IN THE SUPREME COURT OF NSW
EQUITY DIVISION No. 2021/249601

Between: **Al-Munir Kassam**
First Plaintiff
and others

The Hon Bradley Ronald Hazzard
First Defendant
and others

FOURTH DEFENDANT'S OUTLINE OF SUBMISSIONS

Introduction

1. The Fourth Defendant (the Commonwealth of Australia) makes submissions in relation to the Plaintiffs' constitutional arguments only: Plaintiffs' Written Submissions dated 27 September 2021 (**PWS**) at [90]-[134]. The Amended Statement of Claim (**ASOC**) does not seek any relief against the Fourth Defendant.

2. The Plaintiffs' case insofar as it alleges constitutional invalidity of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) (**NSW Delta Order**) and/or s 7 of the *Public Health Act 2010* (NSW) (**Public Health Act**) must fail, for at least the following reasons, addressed sequentially below:

    a. s 51(xxiiiA) is a grant of Commonwealth legislative power that is subject to a specific constraint, but is not a constraint on State power. The State of NSW may and has independently exercised its legislative powers in enacting the Public Health Act, and the First Defendant has exercised the independent executive power of the State in making the NSW Delta Order;
    b. the alleged 'joint scheme' between NSW and the Commonwealth does not involve any legislation of the kind addressed in *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 (***Magennis***) (which concerned s 51(xxxi));
    c. the Plaintiffs have not pleaded and could not prove that the Commonwealth has required the State to contravene s 51(xxiiiA) (by requiring the State to impose civil conscription in the provision of medical or dental services);
    d. in any event, the Public Health Act and NSW Delta Order do not impose any form of civil conscription in the provision of medical and dental services within the meaning of s 51(xxiiiA), as there is no compulsion of those providing medical or dental services.

3. The Plaintiffs' claim of some s 109 inconsistency between the NSW Delta Order and the *Australian Immunisation Register Act 2015* (Cth) (**AIR Act**) also cannot succeed. The constitutional arguments in the proceedings should be dismissed with costs.

4. The Plaintiffs rely upon a purported "admission" by the NSW Premier, in a television interview on 1 September 2021, that "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": PWS [110]-[112]. The transcript relied on does not support the claimed "admission", nor otherwise advance the Plaintiffs' case.

Section 51(xxiiiA) does not constrain State power

5. Section 51(xxiiiA) of the Constitution gives the Commonwealth parliament the power to make laws in relation to:

> "The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;"

6. It is "settled" that the opening words of s 51(xxiiiA), referring to "the provision" of the relevant benefits refer to the provision of those benefits by the Commonwealth.[1] So much has been clear since *British Medical Association v Commonwealth* (1949) 79 CLR 201 (***BMA***).[2]

7. In *BMA*, Latham CJ was of the view that the Commonwealth legislative power did not impose limitations on the States in supplying benefits or providing services of the kind referred to in s 51(xxiiiA), so long as the Federal and State statutes were not inconsistent with each other.[3] His Honour also explained that even if the Commonwealth legislation did "affect or control the operation of State institutions", this would not establish its invalidity (absent any *Melbourne Corporation* argument), including in view of the terms of s 109 of the Constitution.[4] There was no suggestion in *BMA* (or any subsequent case) of s 51(xxiiiA) imposing a constraint on the legislative power of any State or Territory concerning the provision of medical and dental services, or in relation to the imposition of civil conscription.

8. The Plaintiffs have identified no authority suggesting that s 51(xxiiiA) is directed to the power of a State parliament or might operate to render State legislation invalid. The first way in which the Plaintiffs put their constitutional argument (PWS at [91]-[108], which it should be noted does not refer to s 7 of the Public Health Act at all and does not address why the impugned NSW Delta Order involves "civil conscription" for the purposes of s 51(xxiiiA): see below at [36]-[39]) must therefore fail. The State of NSW may – and in this case has – independently exercised its legislative powers in enacting the Public Health Act, and the First Defendant has exercised the executive power of the State of NSW in making the NSW Delta Order.

9. The Plaintiffs contend that s 51(xxiiiA) "takes effect" as an "implied constitutional right of

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

2 See (1949) 79 CLR 201 at 244, 245 (Latham CJ), 254 (Rich J), 260 (Dixon J), 279-280, 282 (McTiernan J), 292 (Webb J).

3 Ibid at 244.

4 Ibid at 245.

individual patients to reject unless consented to vaccination[s]": PWS at [92]. This is not raised in the ASOC. No explanation is offered for why an express head of Commonwealth legislative power in relation to (inter alia) provision of medical and dental services by the Commonwealth should be construed as giving rise to an additional implied right concerning consent by individuals to medical treatment, or as a "guarantee against civil conscription", abstracted from the context in which it appears in s 51(xxiiiA). Nothing in the text or structure of the Constitution provides any basis for such an implication.[5]

10. The first limb of the Plaintiffs' constitutional argument has two parts. The first relies on Kirby J's judgment in *Wong v Commonwealth* (2009) 236 CLR 573 (***Wong***) and a sentence in Williams J's judgment in *BMA*. The second part relies on "other relevant considerations" (the relevance of which to the application of s 51(xxiiiA) of the Constitution is not explained), principally notions of the rule of law and constitutionalism, equality before the law and international human rights instruments.

11. The Plaintiffs refer to Kirby J's judgment in *Wong* as to the purpose of limiting civil conscription as facilitating informed consent: PWS at [94]. Justice Kirby's approach involved rejecting the view of the majority of the Court in *General Practitioners Society of Australia v Commonwealth*[6] and construing s 51(xxiiiA) by reference to "emerging norms of fundamental human rights as expressed in international law".[7] His Honour's analysis was not adopted by any other member of the Court in *Wong*, nor by any subsequent authority. Nor did Kirby J suggest that his own reasoning was addressed to anything other than Commonwealth legislative power.[8] The other judgments in *Wong* provide no support for the proposition that s 51(xxiiiA) limits State legislative power.

12. The Plaintiffs misunderstand Williams J's reference in *BMA* at 287 to the invalidation of "*all legislation* which compels medical practitioners to provide any form of medical service" (emphasis added): PWS at [95]. His Honour commenced the same paragraph of his judgment by stating that the parenthesised words in s 51(xxiiiA) are "a prohibition upon the exercise of the legislative powers of the Commonwealth". There is no basis for the Plaintiffs' apparent contention that Williams J was referring to State legislation in the final sentence of the same paragraph. His Honour's reference to legislation compelling medical practitioners to perform medical services should also be noted, given the Plaintiffs contend that s 51(xxiiiA) protects the individual rights of patients and imposes a restriction on requiring individuals to receive a vaccination.

13. The second part of the first limb of the Plaintiffs' constitutional argument claims to draw support from "other relevant considerations": PWS at [98]. The Plaintiffs appear to be attempting an analogy between this case and those in which the implied freedom of political communication was developed (PWS at [98]-[103]), but nowhere do they

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5 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court).
6 (1980) 145 CLR 532.
7 (2009) 236 CLR 573 at [133].
8 See eg (2009) 236 CLR 573 at [150].

explain why a prohibition on civil conscription (construed in the unprecedented manner for which they advocate) is an incident of representative democracy or responsible government, or "essential to the effective maintenance of government": PWS at [98]. Reliance upon general notions of the 'rule of law',[9] 'constitutionalism', equality before the law[10] or the proposition that there are express limits on the legislative powers of the Commonwealth under s 51 of the Constitution do not advance the Plaintiffs' particular preferred construction of s 51(xxiiiA), or establish anything about whether s 51(xxiiiA) constrains the power of State parliaments. Nor does Justice Webb's judgment in *BMA* assist them: his Honour made plain that he was concerned with "civil conscription of doctors as doctors",[11] not with the preservation of individual choice by patients, as the Plaintiffs' submissions suggest.

14. The final "relevant consideration" relied upon by the Plaintiffs is various provisions of the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic and Social Rights (**ICESR**): PWS at [104]-[107]. It is well established that the provisions of a treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into domestic law by statute.[12] Chief Justice French referred to this as the "long accepted dualism of international law and Australian domestic law".[13] Accordingly, "the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions".[14] The same is true of the provisions of the ICESR. The Plaintiffs incorrectly assert, without authority (PWS at [107]), that the provisions on which they rely are "part of Australian law" that may inform questions of constitutional interpretation.

No legislation of the type considered in *Magennis* is involved

15. The second limb of the Plaintiffs' constitutional argument (PWS at [109]-[120]) relies on *Magennis* and alleges the existence of a "scheme or arrangement" by which NSW laws are subject to the same restrictions under s 51(xxiiiA) as laws of the Commonwealth. The Plaintiffs' submission that this case is somehow analogous to *Magennis* should be rejected, having regard to the unusual circumstances of that case (addressed in this section) as well

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9 A concept which lacks an "immediate normative operation in applying the Constitution": *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 (McHugh and Gummow JJ).

10 Relying on the dissenting views of Deane and Toohey JJ in *Leeth v Commonwealth* (1992) 174 CLR 455, rejected by five judges of the Court in *Kruger v Commonwealth* (1997) 190 CLR 1 at 44–45. (Brennan CJ), 63–68 (Dawson J, McHugh J agreeing at 142), 112–13 (Gaudron J), 153–55 (Gummow J).

11 79 CLR at 294.

12 See *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478 per Dixon J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7 per Mason CJ and Deane J; *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at [96] per Hayne J.

13 *Tajjour* at [48].

14 *Dietrich v The Queen* (1992) 177 CLR 292 at 305-6 per Mason CJ and McHugh J. See also at 348-49 per Dawson J, 359-60 per Toohey J.

as the facts relied on in the present case for the supposed "joint scheme" (addressed in the following section). The Plaintiffs' attempt to apply *Magennis*-type reasoning to s 51(xxiiiA) is novel.

16. *Magennis* involved the very rare circumstance in which a State law was unambiguously premised on the assumed validity of a Commonwealth law. In those circumstances, where the relevant Commonwealth law turns out to be invalid, the State law might be rendered ineffective. The State law at issue in *Magennis* legislation approved and ratified entry into an agreement with the Commonwealth which was held to be invalid. It was, as a matter of State legislative intention, dependent in its operation upon the existence of a valid agreement with the Commonwealth. In the absence such a valid agreement, the State Act was held to be inoperative, but valid.[15]

17. By contrast, if State legislation is not "coupled" to Commonwealth legislation in the same manner, it will not be invalid. An example is provided by *Tunnock v Victoria* (1951) 84 CLR 42 (***Tunnock***). The Victorian Act in that case was valid, despite the fact that as Williams and Webb JJ stated,[16] it 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".

18. In *Spencer v Commonwealth* (2018) 262 FCR 344 (***Spencer***), Griffiths and Rangiah JJ addressed *Magennis* and *Tunnock* and found that the plaintiff's case was analogous to *Tunnock*.[17] Their Honours explained[18] that in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (***ICM***), the majority did not find it necessary to consider the argument that the NSW legislation which implemented a funding agreement between the Commonwealth and the State was invalid or inoperative. They quoted, with apparent approval, an earlier Full Court statement in *Alcock v Commonwealth* (2013) 210 FCR 454 at [82] that:

> "The postulation of an arrangement of some sort between the Commonwealth and Victoria did not supply any factor which might engage the operation of s 51(xxxi) in a way which would affect the authority of the Victorian Parliament or the validity of the Marine Parks Act. Even if there was some arrangement (formal or informal) between the Commonwealth and Victoria which was reflected in the Marine Parks Act, that would not signify that Victorian legislation, dealing with areas where Victoria had title, property and full legislative capacity, was invalid, as s 51(xxxi) of the Constitution is not addressed directly to the power of a State Parliament."

19. The Full Federal Court in *Spencer* also held that where it is alleged that a State has

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15 *Magennis* at 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".

16 (1951) 84 CLR 42 at 54.

17 262 FCR 344 at [230].

18 Ibid at [231].

effected an acquisition of property, s 51(xxxi) of the Constitution will not apply unless the State is required by the Commonwealth, under an intergovernmental agreement, to acquire the property on other than just terms.[19] There was no such requirement under the intergovernmental agreements at issue in *Spencer*.[20] The appellant in *Spencer* argued that it was sufficient to engage s 51(xxxi) that there be "joint action" between the Commonwealth and the State. The Full Federal Court rejected that submission, holding there is no constitutional principle that "joint action" with the effect of acquiring property enlivens s 51(xxxi).[21] As Griffiths and Rangiah JJ put it:

> "As we have said, where it is alleged that the State has effected an acquisition of property, s 51(xxxi) will not apply unless the State is required under an intergovernmental agreement with the Commonwealth to acquire the property on other than just terms. Assuming that an informal agreement is sufficient, there can be no lesser requirement where the agreement is an informal one. Latham CJ used the expression 'joint action' in the context of the specific facts of the case in *Magennis* where the terms and conditions of an agreement required the State to acquire property. There is no Constitutional principle that any action that can be described as 'joint action' that has the effect of acquiring property enlivens s 51(xxxi) of the Constitution. The expression cannot be understood as some free-standing criterion for the engagement of the provision."

20. The same reasoning is applicable to the Plaintiffs' reliance in the present case on the existence of a "joint scheme". Even if an 'informal agreement' was sufficient (which is disputed, see below at [21]), there could be no lesser requirement than that the Commonwealth had required the State to impose civil conscription in the provision of medical or dental services, in the sense in which those terms are used in s 51(xxiiiA). Section 51(xxiiiA) could not possibly be engaged by the mere fact of "joint action" between the Commonwealth and State.

21. Here, as in *Spencer*, the Plaintiffs apparently rely on *ICM* at [38]-[40] to contend that *ICM* involved an acceptance (by French CJ, Gummow and Crennan JJ) that an informal arrangement of the kind in issue in *Gilbert v Western Australia* (1962) 107 CLR 494 (***Gilbert***) (a funding arrangement evidenced by exchange of letters) would be sufficient to engage a constitutional limitation imposed by s 51 (in this case s 51(xxiiiA)). That proposition is contrary to authority and should not be accepted. The Full Court in *Spencer*[22] found the primary judge was correct in finding that there was no new principle articulated in *ICM* by reference to the circumstances of *Gilbert*. Justices Griffiths and Rangiah explained:

> "In *Gilbert*, while the Prime Minister had indicated that the Commonwealth desired to proceed by means of a grant of financial assistance supplemented by

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19 Ibid at [172], [210] (Griffiths and Rangiah JJ), [354] (Perry J).
20 See ibid at [150]-[152], [187] (Griffiths and Rangiah JJ), [395] (Perry J).
21 Ibid at [210] (Griffiths and Rangiah JJ), [352]-[354] (Perry J).
22 Ibid at [215].

> an informal arrangement setting out the conditions to be observed, the conditions were ultimately promulgated in a formal way. In *ICM*, French CJ, Gummow and Crennan JJ left open the question of whether terms and conditions attached to a grant under s 96 of the Constitution may sufficiently be disclosed in an informal fashion, rather than being found only in a formal intergovernmental agreement. That question was concerned with the mode of proof, rather than what needed to be proved."

22. In any event, as the primary judge (Mortimer J) found in *Spencer*, "the kind of arrangement made in *Gilbert* did not have the invalidating features of the agreement in *Magennis*".[23]

23. The Plaintiffs' submission as to the invalidity of the "joint scheme" by reference to the concept of responsible government, citing the discussion of that concept by Professor Twomey[24] (PWS at [115]-[118]) is somewhat difficult to understand, but nothing in the cited passage of Professor Twomey's text, nor the remarks of Gummow and Hayne JJ or Gaudron J in *Re Patterson, Ex parte Taylor* (1998) 195 CLR 424 alter the position that the impugned State legislation (and the NSW Delta Order) is not in the *Magennis* category. The alleged status of the *National Plan to Transition Australia's National COVID-19 Response* as a "co-operative arrangement" of the kind referred to by Professor Twomey is certainly not an additional reason to invalidate it: cf PWS at [115].

24. The operation of s 7 of the Public Health Act (and the NSW Delta Order made pursuant to that section) does not depend on the validity of any intergovernmental agreement, federal funding or other exercise of executive power by the Commonwealth. The Plaintiffs' case must therefore fail, even prior to any consideration of the character of any Commonwealth law or action. NSW may validly legislate independently in relation to the provision of medical and dental services (including in such a manner as to impose civil conscription, as that term is used in s 51(xxiiiA) of the Constitution).

The Commonwealth has not required the State to contravene s 51(xxiiiA)

25. As already noted, s 51(xxiiiA) is a grant of power to the Commonwealth Parliament. The necessary foundation of any challenge to either the operative character or the validity of a State law based on s 51(xxiiiA) is an allegation that the Commonwealth has required the State, by federal law or potentially by federal executive action, to impose civil conscription in the provision of medical or dental services.[25]

26. The Plaintiffs, however, have not pleaded (nor foreshadowed any amendment to their pleading to assert, nor otherwise identified in their submissions) any requirement of the informal "joint scheme" upon which they rely by which the Commonwealth requires the State to impose civil conscription in such a manner as to contravene s 51(xxiiiA). Their

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23 (2015) 240 FCR 282 at [595].

24 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) p 28.

25 See, by analogy, *Spencer v Commonwealth* (2018) 262 FCR 344 at [164]-[172] (Griffiths and Rangiah JJ).

constitutional challenge must fail for that reason, regardless of whether s 7 of the Public Health Act or the NSW Delta Order have the effect of imposing civil conscription (which is also disputed by the Commonwealth, in the next section of these submissions).

27. The particulars to paragraph 12 of the ASOC relevantly state (at (a)) that the Commonwealth:

> "… agreed to make and maintain an order under the Biosecurity Act and to record and certify vaccination of the people of NSW under the *Australian Immunisation Register Act 2015* (Cth), the quid pro quo for which is that the Third Defendant will impose a civil conscription by vaccination of its population with vaccines obtained and recommended by the Commonwealth."

28. While there is an assertion in this paragraph of the particulars that NSW will impose civil conscription, the Plaintiffs do not claim that the State was required by the Commonwealth to do so. The same is true of the Plaintiffs' submissions (PWS at [114]), which refer to the imposition of civil conscription "through the funding, milestones, other cooperative provisions and targets [and see especially clauses 4.3, 4.24 and 5.8]". It is unclear what document is being referred to in this sentence, but what is clear from the s 51(xxxi) cases is that the mere fact that provision of Commonwealth funding (including under a formal intergovernmental agreement) conditioned against the achievement of milestones or targets may play a role in State decision-making, or that the Commonwealth may seek to induce a State to exercise its powers in particular way by providing funding to the State, does not mean that the Commonwealth has imposed a "requirement" that could invalidate a State law.[26]

29. The three paragraph "Summary" which follows the Plaintiffs' "Joint Scheme Tender Document Analysis" (PWS at p 60) states that under the "joint scheme", NSW is required to reach certain double-dose vaccination targets. Even if this was an accurate characterisation of the documents upon which the Plaintiffs rely in their "Tender Document Analysis" (which is contestable), it could not amount to a requirement for the imposition of civil conscription in a manner contrary to s 51(xxiiiA), in circumstances where the State both (a) remains free to determine the means by which those agreed vaccination targets are achieved; and (b) is not obliged to require medical practitioners to provide any service.

30. The Plaintiffs also could not prove, by reference to the evidence in this case, that the Commonwealth has required the State to contravene s 51(xxiiiA). That submission directs attention to the test for "civil conscription". That test was most recently addressed by the High Court in *Wong*. In that case, French CJ and Gummow J found that civil conscription involved "some form of compulsion or coercion, in a legal or practical sense, to carry

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[26] *Spencer v Commonwealth* (2015) 240 FCR 282 at [386], [485]-[489] (Mortimer J); on appeal, *Spencer v Commonwealth* (2018) 262 FCR 344 at [184]-[187], [223], [224] (Griffiths and Rangiah JJ), *ICM* at [36], *Pye v Renshaw* (1951) 84 CLR 58 at 83.

out work or provide services".[27] Their Honours noted that this required "close attention to the legislative scheme in question, in particular, to those aspects which are under challenge".[28] Control of something less than the whole of a medical or dental practitioner's professional activities may amount to a form of civil conscription, but only if the "necessary legislative compulsion or coercion be present".[29] However, there can be no civil conscription absent "practical compulsion to perform a professional service".[30]

31. In *Wong*, Hayne, Crennan and Kiefel JJ[31] doubted whether civil conscription could be defined in the abstract.[32] Their Honours noted the dissenting opinion of Dixon J in *BMA* has come to be regarded as better expressing the construction and application of s 51(xxiiiA).[33] As their Honours explained, the determinative question for Dixon J in *BMA* was:

> "… whether the isolation of an incident in medical practice and the imposition of a duty in reference to what is done can fall within the conception described by the words 'any form of civil conscription', or whether on the other hand compulsory service or the compulsory performance of a service or services is not connoted".[34]

32. Justices Hayne, Crennan and Kiefel endorsed Dixon J's statement in *BMA* that "compulsion to serve seems to be inherent in the notion conveyed by the words". Their Honours held that the imposition of a "practical compulsion to meet a prescribed standard of conduct when the practitioner does practice" does not constitute civil conscription.[35] That was because there was, in their Honours' view, "no compulsion to serve as a medical [practitioner], to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently".[36] The same is true of what the Plaintiffs characterise as the "joint scheme" in the present case. It simply does not involve compelling medical practitioners to provide medical services (specifically COVID-19 vaccinations) to patients, or to act in any other medical capacity.

33. In a Schedule to their submissions entitled "Joint Scheme Tender Document Analysis", the Plaintiffs claim to "demonstrate[] the joint scheme to bring about a civil conscription", with the NSW Delta Order being "part of and made in furtherance of the scheme" (PWS at [109]). None of the sections of the multiple documents identified in that Schedule (many of which long predate the COVID-19 pandemic, noting that the "joint scheme" is alleged

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27 *Wong* at [60].
28 Ibid at [61] (French CJ and Gummow J).
29 Ibid at [62] (French CJ and Gummow J).
30 Ibid at [68] (French CJ and Gummow J).
31 Whose plurality judgment is not addressed in the Plaintiffs' 'Civil Conscription Case Review'.
32 (2009) 236 CLR 573 at [193].
33 *Wong* at [195].
34 Ibid, quoting (1949) 79 CLR 201 at 262.
35 Ibid at [226].
36 Ibid, adapting (1949) 79 CLR 201 at 278 (Dixon J).

in the ASOC to have been agreed between late June and August 2021)[37] make reference to, or have the effect of, requiring the State to compel medical practitioners to provide vaccinations or other medical services.

34. That is hardly surprising, given the *Australian COVID-19 Vaccination Policy* (August 2020) [38] expressly states that while the Australian Government strongly supports immunisation, "it is not mandatory". While the *Operation COVID SHIELD National COVID Vaccine Campaign Plan* (3 August 2021) [39] refers to States and Territories potentially adjusting their "policy settings" to mandate vaccinations for quarantine, border and healthcare workers, the "mandate" referred to is for individual workers in those categories to receive a vaccine in order to perform particular types of work. It is not any form of requirement for medical practitioners to provide vaccinations to such workers. Moreover, that document repeatedly acknowledges the independent capacity for the States and Territories to determine how best to achieve increased vaccination rates and the targeted 70 and 80% double-dose vaccination rates, stating that "[t]he Plan acknowledges the unique environments, challenges and capabilities within each S&T and allows flexibility in the ways in which each S&T achieves their target".[40]

35. The failure by the Plaintiffs to plead, and their inability to prove, that the Commonwealth has required NSW to contravene s 51(xxiiiA), provides a third reason why their constitutional challenge cannot succeed.

Section 7 of the Public Health Act and the NSW Delta Order do not impose civil conscription

36. The fourth reason the Plaintiffs' constitutional arguments cannot succeed is that neither section 7 of the Public Health Act nor the NSW Delta Order (the terms of which require "close attention" in the context of any s 51(xxiiiA) argument) [41] compel a medical practitioner to do anything. Thus they do not impose civil conscription, as that term is used in s 51(xxiiiA). The Plaintiffs' submission that s 51(xxiiiA) of the Constitution provides a guarantee to individuals against "compulsory vaccination" (see eg PWS at [96]) is not consistent with any authority.

37. The constitutional section of the Plaintiffs' submissions does not address the terms of either the Act or the NSW Delta Order. In the case of s 7 of the Public Health Act, that omission is potentially explicable on the basis that paragraph 12 of the ASOC only challenges the validity of the Order, not the validity of s 7 itself. However, the relief claimed includes, in

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37 Meaning the Plaintiffs' argument as to the elements of the "joint scheme" is likely to suffer similar "problems of chronology" as were identified in *Spencer v Commonwealth*: see eg (2018) 262 FCR 344 at [429]-[430] (Perry J).

38 Court Book Section C2, Volume 1 tab 28.

39 Court Book Section C2, Volume 1 tab 35.

40 *Operation COVID SHIELD National COVID Vaccine Campaign Plan* (3 August 2021), pp iv, 10, 45 (Court Book Section C2, Volume 1, tab 35, pp 309, 320, 355).

41 *Wong* at [61] (French CJ and Gummow J), see also at [209] (Hayne, Crennan and Kiefel JJ) "it is necessary to begin by noticing what the impugned provisions do not compel, either legally or practically".

proposed order 2, a declaration that s 7 of the Public Health Act is invalid "to the extent that it authorises and thereby impairs the constitutional guarantee against a civil conscription".

38. It is plain that the general conferral of power in s 7 of the Public Health Act does not purport to impose any form of civil conscription. The NSW Delta Order imposes restrictions (for a limited time period of 90 days: see s 7(5) of the Public Health Act) on certain categories of workers who have not *received* at least one dose of a COVID-19 vaccine,[42] but does not in its legal or practical effect require any health practitioner to administer a vaccine to such a person. There is simply no form of compulsion to perform a medical service.

39. Thus even if the Court was to reject all three of the reasons for the failure of the Plaintiffs' constitutional argument set out above, the Plaintiffs still could not succeed.

Section 109 of the Constitution

40. The ASOC alleges (at [13]) s 109 inconsistency between s 7 of the Public Health Act (to the extent s 7 authorises the making of the NSW Delta Order) and (unspecified) provisions of the AIR Act. The Plaintiffs' submissions on this issue appear to be confined to an attempt to invalidate the NSW Delta Order (PWS at [126]-[134]). Their s 109 argument appears to be largely dependent on the Plaintiffs' successfully establishing that the Order involves civil conscription contrary to s 51(xxiiiA) (see PWS at [128]), on the basis that s 51(xxiiiA) is said to be the head of power enabling the enactment of the AIR Act, and there is then alleged to be "an inconsistency between the objects and the terms of the corresponding laws" (PWS at [130]).

41. Putting aside the correctness or otherwise of the implicit assertion that the AIR Act was enacted in reliance only on s 51(xxiiiA) of the Constitution (an assertion contradicted by the terms of s 13(1) of the AIR Act), if the NSW Delta Order does not impose civil conscription, there could not possibly be an inconsistency of the kind advocated by the Plaintiffs.

42. The only other identified inconsistency seemingly relates to the provision for authorised dealing with protected information under s 22 of the AIR Act (see PWS [132], [133]). It is entirely unclear (from PWS [133]) which provisions of the NSW Delta Order are said to be inconsistent with s 22 of the AIR Act, or how any such inconsistency is said to arise. Contrary to the Plaintiffs' submission, the provision enabling the Minister to authorise a person to record, disclose or otherwise use protected information for a specified purpose that the Minister is satisfied is in the public interest is found in s 22(3) of the AIR Act, not in the NSW Delta Order. If reliance is placed on cl 5.8 of the NSW Delta Order (as is suggested by the particulars to paragraph 13 of the ASOC), there is no such inconsistency having regard to s 22(2)(d) of the AIR Act, which expressly permits a person to make a

[42] See, currently, cll 4.3 (authorised workers leaving areas of concern for work), 4.24 (early education and care and disability support workers whose place of residence is in an area of concern), 5.8 (persons whose place of residence is in an area of concern attending construction sites in greater Sydney).

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".

Conclusion

43. So far as they rely on any constitutional argument, the proceedings should be dismissed with costs.

29 September 2021

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