further the Australian Immunisation Register Act 2015 section 10A imposes a requirement to report information relating to all relevant vaccinations to the Commonwealth.

132. Section 13 Requirement to report information relating to certain relevant vaccinations. Section 22 refers to authorised dealings with protected information under the Australian Privacy Principles.

133. However under the Order the Minister may, in writing, authorise a person to make a record of, disclose or otherwise use protected information for a specified purpose that the Minister is satisfied is in the public interest. Accordingly a further inconsistency arises, adverse to the Plaintiffs and their interests.]

134. The Order should be set aside

Section 8: CONCLUSION.

135. The Orders should be made with costs.

Peter E King
Elizabeth J Rusiti
Counsel for the Plaintiffs
27 September 2021

SCHEDULES

A.	EXPERT EVIDENCE REVIEW	See Separate Schedule
B.	OBJECTIONS TO EVIDENCE	See Separate Schedule
C.	JOINT SCHEME DOCUMENTS	See Attached Schedule
D.	CIVIL CONSCRIPTION CASE REVIEW	See Attached Schedule

1. The starting point is the PBS Case. In *PBS* the Court held that any mandated conduct whether expressly or in its effect would amount to a prohibited civil conscription otherwise the prohibition would easily be circumvented by the legislature.
2. Then as Webb J said in BMA: '*The commonwealth parliament is not constitutionally authorises to force or compel any individual to accept vaccination or a medical procedure against his or he own will, and even if the doctor were compelled to provide a service, the patient would have the right to waive that service'*.
3. Latham CJ delivered the leading judgment. His Honour first discussed the issue of the nature and scope of the constitutional validity of the legislative power of s7A(1) of the Pharmaceutical Benefits Act 1944 (Cth) [which imposed a penalty of £50 on any medical practitioner who failed to use a prescription form supplied by the Commonwealth for a medicine, the formula of which was contained in the Formulary, or for any material or appliance, the name of which was contained in the addendum to the Formulary, whether or not these items could be obtained free of charge] granted to the Federal Parliament under the amendment. He stated that as a consequence of the introduction of the words '*the provision of' at the beginning of s*

51(xxiiiA), the new power given to the Commonwealth 'relates only to provision of medical services by the Commonwealth, and not by ... doctors in private practice.' He defined private medical practice as involving employment by a patient of a doctor who provides the service for which the patient is bound to pay a fee.

4. While the Commonwealth Parliament can validly make laws with respect to the provision of the benefits and for medical and dental services, it is not authorised to make laws '*providing for the complete control of medical services rendered by any person to any other person*.' Nor does the Commonwealth legislature have the constitutional power to 'control the practice of the medical profession completely or to such less extent as Parliament might think proper.'
5. According to Latham CJ, '[*t]here are various ways of compelling people to a course of action. The imposition of a penalty or imprisonment is a common form of compulsion'* [at 252].
6. The term '*civil conscription'* is wider than industrial conscription. It is applicable in the case of any civilian service, ie non-military, work or service. It could properly be applied to any compulsion of law requiring that men should engage in a particular occupation, perform particular work, or perform work in a particular way. [at 249]
7. Latham CJ stressed the importance of the words 'any form' in the prohibition, and said that *'[t]hey show that the Parliament intended that any service to which the limitation applied should be completely voluntary and not procured by compulsion of law.'* [at 250]
8. The s 51 (xxiiiA) clause gives the constitutional objective to safeguard the right to be free for governmental interference in making choice about perusal health care, which is regarded as a fundamental civil right by John Stuart Mill.
9. Each adult person of sound mind '*is the proper guardian of his own \health, whether bodily, or mental or spiritual*'. [In his influential essay *On Liberty* (1859), Mill argued that individuals should be amenable to the power of the State only when their conduct is based on choices which impinge on or concern others. See also Gerard Dworkin (ed), *Morality, Harm and the Law* (1994) page 9.
10. Dixon J, in dissent, distinguished between the principal power contained in s 51(xxiiiA) and the incidental power. For this characterisation of incidental powers his Honour relied on *Le Mesurier v Connor* [1929] HCA 41; (1929) 42 CLR 481, 497.]

11. In the next case, *General Practitioners* [1980] HCA 30; (1980) 145 CLR 532, the Court held that the practical effect of ss 16A, B, and C [under the new s 16A of the *Health Insurance Act 1973* (Cth), as amended by s 15(1) of the *Health Legislation Amendment Act 1986* (Cth), is that no Medicare benefit is payable in respect of services rendered by a practitioner until that practitioner has given the new s 23DC undertaking. Section 16B was replaced by s 23DB which provides that the Minister may approve forms of undertaking to be given by persons who wish to become approved pathology practitioners. Section 16C was replaced by s 23DC, which deals with the giving, acceptance, and time limits relating to approved pathology practitioner undertakings] was to compel pathologists to be registered under the Commonwealth scheme, and to comply with the normative standards thereby imposed for the conduct of clinical practice, the law did not amount to civil conscription because there was no legal or practical compulsion on them to perform a medical service.
12. Gibbs J delivered the leading judgment. His Honour reiterated the principle that there is no explicit head of power under which the Federal Parliament can regulate private medical practice, in the sense of the physician–patient relationship [at 548]. The Commonwealth's powers are limited to regulation of those financial and administrative incidents of practice that pertain to provision by the Commonwealth of medical and pharmaceutical benefits. He recognised that amendments to the Act, which made the Commonwealth medical benefits payable only for services rendered by '*approved pathology practitioners*', meant that the specialist medical practitioners who wished to establish, or continue in the practice of rendering pathology services had no real choice — they had to become '*approved pathology practitioners'*. In so doing, they had to submit themselves to obligations and sanctions cast upon them by virtue of ss 16A, B and C of the Act, its Regulations, and the undertaking. According to Gibbs J, the Act, the Regulations and the undertaking relating to provision of benefits for pathology services '*do have the effect — legal or practical — of compelling medical practitioners to observe certain positive requirements'*: [at 554].
13. Although the legislation had the practical effect of compelling pathologists to be registered under the Commonwealth scheme and to abide by the obligations thereby imposed, it would apply only if they wished their patients to be eligible for Medicare

benefits. Consequently, the legislation did not impose '*any form of civil conscription*', as defined by his Honour. [at 557].

14. Gibbs J posited the following interpretation of the prohibition clause 'but not so as to authorise any form of civil conscription': "*There is nothing in the Constitution that would indicate that the expression 'any form of civil conscription*' where it appears in s 51(xxiiiA) should be given an enlarged meaning which its words do not naturally bear. The words '*any form of' do not, in my opinion, extend the meaning of 'conscription', and that word connotes compulsion to serve rather than regulation of the manner in which a service is performed.*" [at 557]. However Gibbs J agreed with the majority view in *BMA* that the effect of the expression 'any form of civil conscription' is not limited to compulsory service which is performed full-time, or regularly, but is intended to prevent any form of compulsion to perform particular services: ibid 556.
15. The High Court followed the same interpretive approach to incidental powers in s 51(xxiiiA) in the case of *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* [1987] HCA 6; (1987) 162 CLR 271. The Court held that provisions of the National Health Act 1953 (Cth), which created a system of controls over the location, number of beds, level of fees, selection of patients, auditing of accounts, and inspection of approved private nursing homes, were substantially connected with the subject matter (provision of hospital and sickness benefits to residents of those homes) conferred on the Commonwealth under s 51(xxiiiA) [at 283–4 (Mason ACJ, Wilson, Brennan, Deane, Dawson JJ)].
16. In their joint judgment, Mason ACJ, Wilson, Brennan, Deane and Dawson JJ observed that: "*It may be that the degree and nature of the controls imposed on proprietors seriously affect their freedom to run their business as they wish. It might be argued that those controls are more stringent than are strictly necessary to achieve the objectives of the legislation and in some instances, even the economic viability of a home may be threatened. But it is not for the Court to determine that argument or to pass [judgment] upon the wisdom or the suitability of the particular scheme that the legislature has chosen to institute, so long as the Court is unable to say that it lacks a sufficient connection to the head of power.*" [at 283].
17. The Court's admission in *Alexandra* that the controls found to be incidental to the head of power were more stringent than was '*strictly necessary to achieve the*

objectives of the legislation and in some instances, even [threatened] the economic viability of a [nursing] home' suggests that the judges were unwilling to apply either the purposive approach or the proportionality principle of constitutional interpretation to limit the scope of incidental powers.

18. As to the issue of practical and economic compulsion in *General Practitioners*, Gibbs J mentioned, but did not discuss, the question of whether practical and economic compulsion could amount to civil conscription [*General Practitioners* [1980] HCA 30; (1980) 145 CLR 532, eat g page 554]. Barwick CJ, however, expressly agreed with Latham CJ's statement in *BMA* that '*civil conscription could result from practical or economic considerations* [at 583].
19. Aickin J confirmed that the words '*but not so as to authorise any form of civil conscription'* were designed to impose an important limitation on legislative power, and that this limitation extends to practical as well as legal compulsion. His Honour pointed out that imposition by legislation of economic pressure that is difficult or unreasonable to resist would be just as effective as legal compulsion, and would, like legal compulsion, be a form of civil conscription. To regard such practical compulsion as outside the restriction placed on this legislative power would be to turn what was obviously intended as a constitutional prohibition into an empty formula, a hollow mockery of its constitutional purpose. [at 566]
20. Murphy J also stated that practical compulsion, as distinct from legal compulsion, is enough to satisfy the concept of '*civil conscription'* in s 51(xxiiiA), [565 (Murphy J)], whereas Mason and Wilson JJ decided to leave this question open. [564 (Mason J), 572 (Wilson J)].Consequently, although not found to be relevant to the facts of *General Practitioners*, the concept of practical and economic compulsion as a form of civil conscription is still germane to the operation of the constitutional prohibition as to which *PBS* and *BMA* remain the binding authorities.
21. A recent decision by the Hi*gh Court of Australia in Wong v Commonwealth; Selim v Professional Services Review Committee* [2009] 236 CLR 573 (the PSR case) has not only clarified the scope of the Australian constitutional prohibition on "any form of civil conscription" in relation to federal legislation concerning medical or dental services (s 51xxiiiA), but has highlighted its importance as a great constitutional

guarantee ensuring the mixed State- federal and public-private nature of medical service delivery in Australia.

22. The PSR case concerned litigation involving Dr Wong and Dr Selim, general practitioners who were accused of inappropriate practice by a Professional Services Review (PSR) committee. The doctors had billed Medicare for a high volume of services, but allegedly did not provide the appropriate quality of clinical input into those services. As a consequence, Drs Wong and Selim faced potential sanctions, including reprimand, counselling and disqualification from participation in the Medicare scheme for up to three years. In their defence, the doctors contended that, among other things, the PSR scheme under Pt VAA of the Health Insurance Act 1973 (Cth) (the Act) (including the mechanism for paying Medicare benefits under ss 10, 20 and 20A) offended the s 51(xxiiiA) constitutional prohibition on any form of civil conscription. Previous decisions of the High Court have clarified that the prohibition does not prevent federal laws regulating the manner in which medical services are provided.

23. The PSR case determined that the anti-overservicing provisions directed at bulk-billing general practitioners under Pt VAA of the Health Insurance Act 1973 (Cth) did not offend the prohibition. Importantly, the High Court also indicated that the s 51(xxiiiA) civil conscription guarantee should be construed widely and that it would invalidate federal laws requiring providers of medical and dental services (either expressly or by practical compulsion) to work for the federal government or any specified State, agency or private industrial employer.

24. This decision is likely to restrict the capacity of any future federal government to restructure the Australian health care system, eg by implementing recommendations from the National Health and Hospitals Reform Commission for either federal government or private corporate control of presently State-run public hospitals. The Federal Court had earlier held in *Selim v PSR Committee* (2008) 167 FCR 61 at [50]: "*To the extent that there is a practical compulsion for general practitioners to participate in the Medicare Scheme, what is compelled is not service of the Commonwealth. Rather, it is that they conduct their practices with the care and skill that would be acceptable to the general body of practitioners. Such a condition is "clearly necessary to the effective exercise of the power conferred by s 51(xxiiiA)*". The Act does not

authorise any such civil conscription. The majority of the High Court in the PSR case upheld that view of the Federal Court. Heydon J dissented on the facts but agreed with the majority's interpretation of the civil conscription guarantee.

25. In their joint judgment French CJ and Gummow J expressed the view (at [20]) that where questions of constitutional construction are concerned, no "*all-embracing and revelatory theory or doctrine*" should be adopted. Some viewed this as a disappointing start by a new Chief Justice with a background in theoretical physics. French CJ and Gummow J went on to say that the character of s 51(xxiiiA) must particularly take into account its origin in the 1946 referendum (through s 128) emphasising, as Sir William Harrison Moore considered, three great principles implicit in s 128: those of parliamentary government, of democracy and of federalism. The task of locating just such foundational and emerging principles of the rule of law in not just s 128, but every such rights guarantee in the Australian Constitution, and applying them to the complexities of current disputes, and is perhaps the most critical ongoing theoretical task of this Honourable Court and ultimately the High Court justices.
26. In determining the meaning of "any form of civil conscription", French CJ and Gummow J endorsed remarks made by Aickin J in *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 in which he stated (at 571): "*civil conscription is not a technical expression with a settled meaning. It is no doubt used by way of analogy to military conscription, but the use of the words 'any forms of civil conscription' indicates to may mind an intention to give the term a wide rather than a narrow meaning, the precise extent of which cannot be determined in advice.*'
27. Through their discussion of legislative history and the genesis of s 51 (xxiiiA), French CJ and Gummow J ultimately support a construction which treats civil, conscription as involving some form of legal or practical compulsion or coercion. This construction extends to prohibiting and compulsion to carry out work or provide services for the Commonwealth itself, a statutory body which is created by the Parliament for the purposes of the Commonwealth, or a third party (whether private or governmental in nature) if at the direction of the Commonwealth [at 60].
28. In one of his final judgments, Kirby J rejected the presumptively historicist approach to constitutional interpretation apparently advocated by French CJ and Gummow J. He stated (at [96]-[97]): "I adhere to the opinion I expressed in Grain Pool: "*Although*

it is sometimes helpful, in exploring the meaning of the constitutional text, to have regard to the debates in the Constitutional Conventions that led to its adoption and other contemporary historical and legal understandings and presuppositions, these cannot impose unchangeable meanings upon the words. They are set free from the framers' intentions. They are free from the understandings of their meaning in 1900 whose basic relevance is often propounded to throw light on the framers' intentions. The words gain their legitimacy and legal force from the fact that they appear in the Constitution; not from how they were conceived by the framers a century ago".

29. Kirby J, in applying that theory of the need to interpret the Constitution as a reflection (and protection) of the living and evolving will of the Australian people, held (at [99]-[101]): *"When the Constitution was amended by referendum to incorporate the added paragraph, the words had thereafter to respond to new circumstances, quite different from the controversial war-time conscription for Australians to perform overseas military service in the Great War; or strike-breaking and man-power regulation in later years of the twentieth century, both in Australia and the United Kingdom".* Kirby J used this interpretative approach to hold that the words 'medical and dental services' in s 51 (xxiiiA) *'also include, of necessity, the patients who are the recipients of the provision of such services'* [at 124].
30. He continued at 125 - 127: *"The purpose of incorporating a prohibition on 'civil conscription' in the provision of such services is thus to preserve such a contractual relationship between the the provider and the patient, at leas to the extent the each might wish their relationship to be governed by such a contract. In this sense, the prohibition on 'civil conscription' in the provision of such services is thus to preserve such a contractual relationship to be governed by such a contract. In this sense, the prohibition is expressed for purposes of protection, including a protection extending to the patient. It is designed to ensure the continuance in Australia of the individual provision of such services, was against their provision, say, entirely by a government-employed or government-controlled health profession ..... [T]he prohibition on 'any form of civil conscription' is designed to protect patients from having the supply of 'medical and rental services[', otherwise than by private contract, forced upon them without their consent.*

31. Kirby J held (at [135]): *"To the extent that the interpretation of the prohibition on "civil conscription" urged by the appellants finds support in the international expression of fundamental rights, and in the international law that states those rights, the wider view of the phrase should be preferred to a view that would fail to uphold such fundamental rights in the Australian context. It is important to recognise that the fundamental human rights referred to in the instruments of international law preceded the inclusion of reference to them in such instruments. All that international law has done is to express the rights that inhere in human beings by virtue of their humanity."*
32. Kirby J took a very broad view of the type of contemporary arrangements promotion of which would lead to federal legislation contravening the s 51(xxiiiA) guarantee (at [150]): *"[A] law pretending to be one to uphold the lawfulness and integrity of financial expenditures but which, instead, was properly to be characterised as one intruding into the individual relationship between providers of 'medical and dental services' and recipient patients, might attract constitutional invalidation. So might a law which was so detailed and intrusive as to impose coercive requirements and restrictions on the provider of such services, disproportionate to any legitimate federal minters, financial or otherwise. Similarly, to enact laws imposing blanket rules affecting the individual relationship between providers of 'medical and dental services' and their recipients, whether for reasons of cost minimisation or for the achievement of particular administrative outcomes in terms of medical or dental practical, could risk invalidation. They might do so either as failing the primary grant of legislative power or as failing within ma prohibited 'form''civil conscription."*
33. Kirby J stated that the natural meaning of "any form of civil conscription", its constitutional history, contemporary context and purpose all supported its application as a guarantee against any federal intrusion into what was in effect the small business option for the provision of medical and dental services in Australia (at [151]-[152]): *"The test for attracting the prohibition contained in s 51 (xxiiiA) is whether the impinged regulation, by its details and burdens, intrudes impermissibility into the private consensual arrangements between the providers of 'medical and den tax services' and the individual recipients of such services. It is the consensual feature of those arrangements which the head of power postulates will be undisturbed....."*

34. Though his interpretation of civil conscription was considerably broader than that of French CJ and Gummow J, Kirby J agreed with his colleagues that the challenged provisions of the Act did not amount to any form of civil conscription. Kirby J held that the provisions of the Act did no more than ensure the lawfulness and integrity of the provision of medical and dental services and thus did not constitute a form of civil conscription.
35. One of the most detailed descriptions of the types of federal legislation prevented by the guarantee in s 51(xxiiiA) was provided by Aickin J in *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 565-566: "*No doubt a legal obligation to perform particular medical or dental services, or to perform medical or dental services at a particular place, or to perform such services only as an employee of the Commonwealth would be clear examples of civil conscription.* An equally clear example would be the prohibition of the performance of medical or dental services by particular qualified practitioners other than in some designated place, though no punishment was attached to failure to practise in that place. Other forms of "practical compulsion" are easy enough to imagine, particularly those which impose economic pressure such that it would be unreasonable to suppose that it could be resisted. The imposition of such pressure by legislation would be just as effective as legal compulsion, and would, like legal compulsion, be a form of civil conscription. To regard such practical compulsion as outside the restriction placed on this legislative power would be to turn what was obviously intended as a constitutional prohibition into an empty formula, a hollow mockery of its constitutional purpose.
36. The concluding words of Aicken J pick up on the famous joint judgment of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-582 where those justices protested against the majority's excessively literalist interpretation of another constitutional rights guarantee. That restrictive interpretation (as one eminent commentator has stated, "*bereft of any real analysis*", reduced the pivotal rule of law guarantee in s 80 (concerning "*trial by jury*" and all the common law principles and rules required to make that effective) into "*a procedural solecism ... a cynic might, perhaps, suggest the possibility that s 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory*". Yet, *in Brown v The Queen* (1986) 160

CLR 171 at 194-197 and 201-202 respectively, Brennan and Deane JJ gave examples of how evidentiary originalism might be stretched into a richer analysis of the normative arrangements governing the Australian community, referring respectively to foundational principles such as "*liberty under the law*" and "*a deep-seated conviction of free men and women*".

KASSAM & ORS v HAZZARD & ORS
2021/249601
JOINT SCHEME TENDER DOCUMENT ANALYSIS
SCHEDULE TO PLAINTIFFS' SUBMISSIONS

No	Description	Notes/ Comments	Date	CB Ref
1	Intergovernmental Agreement on Federal Financial Relations	This is an Agreement between the Commonwealth and all States & Territories, which includes an agreement (references are to clause numbers): 1(a) to collaborate on … service delivery in areas of national importance 2 that coordinated action is necessary 6 that States & Territories have primary responsibility for many service deliveries 9 to mutual agreement on objectives, outcomes & outputs 11 to a shared commitment to genuinely cooperative working arrangements 19 that the Commonwealth commits to on-going financial support for States' & Territories' service delivery, including of National Health Reform Funding & National Partnership payments for delivery of specified outputs or projects or to reward those 24. that the Commonwealth will provide National Partnership payments in respect of nationally significant reforms	Commenced 01 01 2009 Current version July 2011	
2	NSW Health Influenza Pandemic Plan	Purpose – Guidance to NSW Health staff to prepare for & respond to influenza pandemic It is a whole-of-health responsibility References are to clause numbers, unless otherwise stated: 1. It is a sub-plan of: National Action Plan for Human Influenza Pandemic; Australian Health Management Plan for Pandemic Influenza (***AHMPPI***) (*document 5*	27 05 2016	

		below); and NSW Human Influenza Pandemic Plan 3.2 National coordination – work collaboratively with other jurisdictions to ensure national consistency; guided by AHMPPI 4.1 Australian Dept of Health oversees national pandemic response – collects & analyses data; manages national medical stockpile 4.1 Australian Health Protection Principal Committee (***AHPPC***) coordinates inter-jurisdictional preparedness and response 4.3 The NSW Health Secretary will have overarching responsibility 5. Stages – prevention, preparedness, response, recovery. This aligns with AHMPPI 5.3 Response – guided by AHMPPI. The decision to transition through different stages will be taken by Australian Government in consultation with States & Territories 16 Vaccination is a key response activity outlined in AHMPPI. Commonwealth Dept of Health will coordinate distribution of pandemic vaccines to States & Territories NSW Dept of Health will coordinate distributions to nominated vaccine dispensers 17 Australian Government is responsible for the National Medical Stockpile (ie strategic reserves of medicine & equipment) & for deployment plans App. 5 Australian Pandemic Response Stages – which includes references to a coordinated and consistent approach Pg. 45 – Targeted action which includes supporting the		

		implementation of vaccination clinics		
3	Australian Government Dept of Health Emergency Response Plan for Communicable Disease Incidents of National Significance Government: National Arrangements (***National CD Plan***)	References are to clause numbers, unless otherwise stated: 1.1 States & Territories have primary responsibility for management of communicable diseases. Some emergencies may trigger the need for a nationally coordinated approach. This plan sets out arrangements to facilitate the nationally coordinated approach 1.3 Agreed national coordination and communication arrangements Pg. 8 Table sets out State vs Commonwealth responsibilities – both are to support an integrated health response. States are resp for distribution of vaccines; Commonwealth manages National Medical Stockpile	May 2018	
4	NSW Human Influenza Pandemic Plan	References are to clause numbers: 4. This Plan is consistent with the NSW Health Influenza Pandemic Plan 28. NSW is to contribute to a national, cooperative approach 39. NSW will work with Australian Government and other jurisdictions to coordinate infojrmation sharing, decision making and communication strategies 44. State Health Pandemic Management Team, chaired by NSW Health Secretary, leads NSW Health response to a pandemic 56. NSW is to work with Aust Government and other jurisdictions to support an integrated health response	07 06 2018	
5	Aust Health Management Plan for Pandemic Influenza (***AHMPPI***)	References are to clause numbers, unless otherwise indicated: 1. Outlines agreed arrangements between Australian and State & Territory Governments for management of an influenza pandemic	Aug 2019	

		2.6 Individual liberty – Ensure that the rights of the individual are upheld as much as possible 2.7.1, 5th para – the availability of a customised pandemic vaccine will be the greatest tool in reducing impact 2.7.2 provide a response that is proportionate to the impact 2.9 this plan will be used to inform operational planning in State & Territory and Australian Governments. The Australian, State & Territory Depts of Health are parties to this plan 4.1.1 minimising impact of a pandemic on Australian communities requires coordinated measures to control spread 4.1.4 Australian Government will fast-track assessment and approval of customised pandemic vaccine, procure vaccines, develop national vaccine policy, national pandemic immunisation program. Australian, State & Territory Governments will work together to coordinate implementation of pandemic influenza immunisation programs 6th para – State & Territory Governments will implement the national pandemic immunisation program 4.1.7 Australian Govt will coordinate national pandemic measures and allocate available national health resources 5.3.2.2 The most effective prevention is vaccination. Australian Government maintains contracts with vaccine manufacturers for rapid development and supply. Pandemic vaccination campaigns will build on these seasonal immunisation systems Pg. 69 Australian Government is to make arrangements with vaccine manufacturers to guarantee		

		customised pandemic vaccine supply and develop pandemic vaccine program delivery strategy (see also pg. 75) Pg. 78 Australian Government is to fast-track assessment and approval of customised pandemic vaccine, implement pandemic specific immunisation program, monitor vaccine uptake See pg. 113 - vaccine roll out stages Pg. 154-5 Vaccination is the key tool to limit the number of individuals infected Delivery strategies will need to be devised to make best use of customised vaccine when it becomes available. Individual compliance with vaccination is likely to depend on the perceived severity of the pandemic strain and the adverse effects associated with vaccination. The public's perceived risk-benefit profile for vaccination is likely to be dynamic, becoming less favourable over the course of a pandemic response See pg. 161 re "Customised Pandemic Vaccine" – There may not be sufficient time to assess effectiveness before a customised vaccine is rolled out. Rare but severe adverse events can only be identified after use of such vaccines in much larger population groups than in small clinical trials Pg. 223 Australian Government develops pandemic specific immunisation program; State & Territory Governments coordinate pandemic immunisation program		
6	Australian Health Sector Emergency Response Plan for Novel Coronavirus (Covid-19)	References are to clause numbers, unless otherwise indicated: Pg. 2 This document is designed to guide the Australian health sector response (*to Covid-19 about which little was known at the time – noting*	07 02 2020	

		the date of this document of February 2020). This plan is a national approach Pg. 4 Governments will be required to work together 2.6, pg. 9 Ensuring that the rights of the individual are upheld as much as possible 4.1.4 pg 17 Australian Government will fast-track assessment and approval of customised vaccine, should this become avail; procure vaccines; develop vaccination policy and immunisation program. Australian, State & Territory Governments will work together to coordinate implementation of immunisation program Pg. 18 State & Territory Governments will implement the national immunisation program		
7	National Partnership on Covid-19 Response between Commonwealth of Australia and States & Territories	This is the original version of the below document, signed by NSW on 14 04 2020.	13 03 2020	
8	National Partnership on Covid-19 Response between Commonwealth of Australia and States & Territories (signed by NSW)	References are to clause numbers, unless otherwise indicated: Pg.2 1 This National Partnership is subject to the Intergovernmental Agreement on Federal Financial Relations (*doc 1 above*) 2. Commonwealth, State & Territory Governments recognise responsibility to protect Australia by ensuring that health system can respond to Covid-19 3. Commonwealth, State & Territory Governments commit to working together 5. This Agreement will provide States funding to respond to Covid-19 outbreak, in recognition of the cost & burden incurred by State health services	14 04 2020	

		7. Commonwealth will provide a contribution to States for Covid-19 expenditure from 21 Jan 2020 8. This is an Agreement between the Commonwealth, States & Territories 12. The objective is to provide financial assistance for additional costs incurred by State health services in responding to Covid-19 Pg.5 cl. 22 Three sets of payments – Upfront Advance of $100m to be shared on population share basis, payable when State signs and commits to this Agreement; Hospital Services Payment – Commonwealth will provide 50% for costs incurred by States on a monthly basis; Commonwealth will also provide a 50% contribution to costs incurred by States for other Covid-19 activity undertaken by State public health systems, paid monthly Pg.12 cl. 49 Parties do not intend this Agreement to be legally enforceable, but that does not lessen the parties' commitment to it Sch. A Pg. 14 – Roles & Responsibilities – refers to all jurisdictions' responsibilities under the Australian Health Sector Emergency Response Plan for Novel Coronavirus (Covid-19) (*document 6 above*)		
9	Australian Covid-19 Vaccination Policy	References are to clause numbers, unless otherwise indicated: Pg. 1 Each jurisdiction will develop supporting Implementation Plans, which will articulate how each will give effect to its responsibilities under this Policy Australian Government key responsibilities – regulation of vaccines, acceptance from manufacturers, storage & transport, setting funding policy, appropriate data collection & monitoring	Aug 2020 ? The Plaintiffs are unsure as to the correct date of this document	

		States' & Territories' responsibilities – appropriate workforce for vaccine delivery, providing vaccine sites, ensuring immunisation providers remain compliant with safety, ethical and reporting obligations Pg. 4 National Immunisation Program (***NIP***) – set up by Australian, State & Territory Government to increase national immunisation coverage; a collaborative initiative across all levels of govt Pg. 5 Australian Immunisation Register (***AIR***) monitors immunisation coverage across Australia, a whole of life national immunisation register. Monitoring immunisation coverage and administration will be key to ensuring vaccination course completion, as well as adverse event reporting Pg. 6 Vaccine roll-out will draw on effective cross-jurisdictional coordination and delivery While Australian Government strongly supports immunisation …, it is not mandatory Pg. 14 Consumers will not pay for immunisation Consistent with shared funding responsibility for immunisation, Australian, State & Territory Governments will determine the approach to funding of the vaccination program Pg. 15 AIR will be used to … provide Immunisation History Statement to prove immunisation status for childcare, school, employment, travel AIR will be the unifying national system to monitor overall immunisation levels and individual immunisation status It will be mandatory for vaccination providers to report vaccinations to AIR		

10	Australia's Covid-19 Vaccine National Roll Out Strategy	Vaccine hub locations will be determined in conjunction with State & Territory Governments	?	
11	National Partnership on Covid-19 Response between Commonwealth of Australia and States & Territories (signed by Commonwealth; latest version)	This is the latest version of the National Partnership Agreement (*document 8 above*)	26 02 2021	
12	Australian Government Covid-19 Vaccination Program – Aged Care Implementation Plan	Sets out the different responsibilities of Commonwealth and States & Territories re implementing vaccination in the aged care setting	09 03 2021	
13	AHPPC Statement on Vaccinating and Testing Quarantine Workers	*"all quarantine workers should be strongly encouraged to undergo vaccination, and jurisdictions may implement requirements for quarantine workers to receive vaccinations"*	29 06 2021	
14	PM's Media Statement	National Cabinet agreed on the imperative to work together to administer Cov-19 vaccinations as quickly as possible National Cabinet noted the importance of national coordination National Cabinet agreed to mandate at least first dose for aged care workers National Cabinet agreed to require vaccinations and testing for quarantine workers – All quarantine workers should be strongly encouraged to undergo vaccination, and jurisdictions may implement requirements for quarantine workers to receive vaccinations AHPPC recommends mandatory vaccinations for quarantine workers National Cabinet noted Commonwealth will establish a Covid-19 professional indemnity scheme	28 06 2021	

15	PM's Media Statement	National Cabinet agreed to formulate a Four Stage National Plan Commonwealth to provide further $752m to States through to 30 June 2022 pursuant to the National Partnership Agreement on Covid-19 Response (*documents 7, 8 & 11 above*)	02 07 2021	
16	PM's Media Statement	National Cabinet reaffirmed commitment to implement decision to mandate vaccination for aged care workers, with limited exceptions. All States & Territories will work toward implementing this decision using State public health orders or similar instruments AHPPC to continue considering mandating vaccines for disability support workers National Cabinet agreed and signed Intergovernmental Agreement on Data Sharing, developed by Data and Digital Ministers. Gives effect to National Cabinet's commitment to share data across jurisdictions, where it can be done safely, securely and lawfully	09 07 2021	
17	PM's Media Statement	Announced agreement on updated four-step *National Plan to Transition Australia's National Covid-19 Response* (***National Plan***)	30 07 2021	
18	PM's Media Statement	Support for Four-Step National Plan. Plan has clear vaccination targets We now need 70% of population over 16 to get vaccinated to move to next phase When we hit 80% fully vaccinated, lockdowns should be a thing of the past	02 08 2021	
19	Op Covid Shield National Covid Vaccine Campaign Plan	References are to clause numbers, unless otherwise indicated: Pg. iv Vaccination is the most effective means we have to build national resilience. Once we reach threshold vaccination rate levels, we will be able to live with this virus and begin recovery	03 08 2021	

		Pg. 3 Commonwealth is administering vaccines for aged and disability care residents, through GPs and pharmacies States & Territories are administering vaccines through hospital hubs, high-throughput hubs, community hubs Pg.4 cl. 1.4 This plan covers 1 July – 31 Dec 2021 2.1 Aim – Commonwealth, States & Territories will be linked to targets which will be set out in the National Plan 3.1 Purpose – detail mechanisms & arrangements that will lead to achievement of vaccination targets set out in National Plan Pg.7 cl. 3.2 Op Covid Shield establishes a national framework to coordinate vaccination efforts to achieve vaccination targets Rolling progress towards targets will be tracked and assessed. Action will be taken if significant over or underperformance is observed relative to expected targets Pg.11 cl. 3.3.5 Contingency – The Assessments cell monitors progress against targets and makes recommendations … on how to reinforce success or address potential failure. Recommendations are jointly developed between Commonwealth Taskforce and States & Territories Pg.12 cl. 3.4.1 National Cabinet agreed to mandate at least one dose for aged care workforce Pg.13 cl. 3.4.4 This Taskforce will review with States & Territories where policy settings can be adjusted to mandate vaccines for quarantine and border workers 3.4.5 This Taskforce will review with States & Territories where policy settings can be adjusted to mandate vaccines for healthcare workers		

		Pg.16 Targets will be set and monitored weekly. Where unacceptable tolerances are reached, contingency planning will be initiated Pg.17 cl. 4.5 The costs of the Covid-19 Vaccination Program are largely funded by the Australian Government, with support from State & Territory Governments Australian Government - $5bn to purchase vaccines; $2bn to support delivery & administration State & Territory Governments are sharing the costs of delivering and administering vaccines with the Commonwealth. Commonwealth contributes 50% of price of States & Territories administering each dose & of clinics Pg.18 cl. 5 requirement to accelerate Australia's vaccine rollout, highlights need for unprecedented level of collaboration Pg. 27 Australian Government maintains storage hubs. This Taskforce manages inventory and supply Pg.33 – incentives to promote uptake Pg.35 – incentives – providing vaccinated people with greater personal freedoms Pg.45 States & Territories play a fundamental role in achieving high public sentiment and increased vaccination rates. Essential to create State & Territory administration (*ie of vaccine rollout*) channels to meet required throughput. Flexibility in the ways each State & Territory reaches its targets Pg.46 States & Territories are to assess public sentiment within their State or Territory, by location and population segment		
20	PM's Media Statement	National Cabinet has fully agreed the National Plan	06 08 2021	

		PCR testing will continue to be the priority testing method in Australia, but further work will be done on Rapid Antigen Testing Australia's policy remains that vaccines should be voluntary and free. In general, in the absence of a State or Territory public health order or a requirement in an employment contract or industrial instrument, an employer can only mandate vaccination through a lawful and reasonable direction		
21	National Plan to Transition Australia's National Covid-19 Response	Four phases Move from phase A to phase B at 70% double dose Move from phase B to phase C at 80% double dose Before 70% double dose: accelerate vaccination rates; implement national vaccination plan; recognise and adopt existing digital Medicare Vaccination Cert (*ie AIR*); prepare vaccine booster program Between 70% & 80%: maintain high vaccination rates, encouraging uptake through incentives & other measures; ease restrictions on vaccinated residents; introduce reduced quarantine arrangements for vaccinated residents; prepare/ implement vaccine booster program Phase C – Vaccination Consolidation Phase: maximise vaccination coverage; minimum ongoing restrictions; highly targeted lockdowns only; continue vaccine booster program; exempt vaccinated residents from domestic travel restrictions; lift restrictions on outbound travel for vaccinated Australians; gradual reopening of inward and outbound travel, with reduced quarantine requirements for fully vaccinated travellers Phase D: live with Covid, management consistent with influenza; boosters as	06 08 2021	

		necessary; unvaccinated travellers still subject to pre-flight and on-arrival testing		
22	PM's Media Statement	National Cabinet noted the work of the Data and Digital Ministers Meeting around incorporating the proof of vaccination status into existing State & Territory check-in apps, noting that it will be optional for individuals to include their vaccination status	20 08 2021	
23	Aust Govt Covid-19 Indemnity Scheme to Protect Health Professionals – Media Release	Medical indemnity scheme will support increased vaccination uptake Significant adverse reaction – a no fault claims scheme; appropriate compensation without need for court proceedings Backdated to start of vaccine roll-out Will support claims made against private health practitioners who administer the vaccines Details of scheme not yet finalised	15 09 2021	

Summary:

1. The Plaintiffs contend that the National Plan, which itself is part of the cooperative arrangement variously referred to as the National Covid-19 Response, supported by the funding arrangements contained in the National Partnership on Covid-19 Response between Commonwealth of Australia and States & Territories and the vaccination program implementation set out in Op Covid Shield, is a joint scheme or informal arrangement between, inter alia, the Commonwealth and the State of NSW, which requires NSW to reach certain double-dose vaccination targets

2. The Plaintiffs further contend that, in performance of its obligations under that joint scheme or informal arrangement, the First to Third Defendants made Order No 2, the effect of which was to effectively mandate Covid-19 vaccines for certain residents of NSW, through economic coercion or other duress

3. The Plaintiffs further contend that the effect of the joint scheme, of which Order No 2 is a part, is an unlawful civil conscription, prohibited by S.51(xxiiiA) of the Constitution