No. 2021/249601

Supreme Court of New South Wales
Division: Common Law
List: Administrative Law

Al-Munir Kassam & Ors
Plaintiffs

Bradley Ronald Hazzard & Ors
Defendants

No. 2021/252587

Supreme Court of New South Wales
Division: Common Law
List: Administrative Law

Natasha Henry & Ors
Plaintiffs

Bradley Ronald Hazzard
Defendant

SUBMISSIONS OF THE STATE DEFENDANTS[1]

INTRODUCTION

1. By Amended Statement of Claim, the Plaintiffs in the *Kassam* matter seek declarations that the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) (**Delta Order**), along with section 7 of the *Public Health Act 2010* (NSW) (**Act**) (which empowered its making), are invalid.

2. By Amended Summons, the Plaintiffs in the *Henry* matter likewise seek a declaration that the Delta Order is invalid, and additionally seek that relief in respect of the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) (**Aged Care**

[1] Being the First to Third Defendants in the *Kassam* matter, and the only Defendant in the *Henry* matter (hereafter, **Defendants**).

Order) and the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) (**Education Order**). Associated and consequential relief is sought in each matter.

3. Both proceedings should be dismissed, with costs. The Delta Order, the Aged Care Order and the Education Order (together, **the Orders**), and their empowering legislation, respond to the COVID-19 pandemic, a potentially fatal infectious disease that spreads through close human contact. They impose restrictions that can reasonably be regarded as necessary to protect public health and safety. None of the many grounds relied upon by the Plaintiffs is sustainable.

4. The Defendants propose to read in both matters:

   (a) the affidavit of Kathryn Boyd affirmed 22 September 2021 (**Boyd Affidavit**)[2];

   (b) the affidavit of Dr Marianne Gale affirmed 22 September 2021 (**Gale Affidavit**)[3]; and

   (c) the affidavit of Professor Kristine Macartney sworn 23 September 2021, annexing Professor Macartney's expert report of 22 September 2021 (**Macartney Report**)[4].

5. In addition, there is a tender bundle of documents upon which the Defendants rely.

6. These submissions address the legislative regime, then the grounds in the *Kassam* matter, then the grounds in the *Henry* matter. The Plaintiffs' submissions in the *Kassam* matter are referred to as **KWS**, and in the *Henry* matter are referred to as **HWS**.

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[2] CB, Section B1, Tab 2.

[3] CB, Section B1, Tab 1.

[4] CB, Section B1, Tab 3.

LEGISLATIVE REGIME

The Act and the Orders

7. The Act has among its express objects the protection of public health, the control of risks to public health, the control of infectious diseases and the prevention of the spread of infectious diseases: s 3(1). It provides that in the exercise of functions under the Act, "the protection of the health and safety of the public is to be the paramount consideration": s 3(2).

8. Section 7 of the Act authorises the Minister to take such action and by order give such directions as the Minister considers necessary to deal with a risk to public health and its possible consequences.

9. Pursuant to s 7, the Minister made the Delta Order on 20 August 2021, taking effect from 21 August 2021. The Delta Order has been amended on numerous occasions since. The order as made is contained at Exhibit KB-1 at pp 48–97. The order as currently in force is included in the Defendants' tender bundle (it is included there as a matter of convenience; being delegated legislation, it is not a matter of evidence).

10. The Delta Order records certain matters about the serious risk and consequences of the spread of COVID-19 as the basis for the Minister concluding that a situation has arisen that is, or is likely to be, a risk to public health: cl 1.8.

11. The Delta Order relevantly imposes various restrictions in "stay at home areas" (currently particular Local Government Areas in regional NSW and all of Greater Sydney except for "areas of concern" – Pt 3) and "areas of concern" (particular Local Government Areas in West and South West Sydney – Pt 4; see Sched 1 for the categorisation of different areas). One such restriction is that a person may not leave an area of concern for the purposes of work unless that person is an "authorised worker", and, if at least 16 years of age, has had at least 1 dose of a COVID-19 vaccine, or has been issued with a medical contraindication certificate (cl 4.3(1) and (3)).

12. A like restriction is imposed on any "relevant care worker" (defined broadly to mean workers in early education and care and disability support) who lives or works in an

area of concern to prevent those workers from entering or remaining in their place of work unless the person has had a dose of the vaccine or a medical contraindication certificate (cl 4.24(1)–(2)). Likewise again, a restriction is imposed on such residents entering and remaining on a construction site in Greater Sydney unless they have had 2 doses of a COVID-19 vaccine, or 1 dose at least 21 days ago or otherwise coupled with a test in the previous 72 hours, or a medical contraindication certificate (cl 5.8(1)).

13. Separately, but similarly, the Aged Care Order restricts aged care workers (broadly speaking) from entering or remaining on the premises of a residential aged care facility unless they have received at least 1 dose of a COVID-19 vaccine (cll 5 and 6), with scope for exemptions, including again for medical contraindications (cl 8). It was made on 26 August 2021, to commence on 17 September 2021 (cl 2).

14. The Education Order restricts education and care workers (broadly speaking) from work at schools and education and care facilities after 8 November 2021 unless they have received two doses of a COVID-19 vaccine or have a medical contraindication certificate (cl 4), with scope for exemptions (cl 6). It was made on 23 September 2021, and commenced immediately.

15. Critically, each or the Orders is of limited time duration, running for 90 days from the time of making. That is so pursuant to s 7(5) of the Act.

Section 7 of the Act

16. Section 7 of the Act confers a broad power on the Minister to deal with public health risks. The power is only enlivened if the Health Minister "considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health". None of the Plaintiffs assert that this condition has not been met in the current pandemic.

17. Section 7(2) authorises the Minister to "take such action", and "by order give such directions", "as the Minister considers necessary to deal with the risk and its possible consequences".

18. Section 7(3) contains a non-exhaustive list of the types of orders that may be authorised, including segregating or isolating inhabitants of the areas (s 7(3)(b)) and directions to "prevent, or conditionally permit, access to the area" (s 7(3)(c)).

19. It is well established that the word "necessary" in the context of rule-making powers has a broad meaning: cf HWS [82]. Thus, in *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd*,[5] Higgins J explained:

> Now, the word "necessary" may be construed liberally, not as meaning absolutely or essentially necessary, but as meaning appropriate, plainly adapted to the needs of the Department — to "the carrying out" of the Act or its "efficient administration": *McCulloch v Maryland*.

20. So too in *Mulholland v Australian Electoral Commission*,[6] Gleeson CJ explained:

> It should also be said that the word "necessary" has different shades of meaning. It does not always mean "essential" or "unavoidable", especially in a context where a court is evaluating a decision made by someone else who has the primary responsibility for setting policy. *In Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation*, a case concerning s 51 of the *Income Tax Assessment Act 1936* (Cth), Latham CJ, Rich, Dixon, McTiernan and Webb JJ said that the word "necessarily", in the context of the allowability of deductions for expenditure necessarily incurred in carrying on a business, meant "clearly appropriate or adapted for", not "unavoidably". ... The reference given in *Ronpibon Tin* in support of the Court's view of the meaning of "necessarily" was to a judgment of Higgins J in 1910, in a case concerning the validity of delegated legislation, *The Commonwealth and Postmaster-General v Progress Advertising and Press Agency Co Pty Ltd*. The primary Act conferred power to make regulations for matters "necessary" for carrying out the Act. Higgins J said that, in such a context, the word "necessary" may be construed, not as meaning absolutely or essentially necessary, but as meaning "appropriate, plainly adapted to the needs of the Department".

21. Likewise, in *Sydney Catchment Authority v Bailey*,[7] Biscoe J stated that "what is 'necessary' for a designated function should be construed liberally as meaning appropriate or reasonably required, not as meaning absolutely or essentially necessary". His Honour referred to the established "general rule that those things are necessary for the doing of a thing which are reasonably required or which are legally

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5 (1910) 10 CLR 457, 469 (footnotes omitted).

6 (2004) 220 CLR 181, 199–200 [39] (footnotes omitted).

7 (2006) 149 LGERA 298, 311–3 [35].

ancillary to its accomplishment".[8] Further examples of the term "necessary" being understood in this way are collected in *Elcham v Commissioner of Police (NSW)*.[9] Thus, contrary to HWS [82], "necessary" does not mean indispensable or essential.

22. The breadth inherent in the judicially accepted construction of the word "necessary" in this context is further expanded by the introductory words, "as the Minister considers" in s 7(2). The consequence of these words is that the question for a Court on judicial review of an exercise of this power is not whether the impugned measure is in fact necessary (in the sense explained above), but whether it is one that it was open to the Minister to consider necessary.

23. Bringing those two aspects together, an order will be supported by the power under s 7 if it was open to the Minister to consider that the directions in the order were reasonably appropriate and adapted to deal with the public health risk and its possible consequences, including matters that are ancillary to the accomplishment of that end.

Orders have a legislative character (cf HWS [20]–[24])

24. An additional relevant matter is that s 7 authorises the making of orders and the taking of actions of both a legislative and administrative character.[10] The essential distinction between the two concepts is that the former determine the content of rules of general application whereas the latter apply rules of that kind to particular cases.[11] The section permits the Minister to take "action". Orders giving directions could, for example, be made addressed to a particular individual or individuals. What is relevant for current purposes is that it is evident from s 7(2), as reinforced by the examples in s 7(3), that an order under s 7 may contain directions of general application.

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8 Ibid, citing *Attorney-General (UK) v Walker* (1849) 3 Exch 242; 154 ER 833.

9 (2001) 53 NSWLR 7, [49]–[56].

10 For the distinction, see eg *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 (FFC), [40]–[79] (the Court).

11 *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185 (FFC), [43] (the Court).

25. The matters identified at HWS [23] do not indicate that s 7 only authorises orders of an administrative character. The fact that the power is contingent on the existence of a particular state of affairs does not bear on its character (HWS [23(a), (b)]). The fact that the directions expire after 90 days (HWS [23(c)]) recognises that risks to public health are often quickly evolving and that the Minister must review on an ongoing basis the appropriate measures to deal with the risk. The absence of parliamentary oversight (HWS [23(d)]) and public consultation (HWS [23(e)]) is a reflection of the same point. Finally, contrary to HWS [23(f)], a recognition of the dual character of the power in s 7(2) is inherent in s 7(7), which authorises applications to NCAT for "*administrative* review" of "any action taken by the Minister under this section *other than the giving of a direction by an order under this section*" or "any direction given by any such order" (emphasis added). Thus, unsurprisingly, administrative directions can be the subject of merits review in NCAT, but legislative orders cannot be.

26. In addition, the fact that orders must be published in the Gazette (s 7(4)), that non-compliance with a direction, without reasonable excuse, is a criminal offence (s 10), and the section involves a broad range of policy considerations, point to the legislative character of orders under s 7.

27. The character of the order made under s 7 is relevant to the grounds upon which it can be reviewed by the Court. For example, orders of a legislative character cannot be challenged on procedural fairness grounds. Thus, pertinently, in a recent challenge to the unreasonableness of the Delta Order in the Federal Court (***Athavle***) Griffiths J treated the order as a legislative instrument and applied the principles applicable when challenging delegated legislation for unreasonableness.[12]

Other provisions of the Act

28. Two further provisions of the Act should be noted by way of context.

29. First, in addition to the general power conferred by s 7, a specific power available only during a state of emergency is conferred by s 8. The scope of the power as

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12 *Athavle v State of New South Wales* [2021] FCA 1075, [94]ff.

conferred by s 8(2) is expressed in identical terms to that conferred by s 7(2), save that in the case of s 8(2), it is necessary to obtain the agreement of the Minister administering the *State Emergency and Rescue Management Act 1989* (NSW) (**Emergency Act**). It necessarily follows that there exists an overlap between orders that can be made under s 7 and orders that can be made under s 8. The question to which the Plaintiffs' submissions give rise is: what measures are uniquely able to be taken under s 8, and not s 7?

30. The Plaintiffs point to s 8(3), and contend that an order requiring persons in a specified group or area to submit themselves for medical examination in accordance with the order could only be made under s 8, not s 7. That proposition is far from self-evident, because if an order of that kind is capable of falling within the general terms of 8(2), then it is necessarily capable of falling within the relevantly identical terms of s 7(2). Further, both subsections (3) are expressly said to be made "[w]ithout limiting subsection (2)". The better view is that s 8(3) does no more than provide that the measures there described constitute a typical example of the kind of order contemplated by s 8, and that, for the avoidance of doubt, the taking of such measures would not exceed the power.

31. But even if that were not so, and an order requiring particular persons to submit themselves to medical examination was able to be made only under s 8, that goes nowhere, as none of the Orders require any person to submit themselves to any kind of medical procedure (be it an examination or a vaccination). As explained at [54]–[55] below, the Orders instead place restrictions on freedom of movement – which the Plaintiffs in *Henry* at HWS [86] rightly acknowledge is within the power conferred by s 7 – and then offer a conditional *exemption* from those restrictions to those who are willing to seek out and obtain a vaccination. Contrary to the Plaintiffs' oft-repeated assertion, the Orders do not require any person to become vaccinated.

32. The more pertinent distinction between ss 7 and 8 lies in their respective subsections (6), and in s 7(7) (of which s 8 lacks a counterpart). By virtue of s 8(6), any action taken under s 8 has effect as if it had been taken in the execution of Division 4 of Part 2 of the Emergency Act. As the Note points out, the result is as follows:

> Consequently, it is an offence under that Act to obstruct or hinder the Minister administering that Act in the exercise of any such function (section 40), and no proceedings may be brought against any person (including the Crown) as a consequence of any damage, loss, death or injury arising from the exercise of any such function (section 41).

33. By contrast, s 7(6) denies these consequences to an order made under s 7. The result is that s 8 is a power not only to take such measures as the Ministers considers necessary to deal with the risk and its possible consequences (which can be done under either s 7 or s 8), but to do so in a way that makes it an offence for anyone to obstruct or hinder those steps from being taken, and in a way that denies civil liability to those who may be affected thereby. Moreover, whereas s 7(7) allows for administrative review of a decision made under s 7(2), s 8 makes no such provision.

34. Those very serious consequences are naturally suited only to the extreme circumstances of a state of emergency, and explains why Parliament has provided for a separate power in s 8 for such cases. Section 8(2) should thus be understood as conferring a version of the s 7 power, available only for emergencies, that can be exercised without interference from people who might be affected thereby, and with broader consequences. But it should not be understood as impliedly cutting down the scope of the deliberately general words of s 7(2), in circumstances where those same words are used in s 8(2).

35. Secondly, s 62 permits an authorised medical practitioner to make public health orders in relation to particular persons. It does not limit s 7, as the two provisions are directed to different purposes. One empowers a medical practitioner who is concerned that a particular person with a Category 4 or 5 condition might behave in a way that poses a risk to public health to prevent that person from behaving in that way. The other empowers the Minister to take actions and give directions for the purpose of dealing with a risk to public health and its consequences. They are distinct and complementary powers, addressed to different (if overlapping) topics, and vested

in different decision-makers. Accordingly, there is no occasion to limit the scope of s 7 by reference to s 62.[13]

Balancing considerations

36. A related, and obvious, problem with the proceedings as a whole is that they invite this Court to pronounce upon questions of State policy which, *par excellence*, are matters for the elected branches of government alone. It is trite law that "[t]he merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone".[14]

37. A pandemic such as the current COVID crisis presents governments with diabolically difficult regulatory challenges. Restrictions on freedoms of individuals must be balanced with the health, social and economic consequences of acting, or not acting, in any particular way. There is no simple or objectively correct answer to what restrictions, if any, should be imposed; what criteria should attach to those restrictions; and where regulatory lines should be drawn. There is no one right answer to what degree of threat of infection or death justifies what type or degree of regulatory restriction. Making judgments on these matters is necessarily an evaluative, polycentric exercise.[15] Different governments around the world have reacted in a wide range of ways – with an equally wide range of health, social and economic consequences.

38. The Delta Order, as noted in *Athavle*, "represents an attempt at balancing competing interests and considerations".[16] If the balance is thought to be wanting, that is a matter to be redressed by political means, not in the courts. So much was recognised 116 years ago by the Supreme Court of the United States in *Jacobson v*

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13 See *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, [59] (Gummow and Hayne JJ).

14 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

15 Note discussion in Creyke, McMillan and Smyth, *Control of Government Action* (4th edn, 2015), [7.4.2]-[7.4.3E]

16 *Athavle v State of New South Wales* [2021] FCA 1075, [20], and see [79].

Massachusetts – a challenge to mandatory vaccinations in Cambridge, MA, in the wake of a smallpox outbreak – in which the Court held:[17]

> Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case.

KASSAM

39. Paragraphs 5–13 of the Amended Statement of Claim (**ASOC**) contain distinct challenges to the validity of the Orders and s 7. The grounds fall into four broad categories:

(a) arguments about exceeding the scope of s 7(2) of the Act, by reference to the notion of "legal unreasonableness" and the principle of legality – ASOC [5], [6] and [11];

(b) arguments about inconsistency with various other provisions in the Act, namely ss 7(2), 7(5) and 62 – ASOC [7], [8], and [9];

(c) an argument about inconsistency with another State Act, being the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPRA**) – ASOC [10];

(d) arguments connected to the Commonwealth Constitution and Commonwealth legislation – ASOC [12] and [13].

40. These categories are addressed in turn below.

(A) Arguments about exceeding the scope of s 7(2) – unreasonableness/principle of legality

Principle of legality: "civil conscription" (ASOC [5]; KWS [37])

41. Paragraph 5 of the ASOC alleges that the Delta Order is invalid on the ground that it

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[17] 197 US 11, 26 (1905).

authorises "a civil conscription" or a requirement that, as a precondition to gainful employment, residents of NSW first be vaccinated or immunised, in circumstances where s 7 does not authorise such a rule. To the extent that the reference to "civil conscription" is intended to rely on s 51(xxiiiA) of the Commonwealth Constitution, that is dealt with separately below: [99]–[105].

42. To the extent that this ground relies on principle of legality-type reasoning, it should be rejected. The first reason is that the paragraph does not identify any judicially recognised "fundamental principles"[18] altered or abrogated by the Delta Order. On the contrary, the paragraph simply restates the effect of the Delta Order, and then asserts that that effect is not one that s 7 authorises. Yet the express terms of s 7(3)(c) authorise measures to conditionally permit access by persons to a public health risk area, which would include permitting persons to access an area only if they were vaccinated.

43. There is, in any event, no "conscription". As discussed in the context of the next ground, the Delta Order does not mandate vaccination. Rather, having been vaccinated is a precondition of being exempted from certain restrictions that would otherwise apply under the Order, which order is itself only a temporary measure.

44. In any event, it is clear that s 7 sets out to authorise very substantial interferences with ordinary liberties in order to protect public health from the risks of infectious diseases. There is nothing unintended about it. Section 3(1) sets out the objects of the Act as follows (emphasis added):

> (1) The objects of this Act are as follows—
>
> (a) to promote, protect and improve public health,
>
> (b) *to control the risks to public health*,
>
> (c) *to promote the control of infectious diseases*,
>
> (d) *to prevent the spread of infectious diseases*,
>
> (e) to recognise the role of local government in protecting public health.

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18 *Potter v Minahan* (1908) 7 CLR 277, 304.

(f) to monitor diseases and conditions affecting public health.

(2) The *protection of the health and safety of the public is to be the paramount consideration* in the exercise of functions under this Act.

45. That intention is hardly surprising. The Act was designed to enable responses to the very type of pandemic we are now experiencing. The notion that serious infectious diseases may require a strong regulatory response, restricting public freedoms, is by no means a new one – see, for example, the 1905 US Supreme Court decision referred to above. Significant restrictions were imposed in Australia a century ago in response to the Spanish Influenza epidemic.[19]

46. Section 3(2) indicates that in terms of the balance between rights and freedoms, and the protection of the health and safety of the public, the latter is the paramount consideration. It is also relevant that, as noted, orders under s 7 may only be made for a period of up to 90 days at a time: s 7(5). That such a temporal limitation is imposed is an implicit confirmation that the restrictions that may be imposed are very significant. The fact that administrative actions taken under s 7 may be the subject of review in NCAT is also a pointer to the fact that decisions under the section may adversely affect individuals.

47. The Report on the Review of the *Public Health Act 1991*, which precipitated the Public Health Bill 2010, squarely acknowledged "the breadth of the provisions and *the potentially intrusive nature of orders on the rights of individuals*".[20] Similarly, in the Minister's second reading speech for the Act, the potential effect on rights and freedoms in the context of a pandemic was acknowledged:

> The review of the Public Health Act recognised that a number of the current administrative requirements associated with making emergency orders do not deliver greater clarity or accountability to any subsequent emergency action, whilst having the potential to slow the response and therefore the effectiveness

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19 The Honourable Justice John Logan RFD, 'Pandemic Justice – An Historical Perspective' (2020) 94 *Australian Law Journal* 709; Clyde Croft, 'COVID-19 and Emergency Regulations' (2021) 95 *Australian Law Journal* 98.

20 Report on the Review of the Public Health Act 1991, p 69; as referred to in the Second Reading Speech to the Public Health Bill (Hansard, Legislative Assembly, 24 November 2010, Andrew McDonald).

> of that response. Amendment of the relevant provisions therefore is warranted to improve flexibility while ensuring that the appropriate balance is struck with protecting ordinary liberties and freedoms, including freedom of movement and assembly. For example, the requirement that an order be published in the Government Gazette before it takes effect may result in unnecessary delays in responding to public health emergencies, such as the outbreak of a pandemic. In addition, the limitation of orders to 28 days may be inappropriately short, particularly when dealing with a serious infectious disease outbreak.

48. As regards the principle of legality, then, this context engages the principle stated by a unanimous High Court in *Australian Securities and Investments Commission v DB Management Pty Ltd*[21] that "[i]t is of little assistance, in endeavouring to work out the meaning of parts of that scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve". The Plaintiffs' real complaint is that they disagree with the policy of the Delta Order, not its legality.

49. As Griffiths J explained in *Athavle*:[22]

> [81] Some Justices of the current High Court have highlighted some difficulties with the principle of legality (see, for example, *Lee v New South Wales Crime Commission* ... per Gageler and Keane JJ). In particular, their Honours noted 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".

50. The fact that s 7 is a broad discretion to be exercised consistently with the principle of legality (KWS [57], [65]) is no answer to the point derived from the cases above, namely that the principle of legality is inapt to apply in contexts where the very objective of the legislation is to authorise intrusions on rights. The principle of legality is not a trump card, and it "does not override the usual exercise of statutory construction by reference to the text of the statute, its identifiable purpose and the context within which a particular provision is found".[23] As the Court of Appeal held

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21 (2000) 199 CLR 321, [43]. See also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [314]; *Roads and Maritime Services v Desane Properties Pty Ltd* (2018) 98 NSWLR 820, [192]–[193] (the Court).

22 [2021] FCA 1075, [82]–[83] (citations omitted), and see [79]–[83].

23 *Elliott v Minister administering Fisheries Management Act 1994* (2018) 97 NSWLR 1082, [40], Basten JA (with whom Beazley P and Payne JA agreed).

in *Secretary, Department of Family and Community Services v Hayward (a pseudonym)*:[24]

> The foregoing considerations indicate that the correct approach to the question of statutory interpretation must involve a number of elements. The exercise is not governed by a set of mutually inconsistent rules of which one must be chosen, but by reference to principles which, because they may pull in different directions, will involve evaluative judgment. In order to apply the principle of legality, it is necessary to identify with a degree of precision that fundamental right, freedom or immunity which is said to be curtailed or abrogated, or that specific element of the general system of law which is similarly affected. Any presumption of non-interference by general words will carry greater or lesser weight according to the precise issues identified. Particularly this is so where there are conflicting purposes operating in different areas of the law. Thus, in the present case there may be tensions between the public interest in ensuring a person charged with a criminal offence has a fair trial and, on the other hand, the need to ensure that child abuse is promptly and adequately reported, which will not occur if conditions of anonymity cannot be maintained.

51. In the present case, the personal rights and interests emphasised by the Plaintiffs are only one part of the picture. Equally (if not more) important is the public interest in protecting human life (including health), which itself is also a fundamental right and a competing aspect of the public interest.

52. Thus even if any of the matters referred to in paragraph 5 did implicate a fundamental principle of the kind protected by the principle of legality, this ground would still fail.

Principle of legality: other rights (ASOC [6]; KWS [34]–[78])

53. Paragraph 6 of the ASOC invokes the principle of legality, with particular reference to "the right to bodily integrity" and "personal liberty". It is attended by the same difficulties as paragraph 5. As well, it has two further difficulties.

54. *First*, it asserts in particular (a) that the Delta Order has the effect of "mandating that a particular sub-group undertake a medical procedure". But nowhere does the Delta Order mandate that any person receive a COVID-19 vaccination. Rather, the Delta Order imposes a blanket prohibition on doing particular things (eg. leaving an area of concern, or entering a construction site or a workplace where disability support is

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[24] (2018) 98 NSWLR 599 at [39] (Bathurst CJ, Beazley P, Basten, Gleeson and Payne JJA).

provided), but then offers an *exemption* from that prohibition for any person who chooses to obtain a vaccination. The vaccination requirement is a condition on being able to obtain that exemption. No doubt that incentivises vaccination, but it does not mandate it. Choosing not to obtain a vaccination is not a breach of any part of the Delta Order. But it means that the person who so chooses remains bound by the same blanket prohibition that applies to everyone, unless and until they choose to avail themselves of the exemption, having complied with the conditions on obtaining it.

55. For this reason, the Plaintiffs' lengthy excursus into cases that discuss a right to bodily integrity goes nowhere (cf. KWS [48]–[78]; and also HWS [92]–[101]). Contrary to the Plaintiffs' submission, no part of the Delta Order involves "removing an individual's ability to consent to a medical procedure",[25] nor are people "forced to undergo a medical procedure without their consent".[26] Should a person exercise their choice not to get the vaccine, they may do so without breaching any provision of the Delta Order. But they will not, at the same time, be able to insist on being afforded an exemption that has been extended only to those who are prepared to take that step.

56. There are suggestions in the Plaintiffs' submissions in both matters that this is discrimination against a minority. That minority is compromised of people who make a voluntary choice, which choice has consequences. Further, the obvious point should be made that an alternative policy would have been to not allow the relevant exemption at all, but to maintain the relevant prohibitions. That could reasonably be said to discriminate against those who are at significantly reduced risk of getting COVID-19.

57. *Secondly*, particular (b) complains of restrictions on personal liberty. But that challenge is properly directed not to the vaccination exemptions, but to the prohibitions just discussed. Lockdowns involve a constraint on the freedom of movement. That is an obvious and longstanding type of response to the presence of infectious diseases that "is, or is likely to be, a risk to public health" (to quote s 7(1)). In this context it cannot reasonably be suggested that the lockdown and ring-fence

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25 KWS [53], [73].

26 KWS [75].

measures provided for by the Orders are not the types of measures contemplated and authorised by the Act, including in s 7(3). *A fortiori*, provisions that only *ameliorate* the harshness of such measures, by affording limited exemptions to those who are willing to bring themselves within them.

Unreasonableness (ASOC [11]; KWS [34]–[89])

58. Paragraph 11 contends that the Delta Order is legally unreasonable on a number of grounds. The claim faces a high hurdle. The Plaintiffs bear the onus of establishing legal unreasonableness.[27]

59. The Plaintiffs approach this ground as though the test of legal unreasonableness generally applied to administrative decisions was applicable here. As will be developed shortly, that is not the case. But even if it was, administrative legal unreasonableness requires more than merely "emphatic disagreement" with an impugned decision.[28] Where the impugned decision is "a matter of opinion or policy or taste it may be very difficult to show" legal unreasonableness because, in such cases, the decision-maker "will be left with a very wide discretion which cannot be effectively reviewed by the courts".[29] Legal unreasonableness does not attend a decision that is "[w]ithin that area [in which] reasonable minds may reach different conclusions about the correct or preferable decision".[30] The Delta Order cannot be said to be unreasonable in this sense.

60. A similar argument that the Delta Order was legally unreasonable was recently considered and rejected by Griffiths J in *Athavle*. His Honour there explained that the issue was to be approached by reference to the standards applied to the making of

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27 *Municipal Council of Sydney v Campbell* [1925] AC 338, 343 (Duff J, for the Board); *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 671–672 (Gaudron J); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, [67] (Gummow J; Heydon and Crennan JJ agreeing); *Sagar v O'Sullivan* (2011) 193 FCR 311, [41] (Tracey J).

28 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, [34].

29 *Buck v Bavone* (1976) 135 CLR 110, 118–119 (Gibbs J); see also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [108] (Gageler J).

30 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [28] (French CJ).

delegated legislation. Given that his Honour's reasoning concerned the present Delta Order it warrants quotation at some length:[31]

> [94] It is incontrovertible that subordinate legislation is amenable to judicial review for unreasonableness (see, for example, *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee*[32] per Dixon J and *Adelaide City Corporation*[33] per French CJ). It is important, however, not to lose sight of the fact that the standard of review is not merely "unreasonableness" as such. The standard is much higher, as is reflected in expressions of the standard as "so oppressive or capricious that no reasonable mind can justify it" (*City of Brunswick v Stewart*[34] per Starke J); "such manifest arbitrariness, injustice or partiality that a court would say Parliament never intended to give authority to make such rules" (*Mixnam's Properties Ltd v Chertsey UDC*[35] per Diplock LJ) and "no reasonable mind could justify it by reference to the purposes of the power" (*Clements v Bull*[36] per Williams ACJ and Kitto J)."
>
> [95] The essential point is that there is a "high threshold" to judicial review of subordinate legislation for unreasonableness and the Court should avoid engaging in a merits review of such legislation (see *Adelaide City Corporation*[37] per French CJ). As Spigelman CJ said in *Murrumbidgee Ground Water Preservation Association Inc v Minister for Natural Resources*,[38] where it was contended that a legislative instrument applied unfairly and discriminatorily:
>
> > What is fair or unfair in such a context is a matter on which reasonable minds can differ. In view of the conflicting interests involved, a broad brush approach of general application is not, in my opinion, irrational.
>
> [96] As was stated in *Harbour Radio Pty Ltd v Australian Communications and Media Authority*[39] the proper test is not one of expediency but whether there is a power to make the subordinate instrument. Where there are difficult

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31 *Athavle v State of New South Wales* [2021] FCA 1075, [94]–[96].

32 (1945) 72 CLR 37, 82.

33 *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 249 CLR 1, [48].

34 (1941) 65 CLR 88, 97.

35 [1964] 1 QB 214, 237.

36 (1953) 88 CLR 572, 577.

37 [2013] HCA 3; (2013) 249 CLR 1, [47]–[54].

38 [2005] NSWCA 10; 138 LGERA 11, [152].

39 [2012] FCA 614; 202 FCR 525.

> choices to be made, it is essential that the Court not usurp the role of the maker of the impugned subordinate instrument (see [116]–[125] per Griffiths J).

61. His Honour concluded:

> [100] I consider that the applicants' claims of unreasonable disproportionality fall far short of the high threshold which attaches to this ground of review. Their challenge impermissibly invites the Court to determine on the merits complex policy choices. The applicants have not persuaded me that there is a serious question to be tried as to whether any of the three impugned instruments is so unreasonable as to be beyond power. As I have repeatedly emphasised, it is not the Court's task to engage in a merits review of those policy choices. Those choices require a balance between competing interests. A primary interest will be public health and public protection but other interests need to be balanced. It is a matter for the executive and not the Court to strike that balance.

62. No differently, the present case invites the Court to wade into the merits of the Minister's decision, beyond its legal and constitutional role and its institutional ability. How is the Court capable and legitimately able to make a judgment as to whether, for example, the Delta Order "causes unnecessary suffering and loss, is unduly costly, and is unreasonable in its terms, operation and effect" (particular (b)), or best balances competing risks with respect to other threats to physical or mental health (particulars (d) and (e))? Those are policy judgments, to be made by a Minister who is democratically accountable.

63. It is notable that the Plaintiffs have abandoned some of their arguments under this ground, namely:

(a) in particular (b1): "The Order is disproportionate in its reach compared to the risk in that it is a blanket measure, draconian and/or capricious. ~~in its impact on 99.9% of the inhabitants of NSW for whom there is no demonstrated health risk~~";

(b) the whole of particular (c): "More inhabitants of the State are in hospitals from adverse reactions to the mandated vaccines than from the risk itself":

(c) that "[t]here is no end in sight such that a temporary measure has become permanent or indeterminate ~~on the ground that 80% vaccination rates announced by the Defendants as necessary before terminating the measure are~~

~~not practicably achievable, nor have been achieved anywhere else on the planet~~": particular [11(f)].

64. The making then abandonment of these challenges illustrates the problem with legal challengers seeking to second-guess policy responses to a highly complex, and constantly evolving, health crisis. Moreover, it is important to recall that the Orders are temporary, consistent with s 7(5). The effect on liberties and freedoms must be understood in that context.

65. Read in view of the construction of "necessary" outlined at [19]–[23] above and the further breadth inherent in "as the Minister considers", this ground could not succeed unless the Court was persuaded that the temporary restrictions imposed in the Delta Order were ones that no Minister acting reasonably could have considered appropriate and adapted to deal with the public health risk and its possible consequences. Having regard to the grave public health risk presented by the COVID-19 virus, and particularly the more virulent Delta variant, that very high threshold is not satisfied in this case.

66. Moreover, and contrary to KWS [75], the fact that the Delta Order absolves those who have been issued with a medical contraindication certificate from demonstrating that they have had a dose of a COVID-19 vaccines does tell strongly against the suggestion that the impugned decisions are arbitrary or legally unreasonable. It is only those who are medically able to receive the vaccine that are presented with a choice between remaining bound by the general prohibitions that apply to everybody, or availing themselves of the vaccination exemption. In a similar vein, and contrary to KWS [87], the suggestion that the Delta Order is unreasonable because it is a "one size fits all" response is wrong. There have been changes from time to time to the areas of NSW specified in Schedule 1 to the Delta Order. Contrary to the Plaintiffs' generalised assertions of high-handed and arbitrary behaviour, this aspect of the Delta Order demonstrates that it has been tailored to respond to the changing nature of the COVID-19 threat over time.

67. To the extent that anything different or additional is intended by the allegation that the Delta Order is "disproportionate", that does not add anything beyond what is

already comprised within the legal unreasonableness challenge.[40] What is more, proportionality analysis is to be applied carefully, if at all, to decisions of a legislative character.[41]

68. This Court has been presented with a number of expert reports on a large variety of topics that are said to intersect with the Orders in some way. The Minister has in turn filed and served an expert report from Professor Kristine Macartney. Unsurprisingly, the two sides' experts have differing views. That gives rise to the situation noted by Weinberg J in *Australian Retailers Association v Reserve Bank of Australia*:[42]

> In the context of a case such as this, where even acknowledged experts, from a variety of backgrounds, cannot agree among themselves as to whether it makes good sense to reduce EFTPOS interchange fees, it is difficult to see how the applicants can hope to succeed in challenging the anterior Decision simply to designate EFTPOS, on the basis of Wednesbury unreasonableness.

69. This has prompted learned commentators to make the following observation:[43]

> It is usually not too hard in a given discipline to find two experts prepared to offer differing opinions. Once those conflicting views are adduced, forensically, it would seem almost impossible for the ground to succeed. Where two experts in a specialised field have different opinions as to whether a decision, or some aspect of a decision, is reasonable, it seems hard to contend that the decision is so unreasonable that no reasonable decision-maker could have made it.

70. Once it is shown that the reasonableness of a decision is a matter on which relevant experts have differing views, it is difficult to see how it can be said that the impugned decision was outside the range of decisions capable of being seen as reasonable.

71. The Plaintiffs' expert reports disclose a range of views as to the correct or preferable public health response to the COVID-19 pandemic, and as to various other issues.

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40 *Athavle v State of New South Wales* [2021] FCA 1075, [98].

41 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [65] (French CJ), [120]–[122] (Hayne J, Bell J agreeing); cf *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [290]–[310] (Rares J).

42 (2005) 148 FCR 446, [571].

43 Neil Williams SC and Alan Shearer, "Evidence in Public Law Cases" in Neil Williams (ed), *Key Issues in Judicial Review* (2014, Federation Press), 143.

Much of that evidence speaks not to the Australian context, but to circumstances in various other countries around the world. Likewise, much of it speaks only to the ancestral strain of COVID-19, rather than to the Delta Variant of the virus which is the strain the subject of the present outbreak in NSW. For those reasons (among others), the material is of dubious relevance in assessing what decisions were reasonably open to the Minister in responding to the threat posed by the Delta Variant in NSW in July and August 2021.

72. Moreover, the Plaintiffs' experts themselves evidently hold conflicting views on several key issues, which only highlights that the issues in question are of a kind on which minds can and do differ. The following examples may be noted.

(a) Dr Bhattacharya's report contains the following opinions:

i. A "randomized study" is "the gold standard study type in clinical therapeutics and public health interventions"[44] (cf. Dr Tyson, who opines that "[t]here is an art to medicine that cannot be replicated with purely academic reviews or randomized control trials in the middle of a pandemic"[45]).

ii. At 20–24 weeks after the second dose of the Pfizer vaccine, "the vaccine remains 95.3% efficacious [against] severe disease", and after that time the data is consistent with there being "no decrease whatsoever" in the protection that the Pfizer vaccine affords against severe disease.[46]

iii. "[V]accines are an excellent tool for personal protection against severe disease" for some period of time at least.[47]

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44 Affidavit of Jayanta Bhattacharya sworn on 15 September 2021, Exhibit JB-2 (**Bhattacharya Report**), CB, Section A1, Vol 2, Tab 14, p13.

45 Affidavit of Brian Tyson sworn on 25 September 2021, CB, Section A1, Vol 2, Tab 21, [5(c)].

46 Bhattacharya Report, p 24.

47 Bhattacharya Report, p 25.

iv. "The widespread use of vaccines against polio, measles, mumps, rubella, rabies, and a host of other pathogens has saved millions of lives."[48]

v. "Vaccines are one of the most important inventions in human history".[49]

vi. "[T]he COVID vaccines are safe by the standards of many other vaccines approved for use in the population".[50]

vii. For those people who need "focused protection" (such as the elderly), "the harms from COVID-19 infection are far greater than the possible harms from vaccination".[51]

viii. "A vaccinated individual has a near zero likelihood of having a severe course of the disease resulting in hospitalization".[52]

(b) Dr Tyson's report contains the opinion that "[f]or the healthcare sector in Australia where prior exposure or natural immunity has not taken place there is an argument for vaccinating that group to reduce the spread of Covid19."[53]

73. Even if the Plaintiffs' experts had been able to reach a unified consensus between themselves (which they have not), much of their evidence is contrary to (a) statistics, studies and modelling available to the Minister at the time of his decisions,[54] and (b) the evidence of the Defendants' expert, Prof Kristine Macartney, who is a highly qualified and leading authority in the field of vaccinology and infectious diseases. This evidence provides ample justification for the Minister's decision as a measure that was apt to reduce infections, ICU admissions and deaths, whilst balancing the

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48 Bhattacharya Report, p 26.

49 Bhattacharya Report, p 26.

50 Bhattacharya Report, p 26.

51 Bhattacharya Report, p 31.

52 Bhattacharya Report, p 35.

53 Affidavit of Brian Tyson sworn on 15 September 2021, Exhibit BT1, CB, Section A1, Vol 2, Tab 16, internal p 10.

54 As to which, see Gale Affidavit.

desirability of essential workers being able to work in a way which reduces the risk of transmission of COVID-19.

74. Additionally, in the present case the Plaintiffs cannot discharge their onus of proof of unreasonableness, for at least some of the information that was before the Minister at the time the Delta Order was made has been withheld on the basis of a public interest immunity claim.[55] In these circumstances, the Plaintiffs cannot establish that, on all the material that was before the Minister at the time of his decisions, it was legally unreasonable for him to make them.[56]

75. Nor can the Court draw a *Jones v Dunkel* inference or use *Blatch v Archer* reasoning on the basis of the Minister's failure to give evidence, as the onerous and complex duties that Ministers have to perform precludes the inference that their failure to give oral evidence in court proceedings was due to a consciousness that that evidence would not have assisted them.[57] No attempt has been by the Plaintiffs at any stage to seek reasons or to avail themselves of the procedure under r 59.9 of the UCPR.

76. Contrary to the Plaintiffs' submission,[58] this is not to deprive the court of its supervisory jurisdiction, but rather to limit the evidentiary materials by reference to which that jurisdiction is to be exercised.[59]

77. Further on this topic, the Plaintiffs make a separate argument at KWS [2], [11] and [25] that they were induced to withdraw an *inter partes* Notice to Produce on the faith of an assurance, from which the Defendants have allegedly resiled, concerning the

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55 As to which, see the affidavit of Kathryn Boyd affirmed on 22 September 2021.

56 *Sagar v O'Sullivan* (2011) 193 FCR 311, [41]–[58], [64], [67], [69], [71], [93]; *Plaintiff M46 of 2013 v Minister for Immigration and Border Protection* (2014) 139 ALD 277, [97]; *Jaffarie v Director-General of Security* (2014) 226 FCR 505, [30]; *BSX15 v Minister for Immigration and Border Protection* (2017) 249 FCR 1, [22]–[23].

57 *Minister for Immigration And Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, [143] (Kirby J), [284] (Callinan J); *Singh v Minister for Immigration & Multicultural Affairs* (2001) 109 FCR 152, [72] (Sackville J); *EWV20 as litigation representative for AFF20 v Minister for Home Affairs (No 3)* [2021] FCA 866, [64]–[67] (Griffiths J).

58 KWS, [1]–[2].

59 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 22–23 [33], 31 [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

extent of the documentary materials relied on by the decision-maker that it would put before the Court. That is not correct. In the correspondence to which the Plaintiffs refer, what the Defendants' solicitors said was as follows (emphasis added):[60]

> I can confirm the following matters concerning the first to third defendants' evidence:
>
> - The evidence will include the material immediately before the first defendant when he made *the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* on 20 August 2021.
>
> - The evidence will, further, address the general process by which the first defendant has been apprised of, or briefed with, information concerning COVID-19 and public health orders.
>
> - The evidence will not address or include every piece of information or document concerning COVID-19 or public health orders that has been provided to the first defendant.
>
> - The evidence will refer to documents which are relevant to decision-making concerning the making of public health orders, in particular, the process by which the Crisis Policy Committee of NSW Cabinet makes such decisions. Those documents cannot be put into evidence because they are subject to public interest immunity. The evidence will address the basis upon which public interest immunity attaches to such documents.

78. This is precisely what the Defendants have since done.

79. As to the acting under dictation ground, quite apart from the fact that there is no evidence to support it, it is entirely unclear under whose dictation the Minister is said to have acted. In any event, it is not acting under dictation to canvass the views of Cabinet in making a decision, nor is it acting under dictation to give effect to governmental policy agreed to in Cabinet.[61] Mere communication with others is not sufficient; what needs to be shown is that the Minister so slavishly adhered to the wishes of another person as to produce the conclusion that the decision was "not

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60 CB, Section C2, Vol 1, Tab 12.

61 *Hot Holdings Pty Ltd v Creasey* (2002) 210 CLR 438, [70] (McHugh J), [50] (Gaudron, Gummow and Hayne JJ); see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *CPCF v Minister for Immigration and Border Protection* (2015) 225 CLR 514, [37]–[38].

really that of the [decision-maker] at all", but that of the person dictating to him.[62] The evidence does not come close to establishing that.

80. As to the proposition that the Minister should have sought out and obtained the views of the experts on whom the Plaintiffs in this case rely (KWS [83]–[84]), that incorrectly assumes that the Minister had a duty of procedural fairness in the first place (as to which, see [142]–[143] below). And why those experts, and not others? How many experts is enough? Must the Minister consult every expert mentioned by every person who happens to write to him in the lead-up to the making of a decision under s 7? And who is an expert anyway – anyone who claims to be? To construe s 7 in that way would be to destroy its usefulness as the rapid and responsive public health power it is intended to be.

(B) Arguments about claimed inconsistency with various other parts of the Act

Claimed conflict with s 7(3) re declaration of a public health risk area (ASOC [7]; KWS [19], [34]–[37], [66], [87])

81. Paragraph 7 of the ASOC contends that the Delta Order is invalid on the ground that it was made without satisfying an asserted condition precedent, namely the making of a declaration that the State or part thereof is a public health risk area.

82. This argument overlooks the opening words of s 7(3): "Without limiting subsection (2)". Those words make clear that the Minister's power under s 7(2) extends to localised measures of the kind and of the gravity for which the section provides, where the Minister considers those measures necessary. It is not to set up a procedural impediment to the taking of such measures. That is a sufficient answer to the argument.

83. In any event, the Delta Order *does* declare particular parts of the State to be public health risk areas. First, cl 1.8(c) declares (emphasis added):

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62 *Evans v Donaldson* (1909) 9 CLR 140, 153 (Griffith CJ, Barton J agreeing).

> A number of cases of individuals with COVID-19 have recently been confirmed in New South Wales and other Australian jurisdictions, including by means of community transmission, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales.

84. This is in effect a declaration that the whole of New South Wales is a public health risk area. The absence of those specific words is immaterial; the Act does not prescribe any form of words at all. The question is one of substance, not form, and in substance, this is a declaration of the kind that s 7(3) contemplates.

85. Secondly, Sch 1 breaks this down further, and declares the existence within the State of three overlapping sub-areas, each of which is itself a public health risk area.

(a) There is the "general area" (Sch 1, cl 1), which is every part of the State not covered by the next two areas.

(b) There is the "stay at home area", which is Greater Sydney and the "regional NSW area" (as defined), minus any area of concern (Sch 1, cll 2–3).

(c) There are the "areas of concern", which is each of the local government areas there listed (Sch 1, Pt 3).

86. Again, these declarations substantively satisfy any requirement found to be imposed by s 7(3) to declare the existence of a public health risk area before giving directions of the kind there contemplated.

Claimed conflict with section 62 (ASOC [8]; KWS [68])

87. Paragraph 8 of the ASOC contends that the Delta Order is invalid because it contains measures that can only be taken under s 62 of the Act by, it is said, the Chief Health Officer.

88. In the first place, s 62 orders can be made by the Chief Health Officer *or* by any registered medical practitioner authorised by the Secretary to exercise such functions.[63]

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63 Act, s 60, definition of "authorised medical practitioner", paragraph (b).

89. More to the point, as explained at [35] above, s 62 does not limit s 7.

90. Even if that were not so, none of the particularised provisions of the Delta Order are provisions of the kind described in s 62 in any event, because none of them requires a specified person to engage in specified conduct (cf s 62(3)). The Orders create rules of general application.

Claim that Delta Order exceeded the required expiry date per s 7(5) (ASOC [9])

91. Paragraph 9 contends that the Delta Order is invalid on the ground that it purports to extend or amend prior orders beyond the date on which they would otherwise have automatically expired, contrary, it is said, to s 7(5) of the Act. In particular (c), it is contended that by cl 7.4(1) of the Delta Order, the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) (**Repealed Order**) is "picked up and continued by clause 7.4(1)", which is said to produce invalidity because of an announcement by the Premier that the present Delta Order will continue in effect until 30 September 2021, a period of 95 days after the commencement of the first of the repealed Orders.

92. This ground misstates the effect of s 7(5). This subsection does not prevent the Minister from making new orders that pick up or incorporate provisions of repealed orders. It simply provides for a time period within which orders expire. It is directed to the order itself.

93. The Delta Order commenced from the beginning of 21 August 2021: cl 1.2. Pursuant to s 7(5), it will expire after 90 days (if not repealed sooner), that is, at the end of 18 November 2021.

94. The Repealed Order has been repealed (cl 7.3). It has not continued in force beyond its expiry date. Clause 7.4(1) does no more than to provide that an act, matter or thing provided for by the Repealed Order "continues to have effect *under this Order*" (emphasis added). There could be no s 7(5) objection if the Delta Order simply reproduced the totality of the text of the Repealed Order as a Schedule and provided that the Schedule had effect. Nor could there be any objection if, 90 days after an

order were made, a fresh but identical order were made. Clause 7.4(1) simply does the same thing in a more concise way.

(C) Claimed inconsistency with LEPRA (ASOC [10]; KWS [121]–[125])

95. KWS [121]–[125] contend that the Delta Order is invalid on the ground of inconsistency with LEPRA, in that cl 2.8 confers functions or powers on a police officer which are said to exceed those provided for by LEPRA. This is said to engage s 6 of LEPRA. That section relevantly states:

> (1) 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)).
>
> (2) To the extent of any inconsistency, this Act prevails over an Act or regulation to which this section applies.

96. There is no inconsistency: cf KWS [124]. Clause 2.8 confers no function or power on a police officer that is inconsistent with any provision in LEPRA. What cl 2.8 relevantly provides is that a person is not required to carry or wear a fitted face covering if:

> (a) the person has an illness, condition or disability making that unsuitable;
>
> (b) the person carries evidence of that condition and the person's name and place of residence; and
>
> (c) the person "produces the evidence for inspection by a police officer if requested by the officer".

97. Clause 2.8 imposes conditions on an exemption to a requirement that otherwise applies under the Delta Order. The clause also implicitly grants power to police officers to make the request.[64] But in so doing it does not confer a function or power on police officers inconsistent with anything that is provided for in LEPRA. Part 3 of

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64 Consistently with *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, 301–302 (Mason, Deane and Dawson JJ); *Attorney-General (Cth) v Oates* (1999) 198 CLR 162, [16] (the Court).

LEPRA confers police with powers to require the identity of persons to be disclosed in certain circumstances, but there is nothing to indicate these powers are exhaustive. Indeed, that is confirmed by s 201(1) of LEPRA which applies Pt 15 of LEPRA to the exercise of a power by a police officer to "require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes)" (to quote subsection (e)), "whether or not the power is conferred by [LEPRA]" (to quote the statement at the end of the section). Part 15 of LEPRA contains certain safeguards on the exercise of police powers, but there is nothing in cl 2.8 of the Delta Order which is inconsistent with Part 15, nor do the Plaintiffs identify any other provision of LEPRA with which cl 2.8 is inconsistent.

98. In any event, even if there was an inconsistency between Part 15 of LEPRA and cl 2.8, that would not invalidate the Delta Order. Section 6(2) provides that "[t]o the extent of any inconsistency" LEPRA prevails. That simply means that the safeguards provided in Part 15 would apply to any exercise of police powers under, or in connection with, the Delta Order.

(D) Arguments connected to the Commonwealth Constitution and legislation

Civil conscription per s 51(xxiiiA) of the Commonwealth Constitution (ASOC [12]; KWS [109]–[120])

99. Paragraph 12 alleges that the Delta Order is invalid as an instrument made for the purpose of and to give effect to a "joint scheme of civil conscription" between the State and the Commonwealth in the purported exercise of executive power which was not authorised by law under the *Biosecurity Act 2015* (Cth) or the Act or otherwise: see KWS [109]–[120].

100. However, at KWS [90]–[108], the Plaintiffs advance an additional argument not raised in the ASOC, namely that there is to be implied from the Commonwealth Constitution "an implied constitutional right of individual patients to reject unless consented to vaccination[s]" (KWS [92]). To deal with that argument it is convenient first to address the arguments concerning a "joint scheme of civil conscription".

Joint scheme of civil conscription (KWS [109]–[120])

101. At the outset, the submissions at KWS [110]–[112] are misconceived. They assert that reported comments of the Premier on the Nine Network's Today Show on 1 September 2021 amount to an admission of "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": KWS [112]. There is nothing in the transcript relied upon to support that assertion. Nor, incidentally, is there any relevant admission in that statement. As addressed above, the Delta Order does not make vaccination mandatory.

102. The argument that the Delta Order is invalid because it was made as part of a joint scheme of civil conscription contrary to the constitutional guarantee in s 51(xxiiiA) should be rejected for the following independent reasons:

(a) the Delta Order does not involve "civil conscription" within the meaning of s 51(xxiiiA);

(b) even if it did, the limitation is not relevantly infringed by the Commonwealth unless it *requires* action by the State in breach of the restriction; and

(c) even if the Commonwealth had required the State to act in that way, the Delta Order was still made in the independent exercise of State legislative and executive power and is valid.

103. As to the first point, s 51(xxiiiA) of the Constitution authorises the Commonwealth to make laws with respect to the provision, *by the Commonwealth*,[65] of medical or dental services. However, the parenthetical words – which apply only to the provision of medical and dental services[66] – make clear that such laws cannot "authorise any form of civil conscription". The reference to "civil conscription" in

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65 *British Medical Association v The Commonwealth* (1949) 79 CLR 201, 243 (Latham CJ), 254 (Rich J), 260–261 (Dixon J), 279, 282 (McTiernan J), 292 (Webb J); *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279 (the Court).

66 *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279 (the Court).

s 51(xxiiiA) refers to the legal or practical compulsion of medical or dental practitioners to engage in practice as a doctor or dentist or to perform particular medical or dental services for or at the direction of the Commonwealth.[67] The guarantee was added principally to foreclose the prospect of medical and dental services being nationalised,[68] eliminating the possibility of legislation that "compelled doctors or dentists in effect to become servants of the Commonwealth, or to have the whole of their professional activities controlled by Commonwealth direction".[69] There is nothing in any previous case to suggest that the "civil conscription" limitation in s 51(xxiiiA) protects against compulsory medical treatment: cf KWS [95]–[96].

104. Thus, for the Plaintiffs' argument that the Commonwealth is achieving indirectly through the States what it cannot achieve directly itself (KWS [115], [118]) to succeed, it would be necessary (though not sufficient) to show that the Delta Order compels medical practitioners to act in the service of the Commonwealth, such as to give rise to civil conscription within the meaning of s 51(xxiiiA). Yet no part of the Delta Order compels, whether legally or practically, medical or dental practitioners to provide a professional service for or at the direction of the Commonwealth. Nor, for that matter, does it require such practitioners to act on behalf of or at the direction of the State. The Delta Order does not compel medical or dental practitioners to do anything at all. On settled authority, the "guarantee" derived from s 51(xxiiiA) has no application to the present circumstances.

105. Secondly, even if the Delta Order did provide for civil conscription, there is no arrangement between the Commonwealth and the State *requiring* the State so to act. The limitation in s 51(xxiiiA) is addressed to the Commonwealth. By analogy, it is established that an intergovernmental agreement might infringe the just terms guarantee in s 51(xxxi), thus exceeding *Commonwealth* power, when the agreement

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67 *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532, 557 (Gibbs J; Barwick CJ, Mason, Murphy and Wilson JJ agreeing); *Wong v Commonwealth* (2009) 236 CLR 573, [50] (French CJ and Gummow J); [201], [209] (Hayne, Crennan and Kiefel JJ).

68 *Wong v Commonwealth* (2009) 236 CLR 573, [45], [48] (French CJ and Gummow J); [179], [181] (Hayne, Crennan and Kiefel JJ).

69 *Wong v Commonwealth* (2009) 236 CLR 573, [50].

requires a State to acquire property.[70] But there is no impermissible circumvention where an intergovernmental agreement leaves it to the State to choose how to proceed, and the State then engages in a legally independent exercise of its own powers. The Plaintiffs have pointed to no such requirement on the State to impose the Delta Order. The argument thus fails for this reason.

106. Thirdly, even if there was some such requirement imposed invalidly by the Commonwealth, such a requirement does not restrict the States' independent powers. Insofar as State action depends for its operation upon the existence of a valid intergovernmental agreement or the provision of federal funding, then a State scheme might be *inoperative* – as opposed to invalid – because the premise is not fulfilled.[71] But if the State scheme is not legally dependent upon the existence of a valid agreement or federal funding, then it operates on its own terms as an independent exercise of State power.

107. The point is illustrated by the history of the soldier settlement scheme after World War II, which was the subject of federal-State arrangements. In *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, a majority of the High Court held the Commonwealth exceeded its powers by entering into the intergovernmental agreement, because it provided for an infringement of the just terms guarantee. The NSW law was construed to depend in its operation upon the existence of a valid law of the Commonwealth. In the absence of such a valid agreement, the State Act was held to be inoperative, but valid.[72]

108. NSW then modified the Act to remove references to the agreement. Subsequently, in *Pye v Renshaw* (1951) 84 CLR 58, an argument was made with respect to the

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70 *Spencer v Commonwealth* (2018) 262 FCR 344 (FFC) at [171]–[172], [182], [210], [223], [354]; see also *Esposito v Commonwealth of Australia* (2015) 235 FCR 1, [66]–[67] (FFC); *Houston v NSW (No. 2)* [2021] FCA 637, [10], [95]-[98] (Griffiths J).

71 See analogously *Alcock* , [82] (Rares, Buchanan and Foster JJ); *Spencer v Commonwealth* (2018) 262 FCR 344, [233] (Griffiths and Rangiah JJ), also [433] (Perry J); *Houston v NSW (No. 2)* [2021] FCA 637, [10] (Griffiths J).

72 *Magennis,* 404 (Latham CJ), 424, 425 (Williams J, Rich J agreeing). While Heydon J, dissenting, in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (***ICM***), held that the State legislation was invalid, his Honour also said at [252] "[t]he States, subject to their own legislation, are at liberty to make uncompensated expropriations".

amended version of the NSW legislation found to be inoperative in *Magennis* that relevant decisions had been taken for an improper purpose, seemingly being a purpose of giving effect to the invalid Commonwealth-State agreement. That argument was rejected. In *Tunnock v Victoria* (1951) 84 CLR 42, a similar challenge to an unamended Victorian Act was rejected as to the relevant parts of that Act, in circumstances where, as noted in *Spencer v Commonwealth* (2018) 262 FCR 344 at [230], the Victorian Act had never been "coupled" to the Commonwealth legislation. That result was reached despite the fact that the Victorian Act was "no doubt mainly enacted to carry out the joint Commonwealth and State scheme embodied in the agreement for the settlement of discharged soldiers … on Victorian land", to quote Williams and Webb JJ at 54. Their Honours explained at 55 that the enactment of the relevant parts of the State legislation was "an independent exercise of the constitutional legislative powers of the Victorian Parliament".

109. The Delta Order here was made under s 7 of the 2010 Act. No part of the Act, nor of the Delta Order, expressly or impliedly depends upon the validity of some intergovernmental agreement or federal funding. It is thus valid and operative.

Implied constitutional right to reject vaccinations (KWS [90]–[108])

110. Just like the limitation in s 51(xxxi) relating to acquisition of property,[73] s 51(xxiiiA) does not limit directly the legislative powers of the States. As a matter of interpretation,[74] these provisions (like certain others, eg 51(ii), 51(iii), 51(xii), 51(xiv)) "abstract"[75] from other heads of *Commonwealth* legislative power conferred by the Constitution. The basis of the "abstraction" is the principle that "when you have … an express power, subject to a safeguard, restriction or qualification to legislate on a particular subject or to a particular effect" that is treated as being inconsistent with the construction of other powers conferred by the same instrument

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73 As to s 51(xxxi) not applying to the States, see eg *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399, [7]–[14].

74 See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371–372 (Dixon CJ); *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [220].

75 *Trade Practices Commission (Cth) v Tooth & Co Ltd* (1979) 142 CLR 397, 445 (Aickin J).

to legislate on the same subject or to achieve the same effect but without the safeguard, restriction or qualification.[76]

111. Further, as noted above, s 51(xxiiiA) has been authoritatively construed as only conferring a power on the Commonwealth to make laws with respect to the provision *by the Commonwealth* of, relevantly, medical and dental services. Accordingly, the parenthetical words in s 51(xxiiiA) could at most only limit the power to make laws with respect to the provision by the Commonwealth of medical and dental services. Further, even if the States could not enact laws involving "civil conscription" within the meaning of s 51(xxiiiA), the Delta Order does not do that for reasons explained above.

112. In relation to the broader argument that there is an implied constitutional right of individuals to reject compulsory vaccinations, an implication can be drawn from the Constitution only so far as it is necessary to give effect to the text or structure of the Constitution said to support the implication.[77] There is nothing in the text or structure of the Constitution to even suggest, let alone compel, such an implication. Logically, such an implication would invalidate a range of legislation throughout Australia providing for, or authorising, involuntary medical treatment (see, eg, *Mental Health Act 2007* (NSW)).

Inconsistency with the Australian Immunisation Register Act 2015 (Cth) (ASOC [13]; KWS [126]–[134])

113. Paragraph 13 of the ASOC asserts that the Delta Order is invalid on the basis that it is inconsistent with the *Australian Immunisation Register Act 2015* (Cth) (**AIR Act**). Although this argument is not developed in KWS it is alleged in the ASOC that this inconsistency exists because cl 5.8 provides for the use of the Australian Immunisation Register in a manner not authorised by, and without regard to the confidentiality provisions of, the AIR Act.

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76 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371–372 (Dixon CJ).

77 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (the Court); *Re Gallagher* (2018) 263 CLR 460, [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing).

114. Section 22(2)(d) of the AIR Act expressly permits a person to make a record of, disclose or otherwise use protected information included in the Register if "the person is required or authorised to do so by or under a law of the Commonwealth or of a State or Territory". Clause 5.8 authorises a person entering a construction site to produce for inspection "evidence from the Australian Immunisation Register that the person has had 1 or 2 doses of a COVID-19 vaccine". The clause thus comes within s 22(2)(d) of the AIR Act. There is no inconsistency; on the contrary, the disclosure is one that the AIR Act itself authorises.

115. KWS [126]–[134] also advance other arguments which are difficult to follow. Insofar as the contention of inconsistency rests on notions of civil conscription, the argument is answered above. Insofar as the argument is that the AIR Act covers the field concerning the recording of an individual's vaccination status, it is not correct. That Act provides for the establishment of an AI register; it does not prevent other laws requiring the recording of vaccination status in other ways.

HENRY

116. The Amended Summons in this matter raises six grounds, although these overlap to a significant extent. The grounds are addressed here in turn.

Ground 1: ultra vires / jurisdictional error (HWS [71]–[133])

117. Ground 1 of the Amended Summons alleges that the Orders are ultra vires on the basis that they exceed the limits of the jurisdiction conferred on the Minister by s 7 of the Act.

118. Much of HWS [74]–[90] concerning the principle of legality and the meaning of the word "necessary" in s 7 has already been addressed. Further, the submissions repeat the fallacy of the Plaintiffs in the *Kassam* matter than the Delta Order "imposes a requirement that a person undergo medical treatment" (HWS [86]) or "forced vaccination" (HWS [97]). As explained above, the Delta Order does not do that. Nor do the Aged Care and Education Orders. The Aged Care Order provide that certain people may not enter relevant facilities from a certain date unless vaccinated. The Education Order restricts people from performing work at relevant facilities from a

certain date unless vaccinated. The vaccination requirement in both cases is a condition on being permitted to do certain things.

119. It is true that the Orders restrict the freedom of individuals to earn a living (cf HWS [102]), and the freedom to carry on business is a liberty that has been recognised as being protected by the principle of legality. But s 7 plainly authorises interferences with such freedoms. Orders to restrict movement, including to segregate or isolate inhabitants or to prevent access to an area, will inevitably interfere with trade and business. And again, critically, these orders are of temporary effect.

120. The submission at HWS [117] that the Orders contravene ss 15 and 23 of the *Disability Discrimination Act 1992* (Cth) because they have the effect of requiring the unvaccinated to be treated less favourably than vaccinated persons should be rejected. *First*, logically that argument must rely on a contention that being unvaccinated is itself a "disability". That submission is not supported by the definition of "disability" in s 4. *Secondly*, ss 15 and 23 apply to particular conduct by a person; they do not apply to Orders made under the *Public Health Act*. *Thirdly*, insofar as the argument treats COVID-19 status as the relevant disability, s 48 permits discrimination which is reasonably necessary to protect public health.

121. HWS [119]–[120] concerning civil conscription is addressed above: see [99]–[112].

122. The arguments at HWS [121]–[129] are difficult to understand. They appear to assert that the Orders are inconsistent with unspecified provisions of the *Privacy Act 1998* (Cth), *Health Records and Information Privacy Act 2002* (NSW) and AIR Act: HWS [128]. No inconsistency exists:

(a) The requirements of the *Privacy Act* generally apply to Commonwealth agencies and "organisations" (which excludes State and Territory authorities): see s 6C.

(b) As for the *Health Records and Information Privacy Act 2002* (NSW), the fact that a person has *not* been vaccinated does not fall within any of the limbs of the definition of "health information" in s 6: cf. HWS [121]. In any event, the Act regulates what health service providers may do with health information

that they collect, hold or use (s 11(1)); it does not regulate the actions of entities other than health service providers, nor does it limit what individuals may do with their own information.

(c) The AIR Act has been dealt with above: see [113]–[114].

123. The fact that those Acts may not impose requirements equivalent to s 7 does not mean that other Acts cannot impose such requirements. There is nothing identified in those Acts which would prevent a requirement in an order under s 7 to require the provision of health information.

124. Finally, the argument that the Orders are not authorised because they infringe the privilege against self-incrimination (HWS [130]–[133]) should be rejected. The Orders require a person to produce evidence that they *have* obtained a vaccine. The Orders do not require *unvaccinated* people to produce anything at all; indeed, there would be nothing to produce. No part of the Orders deprives a person of their right to silence or requires them to provide evidence incriminating themselves. An unvaccinated person acting in breach of (say) cl 4.3 of the Delta Order is in no different position to a trespasser: if questioned by police about their authority to be on another's land, it is a matter for them to demonstrate that they have that authority if they so wish. But if they choose to say nothing, they will not in any meaningful sense have been compelled to incriminate themselves. Rather, they will simply have been observed in the act of committing an offence by officers who themselves will be able to give witness evidence of their own observations of that fact.

125. Moreover, s 7(3)(c) of the Act expressly contemplates that orders under s 7(2) may "prevent, *or conditionally permit*, access to the area". Implicit in the proposition that access to an area may depend on some conditional permit is the allied proposition that a person may be required to demonstrate that they have such a permit when asked. Section 7(3)(c) would be rendered pointless if it were understood only as authorising orders that make access to an area conditional on having some kind of permit, but with no practical facility to enforce compliance with that condition by asking a person in the area to furnish their permit.

126. Finally, the various references throughout the Plaintiff's submissions to international treaties and conventions relied upon are irrelevant in the absence of municipal law incorporating them.[78]

Ground 2: improper purpose (HWS [134]–[138])

127. Ground 2 of the Amended Summons alleges that the Orders are invalid on the basis that the Minister acted for an improper purpose in making them.

128. A flaw in this ground is that various of the improper purposes which are alleged are no more than assertions of the perceived effects of the Orders. That a decision-maker acted for an improper purpose is not proven by asserting that the decision has a particular effect. It is shown by proving, by way of evidence, that the decision-maker had an improper purpose in mind in making the decision. The onus of proof in judicial review challenges is, of course, on the challenger.[79]

129. The test of improper purpose is subjective.[80] Further, to vitiate a decision on this basis it must be shown that the alleged improper purpose is the real, operative or substantial purpose in the sense that without that purpose the decision would not have been made.[81] An improper purpose will not lightly be inferred and will only be inferred if the evidence cannot be reconciled with the proper exercise of the power.[82] Thus where there is evidence that could reasonably support the decision-maker's

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78 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–7 (Mason CJ and Deane J); *Lazarus v The State of New South Wales* [2018] NSWSC 998 at [51] (Walton J); *Lazarus v Kane* [2019] NSWCA 194 at [15] (Basten JA, with whom Bell P and Meagher JA agreed); *Daher v Bell* [2021] VSCA 192 at [57] (the Court).

79 eg *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

80 *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276, 289–90; *Golden v V'landys* [2016] NSWCA 300, [135]–[139].

81 *Iannuzzi v FCT* (2019) 268 FCR 349 (FC), [28], [33] (the Court)

82 *Industrial Equity Ltd v DFCT* (1990) 170 CLR 649, 672 (Gaudron J).

decision without there having been an improper purpose, an allegation of such is not made out.[83]

130. There is no evidence before the Court that any of the alleged improper purposes were ones that animated the Minister, let alone that without those purposes the decision would not have been made.

131. It is important to recall the legal character and effect of the Orders. They are temporary. And they do not impose mandate vaccination in the way contended for by the Plaintiffs.

Ground 3: failure to take into account relevant considerations (HWS [139]–[142])

132. Ground 3 of the Amended Summons alleges that the Orders are invalid on the basis that the Minister failed to take into account a number of relevant considerations.

133. Failing to take a consideration into account will spell invalidity only where that consideration was a *mandatory* consideration, not merely a permissible one: "[t]he ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision".[84] There is no basis to conclude that any of the considerations listed HWS [141] are mandatory considerations under s 7 of the Act. Indeed, the suggestion that the Minister was obliged to take into account no less than 21 considerations in making orders, which of their nature, are likely to address an urgent and evolving public health risk, is absurd.

134. No such requirement to consider such matters is expressed in the Act. Section 7 does not expressly prescribe any considerations at all, but rather, leaves it to the Minister to determine what considerations are relevant.

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83 *LHRC v DFCT* (2015) 326 ALR 77, [150] (Perry J), citing *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30, [67] (McHugh J).

84 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 (Mason J; emphasis in original).

135. No implication can be drawn from the subject-matter, scope and purposes of the Act that the matters enumerated by the Plaintiffs are mandatory considerations.[85] When the Act sets out to prescribe mandatory considerations to be taken into account in the making of decisions, it does so expressly.[86] The nature of the task involved – assessing what actions or directions are appropriate or adapted to deal with risks to public health – is ill-suited to requiring the Minister to have regard to mandatory factors. Moreover, the fact that the function is reposed in the Minister suggests that a broad range of policy considerations may be relevant,[87] a matter which tends against implied mandatory considerations. In addition, s 3(2) of the Act, which states that "the protection of the health and safety of the public" is "the paramount consideration", strongly indicates that the matters identified in Ground 3 are not mandatory considerations.

136. Even if there were any mandatory considerations applying to the power in s 7(2), it is not plausible that they would be of the kind, or specificity, of those enumerated by the Plaintiffs. Indeed, the Plaintiffs' listing of 21 supposed mandatory considerations assumes that the Parliament intended a tightly constricted power, rife with the potential for jurisdictional error by a Minister overlooking one of the highly specific matters listed. That is not a plausible construction of this power, intended to enable the Minister rapidly to address serious public health threats.

137. Finally on this ground, even if some or all of these considerations were required to be taken into account, the Plaintiffs cannot discharge their onus of establishing that they were not taken into account.

Ground 4: wrong issue / wrong question / irrelevant considerations (HWS [144]–[146])

138. Ground 4 of the Amended Summons alleges that in making the Orders, the Minister "identified wrong issues, asked himself wrong questions, and otherwise took into account irrelevant matters".

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85 Note *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

86 See, eg, s 62(6).

87 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 42 (Mason J).

139. This ground confuses two distinct bases for judicial review. The first (alluded to by "identified wrong issues" and "asked himself wrong questions") is where a decision-maker misconstrues the source of power pursuant to which the decision is to be made. There is no evidence that the Minister did that.

140. The second basis for judicial review bound up in this ground is a taking into account of irrelevant considerations. This faces the same problem as Ground 3: the ground is available only where the Act *prohibits* the decision-maker from having regard to a particular consideration.[88] None of the considerations listed in Ground 4 of the Summons (see also HWS [145]) are matters that the Act prohibits the Minister from taking into account in making a decision under s 7, and in any event, the making of delegated legislation cannot be impugned on the basis that body responsible for its promulgation has taken into account irrelevant considerations.[89] For much the same reasons as identified with respect to the Plaintiffs' Ground 4, the subject-matter, scope and purpose of the Act indicate that the Minister may have regard to a wide range of considerations in determining the appropriate directions to make in a pandemic situation.

Ground 5: breach of natural justice (HWS [147]–[149])

141. Ground 5 of the Amended Summons alleges that the Orders are invalid on the basis that the Minister breached the requirements of natural justice in making them, in failing to afford the Plaintiffs a reasonable opportunity to comment on the proposed Orders before they were made.

142. The Orders apply to the 8 million residents of NSW. To suggest that the Minister was required to consult with the six Plaintiffs prior to making them is absurd: cf HWS [148].

143. Lest authority for this obvious proposition is needed, there is a large body of authority which holds that where a power to make a decision is one affecting the

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88 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 39–40.

89 *Vanstone v Clark* (2005) 147 FCR 299, [106] (Weinberg J).

public at large, there will generally be no obligation to afford procedural fairness to each member of the public thereby affected.[90] As noted above, the Orders made by the Minister have a legislative character. The Act did not require the Minister to consult with every resident in the State before making an order of the kind empowered by s 7. That would be antithetical to the purpose of the section, which is to enable the Minister respond in a timely manner to emerging public health risks.

Ground 6: unreasonableness (HWS [150]–[157])

144. Ground 6 of the Amended Summons alleges that the Orders are invalid on grounds of legal unreasonableness. For the reasons given above with respect to the *Kassam* case, that contention cannot be accepted.

145. The considerations discussed in that section in relation to the Delta Order apply equally to the Aged Care Order and Education Order. The evidence supports the proposition that Aged Care workers are working with individuals who, because of their age, are at a substantially higher risk of serious illness or death from contracting COVID-19.[91] Vaccination substantially reduces the risk of transmission of COVID-19. Having regard to those facts and in light of s 3(2) of the Act, there is no basis to contend that the Aged Care order is legally unreasonable.

146. As to the Education Order, the order itself explains that there is a risk of transmission of COVID-19 among children at government schools, non-government schools and early education and care facilities because the COVID-19 vaccine is currently not available for children of certain ages (cl 3(e)). Moreover, between 16 June 2021 and 19 August 2021, 27% of all new COVID-19 notifications were among those aged 0 to 18 years.[92] That heightened risk of transmission (and consequently, serious illness)

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90 See, eg, *Kioa v West* (1985) 159 CLR 550, 584 (Mason J); *R v City of Munno Para; Ex parte John Weeks Pty Ltd* (1987) 46 SASR 400, 406–7 (King CJ); *Botany Bay City Council and Others v Minister of State for Transport and Regional Development* (1996) 66 FCR 537, 553–4 (Lehane J); *Harvey v Minister Administering the Water Management Act 2000* [2008] NSWLEC 165, [103]–[104] (Jagot J).

91 Gale Affidavit, [84]–[87].

92 CB, Section C1, Vol 2, Tab 32, p. 1.

among children is ample justification for a measure that is aimed squarely at protecting children from contracting the virus.

CONCLUSION

147. For the above reasons, both proceedings should be dismissed, with costs.

29 September 2021

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