IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2020 03946

BETWEEN:

KERRY COTTERILL Plaintiff

- and -

FINN ROMANES (in his capactity as the Deputy Public Health Commander) First Defendant

- and -

BRETT SUTTON (in his capacity as Chief Health Officer) Second Defendant

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JUDGE:	NIALL JA
WHERE HELD:	Melbourne
DATE OF HEARING:	29 and 30 July 2021 and 2 August 2021
DATE OF JUDGMENT:	17 August 2021
CASE MAY BE CITED AS:	Cotterill v Romanes
MEDIUM NEUTRAL CITATION:	[2021] VSC 498

JUDICIAL REVIEW AND APPEAL – Constitutional Law (Cth) – Implied freedom of communication about governmental or political matters in the Commonwealth Constitution ('implied freedom') – Plaintiff seeking declarations that certain directions under the *Public Health and Wellbeing Act 2008* given in context of COVID-19 pandemic were ultra vires on basis they impermissibly burdened the implied freedom.

JUDICIAL REVIEW AND APPEAL – Directions require persons to stay home and not leave other than for a permitted reason – Limitations on public gatherings – Whether infringement determined by reference to authorising provisions of the legislation or the directions – Proper level of analysis – Validity of legislation in all its potential operations – Whether *Public Health and Wellbeing Act* burdens the implied freedom – Whether provisions for legitimate purpose – Whether provisions suitable, necessary and adequate in balance – *Palmer v Western Australia* [2021] HCA 5 applied.

PRACTICE AND PROCEDURE – Standing – Whether plaintiff has standing to bring claim in relation to directions after they cease to be in operation – *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 considered – Standing established – No discretionary reason to stay or dismiss proceeding.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms K Foley with Mr J Tito and Mr MQ Nguyen	Smith & Tapper Criminal Lawyers
For the Defendants	Mr A Pound SC with Ms F Gordon and Ms M Narayan	Victorian Government Solicitor's Office

HIS HONOUR:

Introduction

1 At some point in early 2020, the COVID-19 virus entered the Australian community. COVID-19 is a highly infectious disease that has the potential to result in significant illness or death in humans who are infected. It is transmitted from person to person via airborne or aerosol particles exhaled from an infected person, and inhaled or introduced through contact with contaminated surfaces by a person who is susceptible to the disease. The disease has an incubation period of a few days, but a person may be infectious before the onset of symptoms. Once it takes hold within a community, the rate of infection may increase exponentially.

2 There have been a variety of responses from both the State and Commonwealth governments to COVID-19. They have included encouraging and educating members of the community about the need for hygiene (eg. frequent hand washing), social distancing, and the wearing of face masks. They have also involved, at the Commonwealth level, closing or heavily restricting access across the international border, so as to reduce the risk of infected persons coming into Australia. Many, if not all, persons arriving from overseas have been required to stay a period of time in quarantine.

3 In Victoria, there have been, and continue to be at the time of the hearing of this proceeding, a variety of measures imposed to address the spread of COVID-19. They have included requiring people to wear face masks, to record their entry into buildings and other places by the use of a QR code, restricting the type of workplaces that may be open, capping the number of people who can be present at public gatherings and in certain premises based on floor space, and a curfew. Relevantly for this proceeding, the measures have included the making of mandatory directions under the *Public Health and Wellbeing Act* (the '*PHW Act*') that restrict movement of persons within the community.

4 The *PHW Act* empowers authorised officers, appointed by the Chief Health Officer

('CHO'), to exercise 'emergency powers' when a 'state of emergency' has been declared by the Minister for Health ('the Minister').[1] On 16 March 2020, the Minister declared that a state of emergency existed in the whole of Victoria by reason of the serious risk to public health posed by the COVID-19 pandemic ('the State of Emergency Declaration'). The State of Emergency Declaration has been extended a number of times and remains in force.

5 Under sub-ss 200(1)(b) and (d) of the *PHW Act* respectively, the emergency powers exercisable by the CHO include the power to 'restrict the movement of any person or group of persons within the emergency area' and to 'give any other direction that the authorised officer considers is reasonably necessary to protect public health'.

6 Pursuant to those powers, the first defendant, an authorised officer under the *PHW Act* made two directions: on 27 August 2020, the Stay at Home Directions (Restricted Areas) (No 14) ('Directions No 14') and on 28 October 2020 the Stay Safe Directions (Melbourne) (No 2) ('the Stay Safe Directions') (together the 'Directions'). Directions No 14 was part of a sequence of restrictions that commenced on 8 July 2020, and which required all persons in the 'restricted area' to remain at home and only leave for certain specified reasons. The opportunity for public gatherings was also heavily constrained by purpose and number of participants.

7 On 13 September 2020, when outside of her home, the plaintiff was given an infringement notice alleging that she was in breach of Directions No 14. She says that at the time, she was both exercising (which was a permitted reason to leave the home) and demonstrating against the lockdown (which was not).[2] The plaintiff contends that the Directions are invalid because they impermissibly burden the implied freedom of political communication provided for in the Australian Constitution and are therefore not authorised by sub-ss 200(1)(b) and (d) of the *PHW Act*.

8 The implied freedom is a limitation on legislative power, that prevents the State and

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1 *Public Health and Wellbeing Act* 2008, ss 3(1), 198, 199, 200, 201 ('*PHW Act*').

2 Whether her conduct constituted a breach of Directions No 14 is a matter of controversy between the parties and depends on competing constructions of the Direction.

Commonwealth Parliaments from enacting legislation that imposes an unjustifiable burden on communication on political and governmental matters. The principle and the applicable test are well settled.[3] It has three elements that can be posed in interrogative form: do the provisions impose a burden on political communication; is the purpose compatible with the constitutionally prescribed system of representative government; and if so are the provisions appropriate and adapted to the pursuit of that purpose? It is convenient to describe it as the *McCloy* test.

9 The first issue that separates the parties is whether the *McCloy* test is to be applied directly to the *PHW Act* or to the Directions. For the reasons set out below, I accept the defendants' submission that the test is to be applied to the legislation, specifically sub-ss 200(1)(b) and (d), and not to the particular exercises of power made under it. Applying that approach, I have concluded that sub-ss 200(1)(b) and (d) are valid in all their potential operations insofar as they may impose a burden on political communication. That is, because of the legitimate purpose they serve, and the significant constitutional limitations that confine their exercise and ensure that no lawful exercise of power can be obnoxious to the constitutional freedom. There is no reason to read down or dis-apply the provisions in a particular context in order to save their validity.

10 The plaintiff does not contend that the Directions are ultra vires the *PHW Act*, other than by directly applying the *McCLoy* test to them. That contention proceeds from a false premise and her arguments are directed to the wrong target. There being no other ground for attack, based on conventional judicial review grounds, the challenge to the Directions must fail.

11 In case I am wrong about the level at which the analysis is to be applied, I have also considered the plaintiff's submission that, applying the test to the Directions they are invalid. Even if that was the correct course to take, I would reject the plaintiff's

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3 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'); see also *McCloy v New South Wales* (2015) 257 CLR 178, 200–1 [23]; [2015] HCA 34 (French CJ, Kiefel, Bell and Keane JJ) (*McCloy*); *LibertyWorks Inc v Commonwealth* [2021] HCA 18, [44] (Kiefel CJ, Keane and Gleeson JJ) ('*LibertyWorks*').

submissions.

12 The proceeding must be dismissed.

The facts

The virus

13 COVID-19 is a highly infectious virus that can be transmitted from person to person and which can cause a range of respiratory and other disease. Transmission can occur via droplet sized particles within saliva expelled from the airways of the infected person and transmitted to a susceptible recipient. Activities such as speaking, coughing, sneezing, singing and shouting all involve, to a greater or lesser degree, the expulsion of these particles and present a risk of transmission. These particles are larger than five microns in diameter and therefore stay suspended in the air for relatively short distances, thought to be around one metre. For that reason, maintaining a sufficient distance from an infected person reduces the risk of infection. The virus may also be present in smaller particles that can stay in the air longer and travel longer distances depending on ventilation and airflow, and infect people over a greater distance. Transmission may also occur through contact with infected surfaces. There is a higher risk of transmission indoors when compared with outdoors.

14 Infectiousness is measured by a factor referred to as R_0, which refers to the number of people who would become infected from one person with the disease, on average, across a population who were susceptible to the disease and without disease control measures. An R_0 factor of less than one means that the prevalence across a given population is decreasing, one means that it will stay constant, and a number greater than one will mean that it is spreading. The R_0, is not static and can vary over time depending on various matters. In Victoria, during periods of 2020 the R_0 was greater than one and the number of active cases in the community rose quickly.

15 Since there was, at the relevant time, no cure and no vaccine for COVID-19, preventing the spread of the epidemic depended on physical distancing and hygiene. That means

keeping infected persons away from uninfected persons. Aspects of the disease makes that difficult. The disease has an average incubation period of 5.5 days, with a range of 1 to 14 days. The majority of cases will develop symptoms after exposure, with 97 percent becoming symptomatic by day 11.5 (range 8.2-15.6 days). The time at which an infected person may become infectious, and at risk of infecting other persons, often commences before the carrier is symptomatic. Some infected people remain asymptomatic throughout the course of their infection. As a result, people may be infectious even though at a particular point in time they have no symptoms and therefore have no reason to suspect they are infectious and no reason to isolate.

16 Given the possibility that a person may be infectious and be either pre-symptomatic or asymptomatic, identifying infected persons is incredibly challenging. Identifying and isolating infected persons after they manifest symptoms does not address the risk that transmission may have occurred at an earlier point.

17 One partial solution to the problem is widespread testing and then isolating infected persons who have been identified, and those persons who have been in close contact with the infected person during the infectious period. To some extent the risk can also be addressed by identifying the places that an infected person has been during their infectious period and locating the people who were in the same place at the same time and having them isolate. This contact tracing is resource intensive and, with rapidly increasing infection rates, can easily fall behind.

18 Where a newly infectious person is connected to a previously identified infected person then the chain of transmission can be identified and other close contacts found and isolated. However, where a person is found to be infected but the source of that infection is unknown, then it may be that there are other unrecognised cases in the community who are not in isolation. This may lead to further outbreaks. For that reason, cases with an unknown transmission source pose particular risks in the management of the epidemic.

19 Once the virus is in circulation, the more people moving about the community, the

more chance there is of a person coming into contact with an infected person and the greater the opportunity for the disease to spread.

The course of disease in Victoria

20 Dr Charles Alpren is an epidemiologist and public health expert employed by the Victorian Department of Health and Human Services. In an affidavit affirmed on 24 November 2020, he deposed to various matters including the spread of COVID-19 in Victoria during 2020. His evidence in this respect was not challenged.

21 The first case of COVID-19 in Victoria was diagnosed in late January 2020 in a person visiting from Wuhan, China. Case numbers increased across the world in March. In mid-March 2020, the Commonwealth government imposed restrictions on entry from overseas to reduce the importation of the virus into Australia.

22 In the first quarter of 2020, the virus was observed in some people in Victoria, but was largely confined to persons who had come from overseas and there was little evidence of community transmission. That position changed markedly from mid-June 2020 in what was to become known as the second wave.

23 Dr Alpren deposed:

(a) The average number of cases diagnosed daily in the two weeks from 1 to 14 June 2020 was 5.7.

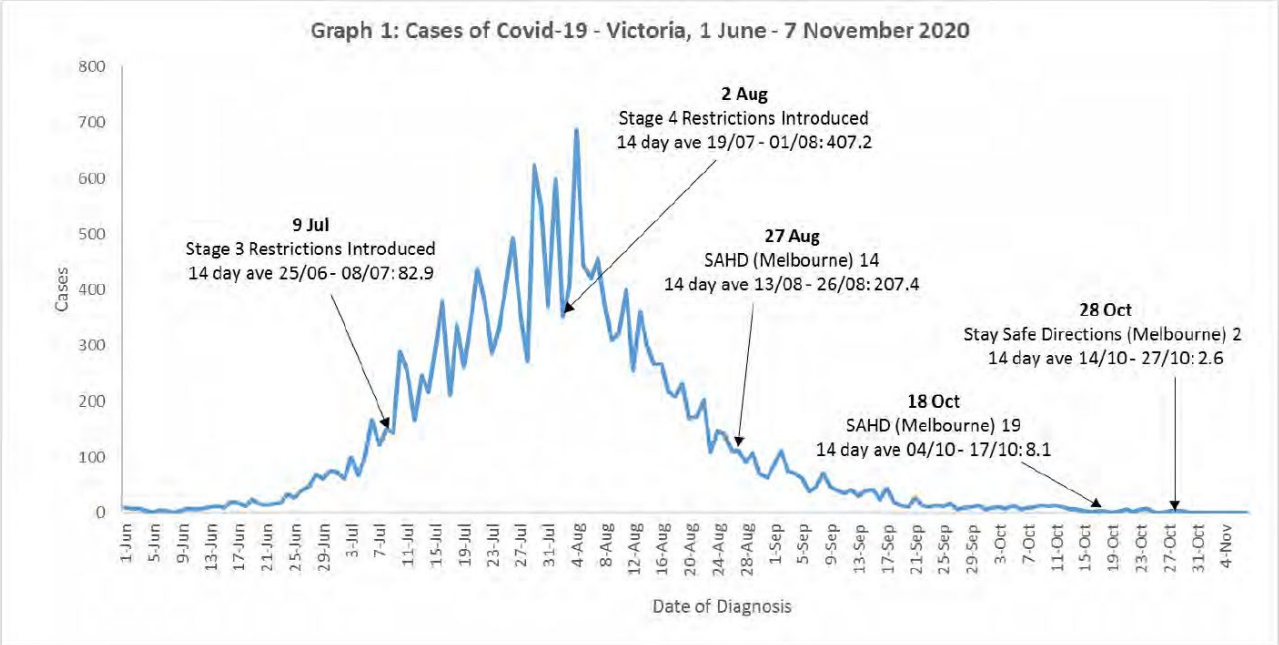
(b) One week later, the average number of cases diagnosed in the preceding two weeks (8 to 21 June 2020) was 10.6, reflecting an increase of 86 percent.

(c) One further week later, the average number of cases diagnosed in the preceding two weeks (15 to 28 June 2020) was 22.1, more than doubling in a week.

(d) Four weeks later, the average number of cases diagnosed in the preceding two weeks (13 to 26 July 2020) had increased by a factor of more than 10 to 329.9.

24 The following graph shows the daily number of cases in Victoria (predominantly found in metropolitan Melbourne) from 1 June 2020 to 4 November 2020, and the dates

on which various restrictions were put in place.



25 On 8 July 2020, 'stage 3 restrictions' were introduced for all of metropolitan Melbourne and the Shire of Mitchell (having been previously applied only to particular postcodes). Under those restrictions, people were required to stay home, unless leaving for specified reasons, and public outdoor gatherings were limited to two people, subject to particular exceptions. The average number of cases diagnosed each day in the 14 days prior was 82.9.

26 On 1 August 2020, there were 5571 active cases of COVID-19 in Victoria.

27 On 27 August, Directions No 14 was made and on that day:

(a) 111 cases of COVID-19 were diagnosed in Victoria, of which 15 cases were classified as being cases with unknown source of acquisition;

(b) the average number of cases diagnosed daily in the previous 14 days (14 – 27 August) was 189.5; and

(c) the total number of cases that would be classified as having an unknown source of acquisition in the previous 14 days was 453.

28 On 27 September, the number of people permitted to gather publicly was increased to five, and the curfew was lifted. On 27 October 2020, the 'stage 3 restrictions' came to an end, as the stay at home requirement was removed, however restrictions on public gatherings continued.

29 On 28 October 2020, the Stay Safe Directions was issued. At that stage there was still some community transmission, but there had been a steady and significant decline in case numbers during September and October 2020. Two cases were diagnosed on that day and the 14 day average was 2.4 cases per day. There were two cases with an unknown source.

30 On 23 November 2020, Victoria introduced a Public Events Framework, by which eligible public events could be exempted from a requirement in the Directions by the CHO or Deputy Chief Officer.

The statutory provisions

31 Section 4(2) of the *PHW Act* provides that the objective of the Act, understood in the context of s 4(1),[4] is to achieve the highest attainable standard of public health and wellbeing, including by protecting public health and preventing disease, illness, injury, disability or premature death.

32 Sections 5 to 11A set out guiding principles to which regard should be given in the administration of the *PHW Act*. They relevantly include:

(a) Decisions should be based on available evidence that is relevant and reliable;[5]

(b) If a 'public health risk'[6] poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk;[7]

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4 Relevantly, by s 4(1) of the *PHW Act* the Parliament recognises that the State has a significant role in promoting and protecting public health, which includes the absence of disease, illness and premature death.

5 *PHW Act* s 5.

6 Defined in *PHW Act* s 3.

7 *PHW Act* s 6.

(c) Prevention of disease, illness or premature death is preferable to remedial measures;[8]

(d) Those responsible for administering the *PHW Act* should, so far as is practicable, ensure that decisions are transparent, systematic and appropriate, and that members of the public should have access to reliable information in an appropriate form;[9]

(e) Decisions should be both proportionate to the public health risk sought to be prevented, minimised or controlled and should not be made or taken in an arbitrary manner;[10] and

(f) Public health and wellbeing can be enhanced through collaboration between all levels of government, industry, business, communities and individuals.[11]

33 Section 11 provides for specific principles in relation to pt 8, being those set out in s 111. Part 8 is headed 'Management and control of infectious diseases, micro-organisms and medical conditions'. Section 111 provides:

> **111 Principles**
>
> The following principles apply to the management and control of infectious diseases—
>
> (a) the spread of an infectious disease should be prevented or minimised with the minimum restriction on the rights of any person;
>
> (b) a person at risk of contracting an infectious disease should take all reasonable precautions to avoid contracting the infectious disease;
>
> (c) a person who has, or suspects that they may have, an infectious disease should—
>
> (i) ascertain whether he or she has an infectious disease and what precautions he or she should take to prevent any other person from contracting the infectious disease; and

8 *PHW Act* s 7.
9 *PHW Act* s 8.
10 *PHW Act* s 9 – headed 'Principle of proportionality'.
11 *PHW Act* s 10.

(ii) take all reasonable steps to eliminate or reduce the risk of any other person contracting the infectious disease;

(d) a person who is at risk of contracting, has or suspects he or she may have, an infectious disease is entitled—

(i) to receive information about the infectious disease and any appropriate available treatment;

(ii) to have access to any appropriate available treatment.

34 The *PHW Act* confers powers and duties on various persons including the Minister, the Secretary and the CHO. The CHO, appointed by the Secretary, must be a registered medical practitioner.[12] The CHO has the powers, duties, functions and immunities conferred by the *PHW Act* and other Acts, including the powers conferred on an 'authorised officer'.[13] In addition to performing the functions and powers specified under the *PHW Act*, the functions of the CHO include:

(a) to develop and implement strategies to promote and protect public health and wellbeing; and

(b) to provide advice to the Minister or the Secretary on matters relating to public health and wellbeing.[14]

35 Although the statutory powers exercised in this case were made under pt 10 of the *PHW Act*, it is convenient to briefly survey pt 8 which deals with infectious diseases. An infectious disease is defined to mean:

> infectious disease includes a human illness or condition due to a specific infectious agent or its toxic products that arises through transmission of that agent or its products from an infected person, animal or reservoir to a susceptible person, either directly or indirectly through an intermediate plant or animal host, vector or the inanimate environment.[15]

36 The CHO may make an examination and testing order, which requires a person who the CHO believes may be infected, to undergo examination or testing.[16] The CHO

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12 *PHW Act* s 20.
13 Authorised officers are appointed by the Secretary under *PHW Act* s 30 or a Council under s 31.
14 *PHW Act* s 21.
15 *PHW Act* s 3.
16 *PHW Act* ss 113 and 114

may also make a public health order directed to an individual, which requires that person to participate in some forms of treatment, to refrain from certain activities, or from visiting a specified place, to reside in a specified place or submit to pharmacological treatment.[17] A failure to comply with an examination and testing order, or a public health order is an offence.[18]

37 In addition to s 111, which provides guiding principles to the application of pt 8, s 112 further regulates the making of an examination order or a public health order. It provides:

> If in giving effect to this Division alternative measures are available which are equally effective in minimising the risk that a person poses to public health, the measure which is the least restrictive of the rights of the person should be chosen.

38 Part 9 of the *PHW Act* provides for the powers of authorised officers including the power to request information,[19] powers of entry[20] and power to apply for search warrants.[21]

39 Part 10 is headed 'Protection and enforcement provisions'. Section 188 empowers the CHO to direct a person to provide information which the CHO believes to be necessary to investigate, manage or control a risk to public health. Failure to comply is an offence.[22]

40 Pursuant to s 189 of the *PHW Act*, if the CHO believes that it is necessary to investigate, eliminate or reduce a risk to public health, the CHO may authorise authorised officers to exercise 'public health risk powers'. Those powers are defined in s 190 and include closing any premises for a period of time 'reasonably necessary to investigate, eliminate or reduce the risk to public health.'[23]

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17 *PHW Act* ss 117 and 118.
18 *PHW Act* ss 116 and 120 respectively.
19 *PHW Act* s 167.
20 *PHW Act* s 168 and s 171 (procedure for entry); s 175 (powers after entry).
21 *PHW Act* s 170.
22 *PHW Act* sub-s 188(2).
23 *PHW Act* sub-s 190(1)(a).

41 Div 3 of pt 10 provides for emergency powers.

42 Section 198 relevantly provides:

> **198 Declaration of a state of emergency**
>
> (1) The Minister may, on the advice of the Chief Health Officer and after consultation with the Minister and the Emergency Management Commissioner under the Emergency Management Act 2013, declare a state of emergency arising out of any circumstances causing a serious risk to public health.
>
> (2) Subject to subsection (3), the Minister may at any time revoke or vary a declaration under this section.
>
> (3) The Minister must consult with the Minister and the Emergency Management Commissioner under the Emergency Management Act 2013 before varying a declaration under this section to extend the emergency area.
>
> (4) Immediately upon the making, revocation or variation of a declaration under this section, a state of emergency exists, ceases to exist or exists as so varied for the purposes of this Part.
>
> (5) As soon as practicable after the making, revocation or variation of a declaration under this section, the Minister must cause notice of the making, revocation or variation of the declaration to be—
>
> (a) broadcast from a broadcasting station in Victoria; and
>
> (b) in the case of the making or variation of a declaration, published with a copy of the declaration in the Government Gazette; and
>
> (c) in the case of the revocation of a declaration, published in the Government Gazette.
>
> …

43 A declaration must specify the emergency area in which the state of emergency exists, and continues in force for the period, not exceeding 4 weeks, specified in the notice.[24] Up until 9 September 2020, the total period that a declaration could continue in force was 6 months. On 9 September 2020, the total period for a declaration to continue in the case of the COVID-19 pandemic was extended to 12 months. On 11 March 2021, that date was further extended to 21 months.

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24 *PHW Act* sub-s 198(7).

44 The power to extend the duration of a state of emergency requires that the Minister make a fresh declaration, turning his or her mind to the conditions and meeting the requirements of the section.

45 A 'serious risk to public health' is defined in s 3(1) to mean:

> **serious risk to public health** means a material risk that substantial injury or prejudice to the health of human beings has or may occur having regard to –
>
> (a) the number of persons likely to be affected;
>
> (b) the location, immediacy and seriousness of the threat to the health of persons;
>
> (c) the nature, scale and effects of the harm, illness or injury that may develop;
>
> (d) the availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce the risk to the health of human beings;

46 If a state of emergency exists under s 198, the CHO may grant an authorisation under s 199. To that end, s 199(2) provides:

> **199 Chief Health Officer may authorise exercise of certain powers**
>
> …
>
> (2) If this section applies, the Chief Health Officer may, for the purpose of eliminating or reducing the serious risk to public health, authorise—
>
> (a) authorised officers appointed by the Secretary to exercise any of the public health risk powers and emergency powers; and
>
> (b) if specified in the authorisation, a specified class or classes of authorised officers appointed by a specified Council or Councils to exercise any of the public health risk powers and emergency powers.

47 Section 200 provides for the four emergency powers as follows:

> **200 Emergency powers**
>
> (1) The emergency powers are—
>
> (a) subject to this section, detain any person or group of persons in the emergency area for the period reasonably

necessary to eliminate or reduce a serious risk to public health;

(b) restrict the movement of any person or group of persons within the emergency area;

(c) prevent any person or group of persons from entering the emergency area;

(d) give any other direction that the authorised officer considers is reasonably necessary to protect public health.

48 Before exercising any of the emergency powers, an authorised officer must, unless it is not practicable to do so, warn the person that a refusal or failure to comply without reasonable excuse is an offence.[25] The power of detention in sub-s 200(1)(a), which was not exercised in this case, is subject to some specific qualifications.[26]

49 Section 201 provides that an authorisation may be given orally or in writing. If given orally, it must be confirmed in writing as soon as reasonably practicable. An authorisation given under s 200 must be given in the manner set out in s 201 as follows:

201 How may an authorisation be given?

…

(3) An authorisation must—

(a) state that the authorisation is given under this Division;

(b) generally describe the serious risk to public health to which it relates;

(c) if the serious risk to public health has occurred, name or describe the place at which the serious risk to public health has occurred;

(d) specify the time at which the authorisation is given;

(e) specify any restrictions or limitations to which of the public health risk powers or emergency powers may be exercised under the authorisation;

(f) specify the period of time for which the authorisation continues in force.

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25 *PHW Act* sub-s 200(4).

26 *PHW Act* sub-ss 200(2), (3), (5)-(7).

50 Section 203 makes it an offence to refuse or fail to comply with a direction given to the person, or a requirement made of the person, in the exercise of a power under an authorisation given under s 199. The infringement notice served on the plaintiff alleged a contravention of s 203.

51 Section 204 provides that, in the event that there were insufficient grounds for the giving of an authorisation, a person may apply for, and be given, 'just and reasonable compensation'.

The construction of the PHW Act

52 In their written submissions, the parties largely agreed on the meaning to be given to the provisions of the *PHW Act*. However, there is one matter that requires examination concerning the interaction between ss 199 and 200.

53 The defendants submit that s 199 and s 200 provide two separate limitations on the exercise of emergency powers. First, they submit that in order for the CHO to authorise authorised officers to exercise emergency powers, the CHO must believe that it is necessary to grant an authorisation under s 199 to eliminate or reduce a serious risk to public health. I agree.

54 Second, they submit the powers in s 200 must be exercised for the purpose of eliminating or reducing a serious risk to public health. That much may also be accepted. They further submit that the powers in s 200 may only be exercised if the authorised officer considers it reasonably necessary to protect health by reducing or eliminating a serious risk to public health. In the present case, Dr Romanes who made Directions No 14, recited that he believed it necessary to protect health by reducing or eliminating a serious risk to public health. The plaintiff does not dispute that he held this view. Thus, if it was required by s 200, it was satisfied in this case.

55 However, I do not agree that s 200 works in the way submitted by the defendants. First, only sub-s 200(1)(d) refers to the state of mind of the authorised officer. That is not surprising because the content of the direction and its connection to the purpose need not be specified by the CHO and is a matter for the authorised officer. It calls for

consideration of whether the authorised officer considers it to be reasonably necessary.

56 Sub-sections 200(1)(a) to (c) are not so conditioned. Again, that is explicable because the CHO will have already found that those specific powers are reasonably necessary in the context of a declaration of emergency that is time limited. It must be borne in mind that the powers in sub-ss 200(1)(a) to (c) involve the implementation of the steps that the CHO considers to be necessary. Although authorised officers must be appointed and have the skills and training to perform their task,[27] there is nothing in the *PHW Act* that says that these skills must relate to health. They may involve what might be thought to be enforcement powers.

57 I would not construe sub-s 200(1)(b) as requiring the authorised officer who restricts the movement of any person to first consider whether it is reasonably necessary to protect health by reducing or eliminating a serious risk to public health. Of course the power must be exercised for the purpose for which it is given, and reasonably, but that is different to requiring the authorised officer to replicate the decision making that the CHO will have already engaged in.

Decisions made under the *PHW Act*

The State of Emergency under s 198

58 On 16 March 2020, acting under sub-s 198(1), the Minister declared a state of emergency throughout Victoria 'arising out of the serious risk to public health in Victoria from Novel Coronavirus 2019 (2019-nCoV).' The declaration operated for four weeks and has been extended on multiple occasions. On each of those occasions, the conditions for the making of a declaration needed to be satisfied. The plaintiff does not contend that they were not.

Authorisation under s 199

59 On 11 May 2020, the CHO authorised a number of persons, including Dr Finn Romanes, to exercise any of the public health risk powers and emergency powers

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27 *PHW Act* s 30.

without restriction or limitation. The instrument of authorisation records that the CHO believes the authorisations are necessary to eliminate or reduce a serious risk to public health.

Directions under s 200

60 Relevantly for the present proceeding, on 27 August 2020, Dr Romanes, 'Deputy Public Health Commander' made Directions No 14. Its salient parts are set out below.

> I, Dr Finn Romanes, Deputy Public Health Commander, consider it necessary to eliminate or reduce the risk to public health – and reasonably necessary to protect public health – to give the following directions pursuant to section 200(1)(b) and (d) of the **Public Health and Wellbeing Act 2008** (Vic.) (**PHW Act**):
>
> **PART 1 – PRELIMINARY**
>
> **1 Preamble**
>
> (1) The purpose of these directions is to address the serious public health risk posed to Victoria by Novel Coronavirus 2019 (**2019-nCoV**).
>
> (2) These directions require everyone who ordinarily resides in the **Restricted Area** to limit their interactions with others by:
>
> (a) restricting the circumstances in which they may leave the premises where they ordinarily reside and the Restricted Area; and
>
> (b) placing restrictions on gatherings, including prohibiting private gatherings (no visitors to another person's home other than in very limited circumstances).
>
> **…..**
>
> **3 Revocation**
>
> The **Stay at Home Directions (Restricted Areas) (No. 13)** are revoked at 11:59:00 pm on 27 August 2020.
>
> **4 Stay at home period**
>
> For the purposes of these directions, the **stay at home period** is the period beginning at 11:59:00 pm on 27 August 2020 and ending at 11:59:00 pm on 13 September 2020.
>
> **PART 2 – STAY AT HOME**
>
> **5 Direction – stay at home other than in specified circumstances**
>
> *Requirement to stay at home*
>
> (1) A person who ordinarily resides in the Restricted Area during

the stay at home period must not leave the premises where the person ordinarily resides, other than for one or more of the reasons specified in:

(a) clause 6 (***necessary goods or services***);

(b) clause 7 (***care or other compassionate reasons***);

(c) clause 8 (***work or education***);

(d) clause 9 (***exercise***);

(e) clause 10 (***other specified reasons***).

Travel restrictions

(1A) A person may only leave their premises under subclause (1) where it does not involve unreasonable travel or travelling to a place for an unreasonable period of time.

Note: travelling to an area outside the Restricted Area for exercise is prohibited under these directions.

(1AA) A person must not travel in a **vehicle** with another person with whom they do not ordinarily reside unless it is not otherwise reasonably practicable for either person to leave their premises for a purpose permitted under these directions.

Example: a person who does not hold a driver's licence may travel in a vehicle with another person with whom they do not ordinarily reside for the purposes of attending a medical appointment or doing their grocery shopping if it is not reasonably practicable for them to get there another way.

(1AB) A person who leaves their premises under either subclause (1)(a) (necessary goods or services) or (d) (exercise) must not:

(a) travel further than 5 km from their premises; or

(b) do so more than once per day.

9 Leaving premises for exercise

(1) A person who ordinarily resides in the Restricted Area may leave the premises to exercise, but must:

(a) only exercise at a facility that is not prohibited by the **Restricted Activity Directions (Restricted Areas) (No. 8)**; and

*Example: as swimming pools are not open under the **Restricted Activity Directions (Restricted Areas) (No. 8)**, a person may not leave their premises to swim in a pool in any location.*

(b) comply with the restrictions on gatherings in clause 11; and

(c) take reasonable steps to maintain a distance of 1.5 metres from all other persons.

(2) Subclause (1)(c) does not prevent a person from walking with another person or persons for the purposes of exercise.

10 Leaving premises for other reasons

(1) A person who ordinarily resides in the Restricted Area may leave the premises in the following circumstances:

(a) for emergency purposes; or

(b) as required or authorised by law; or

(c) for purposes relating to the administration of justice, including, but not limited to, attending:

(i) a police station; or

(ii) a court or other premises for purposes relating to the justice or law enforcement system; or

(d) to attend a **place of worship**, if that place of worship is operating in accordance with the **Restricted Activity Directions (Restricted Areas) (No. 8)**; or

(e) to attend a **community facility**, if that facility is operating in accordance with the **Restricted Activity Directions (Restricted Areas) (No. 8)**; or

(f) for the purpose of driving a person with whom they ordinarily reside where it is not otherwise reasonably practicable for that person to leave their premises for a purpose permitted under, and provided they comply with, these directions; or

Examples: driving a household member who does not have a driver's licence to or from work, to obtain educational services, or to the ordinary place of residence of a person with whom they are in an intimate personal relationship.

(g) if the premises in which the person ordinarily resides is no longer available for the person to reside in or is no longer suitable for the person to reside in; or

(h) for purposes relating to, or associated with, **dealing** in **residential property**, including attending a private inspection of a residential property organised in accordance with the **Restricted Activity Directions (Restricted Areas) (No. 8)** and the **Restricted Activity Directions (Non-Melbourne) (No. 3)**; or

(i) for the purposes of moving to a new premises at which the person will ordinarily reside; or

(j) if the person ordinarily resides outside Victoria, for the purposes of leaving Victoria; or

(k) if the person is permitted to leave Australia, for the purposes of leaving Australia; or

(l) for the purposes of **national security**.

PART 4 – GATHERINGS

11 Restrictions on gatherings

Public gatherings

(3) During the stay at home period, a person in the Restricted Area must not arrange to meet, or organise or intentionally attend a gathering of, more than one other person for a common purpose at a public place, except:

Note: subclause 11(3) does not prevent a person attending a public place (for example, a shopping centre) for a purpose (for example, shopping), where other people are also likely to be attending that public place for a similar purpose. It prevents people from attending a public place intending to gather with other people for a common purpose (for example, meeting family or friends at the shopping centre).

(a) where it is necessary for the person to provide, or the person requires, care and support due to:

(ii) age, infirmity, disability, illness or a chronic health condition; or

(iii) matters relating to the other person's health (including mental health or pregnancy); or

(b) if the person is a parent or guardian of a child, and the person cannot access any child-minding assistance (whether on a paid or voluntary basis) so that the parent or guardian can leave the premises without the child, then the child may accompany the person when gathering with one other person; or

(c) for the purpose of attending a wedding in a Restricted Area that complies with the requirements in subclause (4); or

Note: a person who ordinarily resides in the Restricted Area must not attend a wedding outside the Restricted Area, except as a celebrant who may leave the Restricted Area under clause 5(1B)(c).

(d) for the purpose of attending a funeral that complies with the requirements in subclause (5); or

(e) it is necessary to arrange a meeting or organise a gathering for one or more of the purposes specified in clauses 7 (care or other compassionate reasons), 8 (work

or education) or 10 (other specified reasons); or

(f) where it is for one or more of the purposes specified in clause 6 (necessary goods or services) and the exceptions in clause 5(1AD) apply.

61 The effect of Directions No 14 is colloquially called a 'lockdown'.

The Stay Safe Directions

62 The Stay Safe Directions was given on 28 October 2020. It eased the restrictions in place at the time. Relevantly, the Stay Safe Directions:

(a) Removed the stay at home rule, allowing persons to leave their home for any reason, but retained a 25 kilometre travel limit; and

(b) Retained the limit of 10 people for general outdoor gatherings, with special provision made for certain kinds of gatherings, such as, weddings and religious gatherings.

63 The plaintiff focuses on the fact that there is no exception to allow for public gatherings for the purpose of engaging in political communication.

64 The Stay Safe Directions was revoked on 8 November 2020 by the *Stay Safe Directions (Victoria)* when restrictions were further eased. Since then, there have been a series of measures of varying degrees of severity. They have included a number of periods of lockdown in which the restrictions were very similar to those imposed under Directions No 14.

The meaning and legal and practical effect of the Directions

65 The first point of note is that Directions No 14 was made by an authorised officer who recites that he considers it necessary to eliminate or reduce the risk to public health, and to that end, reasonably necessary to give the direction pursuant to sub-ss 200(1)(b) and (d).

66 In the preamble, Dr Romanes records that the Directions No 14 requires persons who ordinarily reside in the 'restricted area' to 'limit their interactions with others'. In pursuit of that goal, the direction:

(a) restricts the circumstances in which they may leave their ordinary place of residence; and

(b) places restrictions on gatherings.

67 Directions No 14 was in force for 17 days.[28]

68 The requirement to 'stay at home' is provided for in pt 2. Clause 5 provides that persons must not leave their premises 'other than for one or more of the reasons' specified in clauses 6 to 10. Clauses 6 to 10 then set out the circumstances in which a person may leave based on five reasons: obtaining or providing necessary goods or services; care or other compassionate reasons; work or education; exercise; and other specified reasons.

69 The balance of clause 5 deals with some issues of detail, including, by defining the principal and ordinary place of residence;[29] imposing travel restrictions which mean that a person may not travel for goods or services or exercise further than 5 kilometres from their premises once a day;[30] and prohibiting leaving home unless the person wears a face covering at all times.[31]

70 Part 3 fills in the details surrounding the permitted reasons for leaving home including by defining necessary goods and services;[32] explaining what constitutes care and other compassionate reasons;[33] allowing a person to leave home for work if the person is a 'permitted worker' or for education purposes;[34] exercise;[35] and other specified reasons.[36] The freedom to exercise outside of home is further constrained by the limitations on gatherings (which has the effect that a person may exercise with no

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28 Directions No 14 Cl 4. The directions began at 11.59pm on 27 August 2020 and ended at 11.59pm on 13 September 2020.
29 Directions No 14 Cl 5(1D) and Cl 5(2).
30 Directions No 14 Cl 5(1B) and 5(1C).
31 Directions No 14 Cl 5(6).
32 Directions No 14 Cl 6(1).
33 Directions No 14 Cl 7(1).
34 Directions No 14 Cl 8(1).
35 Directions No 14 Cl 9(1).
36 Directions No 14 Cl 10(1).

more than one other person), social distancing, the 5 kilometre limit and a time limit of one hour.[37]

71 Part 4 imposes limitations on gatherings, both public and private. It covers gatherings within premises (by tying attendance back to a permitted reason) and in public places. Except in limited circumstances, a person must not arrange to meet, organise or intentionally attend a 'gathering of, more than one other person for a common purpose at a public place.'[38]

72 It can be seen from that brief survey that Directions No 14 limits or restricts interactions between people in the restricted area by:

(a) Restricting the circumstances in which people may leave home (the stay at home rule);

(b) In the case of exercise, limiting the length of time at which they were permitted to leave their home and the distance they may travel (the time rule and the distance rule);

(c) Requiring the wearing of face coverings outside of the home (the face mask rule) and maintaining social distance; and

(d) Prohibiting gatherings of more than two people (the public gathering rule).

73 It is not in contest that, apart from the potential operation of the implied freedom, the restrictions are authorised by sub-ss 200(1)(b) and (d). It seems plain that the stay at home rule, the time rule, and the distance rule, restrict the movement of persons and thus fall within sub-s 200(1)(b). It is arguable that the public gathering rule is also authorised by sub-s 200(1)(b). In any event, the public gathering rule, the face mask rule, and the requirement for social distance fall within sub-s 200(1)(d). There is no question that in fact the authorised officer considers them to be reasonably necessary to protect public health from a serious risk to public health.

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37 Direction No 14 Cl 5(1AE).
38 Direction No 14 Cl 11(3).

74 There is one relatively minor area of disagreement on the construction of Directions No 14. The issue concerns whether a person can engage in political communication provided they are out of their home for a permitted purpose, and also complying with any express obligations. The defendants submit that, subject to compliance with the express rules, Directions No 14 does not prohibit a person engaging in political communication outside of their residence, provided they leave for a permitted reason. They give the example of a political slogan on clothes worn by a person exercising away from their residence.

75 The plaintiff submits that Directions No 14 does not allow a person to leave their premises for the reason of engaging in political communication, if that person is also leaving for a purpose otherwise permitted by Directions No 14. She says a person leaving their home to exercise within their 5 kilometre zone, but also wishing to protest while exercising (eg. while wearing a political t-shirt or carrying a placard) would contravene the stay at home rule.

76 She says that Directions No 14 does not expressly state that a person may leave for a "non-permitted" purpose if also leaving for a "permitted purpose". Moreover, the language of cl 5(1) ('must not leave the premises … other than for one or more of the [specified] reasons') makes clear that multiple purposes for leaving are permitted, but only if all of those purposes are permitted purposes.

77 As will appear, the constructional question only assumes importance if the *McCloy* test is to be applied directly to Directions No 14, and only then to identify a less burdensome alternative as part of the necessity analysis. Given my ultimate conclusion, the issue does not arise.

78 However, it is convenient to express my conclusion on the topic. It is clear from the express terms of cl 5 that a person may leave their home for more than one reason. That also reflects human experience that a person's purpose for engaging in conduct will often have more than one dimension.[39] However, the text of cl 5(1) of Directions

[39] *Perpetual Trustee Company Ltd v Papantoniou* [2014] NSWSC 685, [71] (Campbell J): 'Human motivation

No 14 is clear: a person may only leave their residence for a permitted purpose or permitted purposes.

79 In this respect, it is plain from its context and purpose that the prohibition on leaving other than for a permitted reason means that, in order to be allowed to leave, the person must leave for a permitted reason and only remain outside of the home while they retain that purpose. The constraint is not only on the physical act of leaving the residence, but also conditions the time outside of the home.

80 The purpose of the provision is to restrict people from leaving their residence and to make them return once the purpose for which they leave has been achieved or is no longer operative. It does so by reducing the reasons for which they may leave. The reasons are narrowly crafted and balance the risk of interaction against what, on their face, are common and understandable reasons to leave. It would undermine the protective purpose of the stay at home rule if a person could leave their residence for any reason provided it was combined with a permitted reason. Such additional (and unconfined) reasons would provide a 'pull factor' that might encourage people to leave their residence when they would otherwise stay home. It would dilute the force of the Directions and also complicate enforcement. As it is, the reason a person leaves is a question of fact, but the menu of permitted reasons limited. Introducing the concept of non-proscribed (but not permitted) reasons would make enforcement harder and may encourage avoidance. It is not supported by the text.

81 The ability to avoid the requirement to stay home turns on the reason a person leaves. It is not inconsistent with a lawful reason for leaving that, when the person is outside of the home they express themselves in a way that might have some political content. Wearing an item of clothing that is emblazoned with a political message might involve political expression, but in itself might say nothing about why the person leaves home. For that reason, the examples proffered by both parties of the politically charged t - shirt is a distraction. Once the focus is properly directed to the reason for leaving a

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is complex. A person's purpose for engaging in conduct may be mixed, and subject to conflicting, even contradictory, motives'.

person's residence, there is no room for a dual purpose that includes a non-permitted reason.

82 Before leaving the terms of Directions No 14, there is one further point that requires mention. The plaintiff has raised the question whether Directions No 14 are decisions of an administrative or legislative character. Having raised it, the plaintiff then submits that the distinction does not matter in this case because the principles to be applied are the same. That being so, I do not propose to enter into the debate.

83 Having set out the statutory provisions and the detail of the Directions, it is convenient at this point to refer to the expert evidence adduced by both parties. The plaintiff called Professor Bennett and the defendants called Dr Alpren and Professor McLaws.

The expert evidence

Professor Bennett

84 Professor Bennett has held the inaugural Chair in Epidemiology at Deakin University since 2009. She holds a PhD in biological anthropology and population genetics, and a Masters in Applied Epidemiology specialising in communicable disease epidemiology with the Australian National University. Her expertise to express the opinions she gave was not disputed. In cross examination the defendants sought to establish that Professor Bennett had little practical experience, however, given the nature of the discipline, with its focus on data and modelling, and her involvement in reviewing and researching practical measures to prevent the spread of disease, nothing turns on this.

85 Her report, dated 30 November 2020, answers a number of questions posed in a letter of instruction from the plaintiff's solicitor. Her report covers three main topics: the 'drivers' of the risk of transmission of COVID-19; the relationship between movement of persons and the risk of transmission; and transmission risk in outdoor settings.

86 Professor Bennett commenced her report by observing that the most common mode of community transmission in a community setting is respiratory droplet transmission. Given droplets rarely travel more than 1.5 to 2 metres from the infected

person, the greatest risk of infection lies with close contacts, who in Victoria are defined to mean people who have been within 1.5 metres of a confirmed case for 15 minutes or more, or within the same closed area for more than two hours.

87 Professor Bennett said that movement of persons per se does not necessarily modify the risk of transmission and that movement can occur without any change to the underlying or contextual risk of transmission. She gave as two examples of movement that may increase risk the use of public transport and having increased exposure to non-household members. She said risks could be reduced by staying outdoors, compliance with basic precautions such as wearing a fitted mask, practicing hand hygiene and coughing etiquette, avoiding direct contact with other people, and avoiding crowded areas that limit the ability to maintain a physical distance of 1.5 metres or more.

88 In relation to public gatherings Professor Bennett was asked: 'given the rate of infection in Victoria during the 'second wave', what is the relative risk of outdoor public gatherings compared to other permitted activities (such as buying coffee or alcohol onsite)?' To that very broad question, Professor Bennett answered that the likelihood of being in proximity to members of households other than one's own in these scenarios is a key determinant of the risk of viral transmission. Infection depends on coming into contact with an infected person in a context that permits transmission. She said:

> If I assume that the scenarios provided occur in the same local environment with a given COVID-19 incidence, that attendees are all local (ie. there is no additional risk from transiting to the activity location, and they are from one area with a given incidence of COVID-19) and that public health directions regarding distancing and mask wearing are complied with equally, then transmission risk will arguably be the same under any such outdoor scenarios. However there are potential contributing behavioural factors that might alter risk that need to be considered

89 Based on those assumptions Professor Bennett concluded:

> it is my opinion that transmission risk in a given outdoor location is materially the same for any activities where individuals do not come into contact with shared surfaces, are complying to the same degree with the Public Health directions regarding distancing, hygiene, and mask wearing, and where those

> present are equally likely to comply with orders regarding isolation/non-attendance if they are laboratory-confirmed cases or are symptomatic (whether they have been tested or not). Under these conditions, I would estimate the relative risk to equal one.

90 In coming to that conclusion, Professor Bennett said that depending on the nature of an activity, people may be less likely to comply with mask wearing or physical distancing, or may be more likely to attend even if they are a confirmed case and potentially infectious or, if not tested, to attend with symptoms.

91 In cross examination, Professor Bennett explained that transmission risk depends on the nature of the interaction between people, and that not all interactions carried the same risk. She made the point that risk depends on the level of infectiousness and the context in which the interaction occurs, with large differences in risk in different settings, such as indoor when compared with outdoor interactions. Professor Bennett noted that her opinion as to the relative risk between outdoor gatherings and activities permitted under Directions No 14 required her to assume that all other things were equal, including: the same local environment; compliance with directions and self-isolation requirements; duration of the activity; number of people involved; density; turnover of participants; behaviour; and mode of travel, for example, whether public transport is used.

92 Professor Bennett accepted that the number of attendees at a public gathering may influence the risk of transmission in a number of ways, including by increasing the likelihood of an infectious person being present and/or by modifying the public's behaviour, especially the ability for individuals to physically distance if crowd density increases. She extrapolated from data on 7 August 2020 on the number of known infectious persons in Victoria (6,769 persons), that at that time, there were 5,057 infectious persons not in isolation and, based on a population of 6.359 million, assessed the risk of an infectious individual not being in isolation was less than one per thousand people, and that therefore the risk of having an infectious person at an event in Victoria, at the peak of Victoria's actives cases, was still very low.

93 Professor Bennett said that the risk of infection might change depending on the nature

of the behaviours exhibited, including increased vocalisation (such as singing, cheering or shouting), greater physical contact with others (shaking hands or other forms of greeting), or more or less compliance with usual precautions because of peer pressure or group behaviour. She said these needed to be assessed on a case by case basis.

94 She said that the risks associated with public gatherings could be mitigated by a COVID-19 Safe Plan that took into account things such as background infection rates, crowd size, density, ventilation, and whether the attendees are seated or standing.

95 Professor Bennett was asked whether there was any 'epidemiological reason' that Victoria could not have had an outdoor protest scheme similar to New South Wales. In her report, Professor Bennett referred to the NSW model as allowing gatherings of up to 500 people. I note that the NSW restrictions allowed public gatherings of up to 20 people until 23 October 2020 and on that day the restriction was relaxed to 500 persons.

96 She said that, as at 18 October 2020, given the low risk of any individual being infectious at that time, and the very low risk of transmission outdoors, especially in the presence of mitigating measures required under a COVID-19 Safe plan, the risk of transmission occurring at even the largest of events permitted in NSW would have been extremely low. For that reason, she said that there was no epidemiological argument against the introduction of a NSW-style COVID-19 Safe strategy in Victoria with a COVID-19 case profile as it was on 18 October 2020, assuming attendance caps were reviewed against community transmission risk.

97 In cross examination, Professor Bennett accepted that some infected individuals may be responsible for infecting a large number of people, a phenomenon she described as 'over dispersion' and which has been described as a 'super spreader'. She said that 10 to 20 percent of people are responsible for the majority of the infections and that 80 percent are believed not to pass on the virus, or pass it on to a small number of people in their own household. These matters are influenced by the infected person's

viral load (which will vary during the period of infection), and their behaviour. In that context, she accepted that theoretically it takes one person in the right conditions to seed an outbreak.

98 Professor Bennett accepted that stay at home directions, together with measures such as a requirement to wear masks and maintain social distance, can be an effective tool to control an outbreak of an infectious disease such as COVID-19. She said that based on prior experience, these measures work but that the role played by each element to the success of the measures was yet to be evaluated.

99 Professor Bennett said that resort might be had to lockdowns in extreme circumstances. In that context, she identified a number of considerations, including the agent and the risk it poses, and also how people will respond to that risk. She said these things come together 'with a rapid response when you are trying to manage a pandemic in the early stages' and that one of the difficult areas was public health communication and understanding compliance, and 'those things we were learning on the fly in the roll out of the response to this pandemic'.

100 Various scenarios were put to Professor Bennett in order for her to express her opinion on the nature of the various risk levels involved. The examples included a group of persons singing outside a supermarket, or travelling by public transport. Professor Bennett said that these potentially increase the risk, but the risk of infection is dependent on many other variables, including the probability of an infected person being present, and compliance with rules such as mask wearing and social distancing. For outdoor gatherings of 'about 10 people' meeting to sing and chant, Professor Bennett thought the risk would be low.

101 Professor Bennett considered that in 2020 the risk of outdoor transmission was very low, that some data showed just four percent of outbreaks had occurred in outdoor settings, and this was consistent with observations in Australia, including in Victoria, about the ratio of indoor to outdoor transmission.

102 Professor Bennett accepted that her opinions as to risk were confined to transmission

risk and did not factor into account the severity of the consequences of infection.

Dr Alpren

103 Dr Alpren is an epidemiologist employed in the Department of Health and Human Services. He is a medical practitioner. Since 2014 he has worked in public health, both in Australia and overseas including with the World Health Organisation and the Centers for Disease Control and Prevention ('CDC'). He has a Masters of Public health from James Cook University. He is presently the Director of Investigation and Analysis in the Data, Intelligence, Modelling and Epidemiology Branch, COVID-19 Division ('DIME'). His affidavit was largely concerned with the nature and extent of the COVID-19 outbreak in Victoria during July to November 2020.

104 In cross examination, Dr Alpren was asked a number of questions and various scenarios were put to him with a view to establishing that allowing persons to leave their home for either a concurrent reason of engaging in political communication,[40] or for that reason alone, would not alter the risk of infection because it was the conduct of the person when out of their home, and not the reason for leaving, that was material.

105 Dr Alpren agreed that in relation to a person who left home for exercise and who complied with the public health requirements of wearing a mask and social distancing but who also wore a t-shirt with a political slogan, there was no 'scientific basis' for saying that person should not be permitted to leave home because of what they were wearing. He agreed that as long as a person leaves for a permitted reason, and they are otherwise complying with the rules, there is no scientific reason to treat that person differently because they also want to engage in political communication at the same time.

106 He said that the scientific basis for the Directions was physical distancing and hygiene. He was asked to consider a person who leaves home for the permitted reason of obtaining a takeaway coffee, and a person who leaves for the sole purpose of walking out their front door to the kerb of their street to erect a protest sign. When asked

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[40] That is, together with a permitted reason.

whether the former was riskier than the latter, he answered that the restrictions were designed to permit society to run whilst maximising the physical distance and minimising the harm that could be brought to the whole of the public during extreme times. He accepted that there was nothing 'necessarily risky' about a person leaving home to engage in political communication. He accepted that a person who left their home to purchase takeaway coffee from a local café would be more likely to interact with others than a person leaving their house solely to place a protest sign on the edge of their street.

107 Dr Alpren accepted that the risk of transmission is not determined by the reason a person leaves but what they do when they leave and how many other people are outside at the same time. In that context, he said that adding to the reasons to leave might increase the number of people who are out at the one time. He said that based on data and modelling that was performed in 2020 he considered that the more reasons you have, the more people are outside and the more interactions there will be.

108 Dr Alpren said that in his discussions at the time the Directions were formulated, there was an awareness of the consequences of the restrictions and that there was behavioural research on the likely effect of different restrictions. When asked whether it would have been safer from a risk perspective to close cafés, given that coffee was not essential, Dr Alpren explained that different people have different lifestyles and some people depend on having food prepared for them, and it is important that the essential things: food, drink, and medical care, were available so that as far as possible people did not come to harm from the restrictions.

109 In response to that evidence, Dr Alpren was asked whether the restrictions could be changed so as to allow a person to leave to engage in political communication without increasing the total amount of time they are permitted to be away from their home. Dr Alpren accepted that this would be possible.

110 In relation to public gatherings, Dr Alpren accepted that it would have been possible to create an exception for outdoor gatherings for the purpose of political

communication, with appropriate conditions, without materially adding to the public health risk. That evidence was later qualified when, in the context of the Stay Safe Directions, Dr Alpren disagreed with the proposition that those directions could have included an exception of public gatherings for the purpose of political communication without increasing the transmission risk. He added that the more reasons and the more exceptions there are, the more risk there is, and that the risk increases with every reason. He said that at the time of the Stay Safe Directions, there was still a risk of transmission and there was evidence of community transmission.

111 Dr Alpren said he was not aware of any evidence specifically directed to risks associated with outdoor protests.

Professor Mary-Louise McLaws

112 Professor McLaws is a Professor of Epidemiology, Healthcare Infection and Infectious Diseases Control at the University of New South Wales.

113 Professor McLaws explained that assessing an outbreak of an infectious disease takes into account variables that include pathogenicity and virulence (that is, the ability to cause disease and death), contagiousness (to cause infection), mode of transmission (how it spreads), and environmental factors (indoor, crowds etc.) that facilitate transmission. From an epidemiological perspective, outbreak management is about reducing the risk and incidence of infection as much as possible. However, she said that control or mitigation involves a number of disciplines including infection prevention and control experts, virologists, clinicians, public health officers, law, community cultural/religious liaison officers, health educators, and health and government authorities.

114 For that reason, consequences such as economic cost, impacts on education, and risks of increased crime including domestic violence, while undoubtedly of great significance, do not present as epidemiological concerns. That is, an epidemiologist outbreak manager is concerned with reducing the risk of infection by achieving the lowest rate of transmission.

115 In her report, Professor McLaws said there are a number of ways to track the incidence and predict the likely course of an outbreak. This will be influenced by the rate of infection (measured by an R_0 value), the source of infection and whether it its linked, and the context in which infection occurs. The R_0 value, the rolling 14 day average daily case numbers (representing two incubation periods), the case fatality rate, and traceability, inform the impact of not introducing restrictions rapidly. Any approach to restrictions should be informed by the precautionary principle, which includes the requirement that uncertainty about potentially serious hazards does not justify ignoring them.

116 Professor McLaws aggregated a number of variables in order to assess whether at a particular point of time it would have been safe to relax the stay at home directions that had been imposed in Victoria on 9 July 2020 (and continued by Directions No 14). She described this aggregation, depicted graphically, as a traffic light system that provided an early warning of increasing transmission. She concluded that Directions No 14: prevented further avoidable infections and deaths; reduced the strain on health services such as hospitalisations, testing clinics and pathology services; increased the number of public health officers and contact tracers; and increased the number of law enforcement checks on those under isolation.

117 In cross examination, Professor McLaws was asked a number of questions about her traffic light system. Professor McLaws said that the mathematics had been verified but the model had not been peer reviewed.

118 Professor McLaws was not aware of any evidence that any of the protests that occurred in Australia during lockdowns were 'super-spreading events' and that there was no additional transmission as a result of the Black Lives Matter protests that had taken place in June 2020. She was not aware of any evidence that outdoor public gatherings of any kind had caused outbreaks in Victoria, and she accepted that the risk associated with outdoor gatherings was much less than the risk associated with indoor gatherings.

119 Professor McLaws said that often, but not always, the purpose of a gathering might indicate what conduct might be expected to occur. She accepted that attending a funeral, which subject to restrictions was permitted, might involve close physical contact including participants crying, blowing their noses, speaking to one another, and singing. She also accepted that political expression might include a solitary silent vigil. She accepted that an outdoor political gathering of 10 people – if necessary precautions were taken – would carry less risk than the risk associated with an indoor funeral of the same size.

The grounds

120 By her Further Amended Originating Motion dated 29 March 2021, the plaintiff seeks a number of declarations directed to the validity of parts of Directions No 14 and the Stay Safe Directions. She seeks declarations to the effect that:

(a) Clauses 5(1) and/or 10 of Directions No 14 are each ultra vires the *PHW Act* by failing to provide a lawful means for a person to leave their premises to engage in political communication,[41] or alternatively to engage in political communication if the person is also leaving for a permitted reason and otherwise complying with the direction;[42]

(b) Clause 11(3) of Directions No 14 is ultra vires the *PHW Act* by failing to provide any lawful means for a person to arrange to meet or organise or intentionally attend a gathering with any other person at a public place for the purpose of engaging in political communication;[43]

(c) Clause 5(1) of the Stay Safe Direction is ultra vires the *PHW Act* to the extent that subclauses (2), (2A) and (2B) restrict a person leaving premises to engage in political communication;[44] and

(d) Clause 11(5) of the Stay Safe Directions is ultra vires the *PHW Act* by failing to

41 Declaration 3 Further Amended Originating Motion dated 29 March 2021 ('FAOM').
42 Declaration 4 FAOM.
43 Declaration 5 FAOM.
44 Declaration 6 FAOM.

provide any lawful means for a person to arrange to meet or organise or intentionally attend a gathering with more than nine other persons at a public place for the purpose of engaging in political communication.[45]

121 The grounds in support of the declarations are somewhat discursively expressed and are reflected in the submissions made by the plaintiff. It is not necessary to refer to them at this point.

122 Notably, the plaintiff does not contend:

(a) That the *PHW Act* is invalid; or

(b) That the Directions are invalid on any public law grounds, other than by reason of the implied freedom. That is to say that, the implied freedom apart, the plaintiff does not contend that the Directions were not authorised by the *PHW Act*. It follows that is there is no separate statutory question that arises for determination.[46]

The plaintiff: standing and utility

123 By way of a preliminary point, the defendants submit that the plaintiff lacks standing to bring the proceeding, or, her claims should not be entertained as a discretionary matter on the basis that her infringement notice has been withdrawn and the Directions are no longer in force

124 In her affidavit, the plaintiff says that on 13 August 2020[47] [*scil* September], she decided to leave her house to exercise. She said that she also wanted to express her political views while she was exercising. She took with her a sign that said 'Toot to boot' which had a hand drawn image of the Premier of Victoria. She said she was also wearing a face mask with the words 'Ban Dan' handwritten on it.

125 The plaintiff deposes that she was otherwise following Directions No 14, in that, she

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45 Declaration 7 FAOM.

46 *Palmer v Western Australia* [2021] HCA 5, [5] (Kiefel CJ and Keane J), [128] (Gageler J) and [200] (Gordon J) ('*Palmer*').

47 In her affidavit the plaintiff refers to this as having occurred on 13 August. This is plainly a mistake and the parties accept that the incident occurred on 13 September, the date of the infringement notice.

was wearing a mask, was within five kilometres of her home, and had not yet left the house that day for exercise. Whilst exercising, she also wanted to express her views regarding the Premier's response to COVID-19. The plaintiff received an infringement notice for breaching Directions No 14, for being out of the house for a non-permitted reason.

126 Following receipt of the infringement notice, the plaintiff says she was deterred from both attending other protests and organising a local protest. The plaintiff says further that she feared she would be issued with another infringement or arrested and charged if she were to attend or plan a protest.

127 The plaintiff was not cross examined.

128 The defendants submit that the plaintiff lacks standing to bring the proceeding. They submit that given the Directions No 14 under which the infringement notice was issued have been repealed and replaced with other directions, and the infringement notice has been withdrawn, the plaintiff no longer has standing to bring the proceeding.

129 The defendants submit that the plaintiff must establish a special interest in the subject matter of the proceeding over and above other members of the public.[48]

130 The defendants submit that the plaintiff has no ongoing liability under the Directions, and because they have expired they do not operate as an ongoing constraint on the plaintiff's conduct. They submit that this is not a case like *Croome v Tasmania*[49] or *Brown v Tasmania*[50] where the plaintiffs had a special interest by reason of the continued existence of the law on the statute books, and the fact that (as in *Croome*) their past conduct rendered them liable to prosecution, or (as in *Brown*) that they intended to engage in the future in conduct which the law proscribed. In this

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48 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530–1 (Gibbs J) and 547 (Mason J); [1980] HCA 53 ('*ACF*'); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 256 [21] (Gaudron, Gummow and Kirby JJ), Hayne J agreeing at 284 [107]; [1998] HCA 49; *Maguire v Parks Victoria* [2020] VSCA 172, [63] (Ferguson CJ, Kyrou and Niall JJA).

49 (1997) 191 CLR 119, 127; [1997] HCA 5 (Brennan CJ, Dawson and Toohey JJ) ('*Croome*').

50 (2017) 261 CLR 328, 343 [17]; [2017] HCA 43 (Kiefel, Bell and Keane JJ) ('*Brown*').

proceeding, both sets of impugned directions have been revoked (Directions No 14 on 13 September 2020 and the Stay Safe Directions on 8 November 2020) and have no ongoing legal effect. They further submit that any further conduct by the plaintiff would take place in a different context, under different directions, and that any determination would have little practical utility.

131 Alternatively, the defendants submit that in the exercise of the Court's discretion the proceeding should be dismissed because it lacks utility. Further, to proceed would be inconsistent with the general principle that the courts should not decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case, and to determine the rights of the parties.[51]

Decision on Standing

132 In my view, the plaintiff has standing. The plaintiff was subject to a direction given to her in the exercise of emergency powers under sub-ss 200(1)(b) and (d) of the *PHW Act*, that required her to remain in her residence and only leave for a permitted reason. She received an infringement notice alleging that by failing to comply with Directions No 14 she had contravened s 203 of the *PHW Act*, which is a criminal offence. Even without the infringement, the plaintiff was required to remain at home. The restriction operated on her before there was any infringement. The operation of the Directions does not depend on an infringement having first occurred.[52]

133 There can be little doubt that, at the time she commenced the proceeding, she had standing to challenge the validity of the Directions. Notwithstanding that the infringement has been withdrawn, she has standing, and in my view the plaintiff is entitled to seek vindication of her conduct.

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51 *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ, McTiernan, Webb, Fuulager, Kitto JJ and Taylor Acting Chief Commissioner); *Knight v Victoria* (2017) 261 CLR 306, 324 [32]; [2017] HCA 29 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)); *Clubb v Edwards* (2019) 267 CLR 171, 192–3 [35]-[36]; [2019] HCA 11 (Kiefel CJ, Bell and Keane JJ); *Zhang v Commissioner of Police* [2021] HCA 16, [21]-[22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

52 *Kuczborski v Queensland* (2014) 254 CLR 51, 101 [152]–[153]; [2014] HCA 46 (Crennan, Kiefel, Gageler and Keane JJ).

134 The issue is similar to that considered by the High Court in *Brown*.[53] In that case, the plaintiffs had been charged with an offence against a law that prohibited protesting of forestry land where logging operations were being conducted. The charges were withdrawn before a hearing in the High Court to challenge the validity of the relevant law. In answer to an argument (eventually conceded) that the plaintiffs ceased to have standing on the withdrawal of the charges, Kiefel CJ, Bell and Keane JJ said:

> Standing is not lost because charges are withdrawn after the exercise of powers under a statute. As Dixon CJ observed in *Wragg v State of New South Wales*, what has been done may be repeated. Furthermore, the plaintiffs have a "real interest" in the question of the validity of the Protesters Act because, unless constrained by it, the plaintiffs intend to engage in conduct which it proscribes. They are therefore interested to know whether they are required to observe the law.[54]

135 Further, the argument of the defendants fails to grasp the important point that the plaintiff seeks to vindicate a private right, namely the right to enter or leave her residence. Unlike in cases like *ACF*[55] and *Onus v Alcoa of Australia Ltd*,[56] this case concerns an affectation of private rights and therefore does not engage the standing principles that apply to a challenge of the exercise of public power that does not affect private rights. In *ACF*, Gibbs J noted the distinction between a suit to enforce public rights and duties, and an action in respect of private rights or 'private damage'. His Honour referred to the following passage of Buckley J in *Boyce v Paddington Borough Council*:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.[57]

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53 (2017) 261 CLR 328; [2017] HCA 43 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
54 Ibid 343 [17] (citations omitted).
55 (1980) 146 CLR 493; [1980] HCA 53.
56 (1981) 149 CLR 27; [1981] HCA 50.
57 *ACF* (1980) 146 CLR 493, 526-7; [1980] HCA 53 (citations omitted).

136 Similarly, Aickin J did not doubt that if 'private damage has been suffered proceedings to recover such damage are always open to an individual plaintiff'.[58] He went on to observe that where private rights are in issue whether or not a declaration should be made may depend on whether the person has a 'real interest' or a substantial interest. In my view, the requirement, backed by criminal sanction, that a person remain in their home or not gather with other persons constitutes an interference with a relevantly private right.

137 The fact that many people, indeed the whole of metropolitan Melbourne, were subject to the Directions does not change the nature of the rights and interests that the Directions curtailed.

138 Even if I am wrong, I would hold that the plaintiff has a special interest in the subject matter of the litigation. Even though she is no longer at risk of being punished for leaving her home in September 2020, nevertheless it is clear from her unchallenged evidence that she intends to protest and the Directions (or the directions that replace them) prevent her from doing so. I am of the view that she is entitled to seek vindication of her conduct.

139 Further, I decline the defendants' invitation to dismiss the proceeding on a discretionary basis. The issues are joined and are not meaningfully described as moot.

140 The exercise of powers under the *PHW Act* are of far reaching and profound importance to the people of Victoria. The exercise of power in a given case is time limited, and as the pandemic waxes and wanes, it is highly likely that the level of restrictions will also change. The important questions that the plaintiff seeks to raise are likely to recur as the most recent round of restrictions attest.[59]

141 Further, and importantly, the parties are in dispute about the level at which the constitutional analysis should be applied. The defendants submit that the correct

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58 Ibid 504. See also Gibbs J at 525-6.

59 *Stay Safe Directions (Victoria) (No 25); Brown* (2017) 261 CLR 328, 353 [64]; [2017] HCA 43 (Kiefel CJ, Bell and Keane JJ); *Roman Catholic Diocese of Brooklyn, New York v Cuomo* 592 U.S. (2020) Gorsuch J (concurring).

question is whether sub-ss 200(1)(b) and (d) are valid in all their operations. That being so, the issue remains alive even though the particular instruments have been revoked.

142 In *Loielo v Giles*,[60] Ginnane J was concerned with the validity of a curfew imposed under the *PHW Act*. At the time the matter was heard, the curfew had been lifted, although during its currency the plaintiff had lost income on her business as a result of the curfew. As in this case, the government defendants submitted that with the lifting of the curfew the plaintiff had no standing or, alternatively, the proceeding should be dismissed on a discretionary basis. Ginnane J rejected both submissions. On standing because of the economic interest,[61] and on discretion because he did not accept that a declaration (had the plaintiff succeeded) would have had no foreseeable consequences.[62] For reasons I have already given, there is no want of standing. Justice Ginnane's conclusion on the second aspect is directly on point, sound in principle, and I intend to adopt the same course.

143 A person's ability to move about the community and to come and go from their home is a critical right. Although the restrictions imposed fell short of a complete deprivation of liberty as might be authorised under sub-s 200(1)(a), they represent a significant limitation on rights of a kind and extent that have rarely, if ever, been seen in Victoria. In my view, there are no discretionary factors that prevent the litigation and this Court's adjudication on the validity of the Directions from proceeding to completion on their merits.

Plaintiff's submissions in support of grounds

144 The plaintiff accepts that the implied freedom is a limitation on legislative power, but adds that the limitation will flow through and confine the scope of the power to enact delegated legislation or the scope of executive power. The plaintiff also accepts that the analysis must occur by reference to the authorising provision of the Act but submits that in some cases this must, or most appropriately will, occur through the

60 [2020] VSC 722 (*'Loielo'*).
61 Ibid [145].
62 Ibid [265].

prism of the exercise of the power in a given case.

145 The plaintiff submits that, in this case, it is not appropriate to adjudicate on the validity of all of the potential applications of the authorising provisions, she says the Court should instead focus on the application of the provisions in the form of the Directions. She says the provisions are 'open textured' and not facially compliant with the implied freedom and, because of their breadth, must be 'read down' to save their validity. In that context, she emphasises the power in sub-s 200(1)(d) to give 'any direction' so long as it is 'reasonably necessary' to protect health. The requirement that the direction be reasonably necessary provides less protection than the implied freedom which requires the application of structured proportionality. The plaintiff therefore frames the question for decision as being whether the Directions would have been compliant with the implied freedom if they had been enacted as legislation.

146 The plaintiff submits that this question should be answered in the negative. Her primary case involves applying the *McCLoy* test to the Directions themselves, 'as if they were legislation'.[63]

147 I shall return to the plaintiff's argument on whether the Directions are appropriate and adapted to a legitimate end later in these reasons.

148 In the event that the Court accepts the defendants' submission that the analysis should only be applied at the level of the statute, the plaintiff, by way of an alternative submission, says that the provisions are not valid in all of their potential operations and that it is necessary to read them down. She does not submit that the provisions are invalid, but, on this alternative submission, appears to submit that this is so, only because the provisions can be read down.

Defendants' submissions

149 The defendants frame the question as being whether sub-ss 200(1)(b) and (d) operate to infringe the implied freedom across the range of their potential operations.[64] They

63 *APLA* (2005) 224 CLR 322; [2005] HCA 44 (as per Gummow J).

64 *Comcare v Banerji* (2019) 267 CLR 373, 407–8 [50]; [2019] HCA 23 (Gageler J) ('*Banerji*').

submit that the powers in the *PHW Act* are valid without the need to read them down, and that means the plaintiff's case must fail.

150 Adopting the approach taken in *Wotton* and *Palmer*, they submit that the powers are so constrained that their lawful exercise cannot be obnoxious to the freedom, and that an exercise of power that complies with the statutory constraints will always be in compliance with the freedom.

151 In that respect, the defendants point to the following aspects of the scheme that are said to impose constitutionally relevant constraints:

(a) The emergency powers can only be exercised when a state of emergency has been declared and in the context of a public health emergency;

(b) a declaration of a state of emergency is temporally limited;

(c) emergency powers can only be exercised for the narrow purpose of 'eliminating or reducing a serious risk to public health';

(d) in order to exercise an emergency power there must be a specific authorisation under s 199 given to an authorised officer, who the *PHW Act* contemplates will have relevant training and skills to exercise the powers;

(e) the operation of guiding principles in s 9, which form part of the context but which are not mandatory relevant conditions;

(f) the requirement of legal reasonableness; and

(g) the operation of the *Charter of Human Rights and Responsibilities* ('*Charter*').

152 The defendants submit that sub-ss 200(1)(b) and (d) are valid in all their potential operations.

153 The defendants submits that the purpose of s 200 is to protect public health in the face of a serious risk to public health of a kind that warrants the declaration of a state of emergency, and that this purpose is compatible with the constitutionally prescribed

system of representative and responsible government.

154 The defendants submit that the power, exercised consistently with the statutory constraints, will always comply with the implied freedom. They rely on the following seven matters:

(a) The powers to restrict movement, and give directions under sub-s 200(1)(d) are rationally connected to the purpose of protecting public health;

(b) The powers can only be exercised in a state of emergency 'arising from any circumstances causing a serious risk to public health';

(c) The powers are temporally confined to the period in which a declaration of a state of emergency is on foot, which is itself limited to an extendable, but finite period of four weeks;

(d) The powers can only be exercised by an authorised officer who is authorised under s 199 by the CHO. The CHO can give that authority only if the CHO 'believes that it is reasonably necessary to grant an authorisation';

(e) The purpose of the provisions, when read in their context, are narrowly confined to eliminating or reducing the serious public health risk;

(f) There is no obvious and compelling alternative; and

(g) The benefit sought to be achieved is very significant.

155 The defendants further submit that the scope of the powers are limited by general precepts that govern the exercise of statutory powers including that the exercise of powers are confined by the subject matter, scope and purpose of the section; that they should be exercised in a proportionate manner (having regard to s 9 of the *PHW Act*); be logical and rational; and comply with the *Charter*.

156 In the alternative, and on the premise that the constitutional analysis is applied directly to the Directions, the defendants also submit that they are valid.

The Implied Freedom: the principles

157 The Commonwealth Constitution mandates a level of protection for political communication. The protection it affords is implied[65], is not absolute[66] and does not take the form of a personal right.[67] Rather, it manifests itself as a limitation on legislative power. Not every burden will be invalid, only those that cannot be justified because they are not reasonably appropriate and adapted to achieve a legitimate end.

158 The context in which the issue arises is explained in the following passage from *Aid/Watch Inc v Federal Commissioner of Taxation:*[68]

> The provisions of the *Constitution* mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the *Constitution* in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system.[69]

159 Where the validity of an exercise of legislative power is in issue, three questions arise: first, does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the purpose of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Assuming a legitimate purpose, the third question asks whether the law is reasonably appropriate and adapted to serve a legitimate end, in a manner compatible with the maintenance of the constitutionally prescribed system of

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65 *Lange* (1997) 189 CLR 520, 561–2 and 567; [1997] HCA 25 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

66 *McCLoy* (2015) 257 CLR 178, 213–4 [69]; [2015] HCA 34 (French CJ, Kiefel, Bell and Keane JJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 76–7 (Deane and Toohey JJ), 94–5 (Gaudron J); [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 159 (Brennan J), 169 (Deane and Toohey JJ) and 217–8 (Gaudron J); [1992] HCA 45 ('*ACTV*'); *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 299 (Mason CJ), 336–7 (Deane J), 363 (Dawson J) and 387 (Gaudron J); [1994] HCA 44; *Monis v The Queen* (2013) 249 CLR 92, 141 [103] and 190 [267] (Hayne J), 206–7 [324] (Crennan, Kiefel and Bell JJ); [2013] HCA 4 ('*Monis*').

67 *Unions NSW v New South Wales* (2013) 252 CLR 530, 551–2 [30], 554 [36]; [2013] HCA 58 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*').

68 (2010) 241 CLR 539; [2010] HCA 42 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

69 Ibid 555–6 [44] (citations omitted but citing *Lange* (1997) 189 CLR 520 at 557–9; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174–5 [7]–[8], 186–8 [44]–[49]).

government.[70]

160 Whether a law is appropriate and adapted in the requisite sense is to be answered by applying a structured proportionality analysis that examines three components: suitability, necessity and balance.[71] Having identified, in answer to the second question a constitutionally compatible purpose, the next inquiry is to suitability which concerns whether the impugned provisions bear a rational connection to the purpose.[72] Next, the process of structured proportionality, turns to necessity: is there an equally practicable alternative that can achieve the outcome but at less cost to the freedom?[73] This does not involve a search for every alternative that may present itself to achieving the same purpose, but looks for an 'obvious and compelling' alternative that is equally practicable and available.[74] The last limb requires an assessment as to whether the provisions are adequate in their balance.

161 A law is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom.[75] The alternative is not demonstrated by a bare contention that the legislation imposing the burden could have had an express carve out for expressions of political opinion.

162 The requirement that the alternative be 'obvious and compelling' reinforces the idea that at the time of its creation, and in the context in which it was made, the body making the legislation or the decision maker had a clear choice. In every case, especially where what is in issue is a scheme balancing various competing considerations, policy choices will need to be made as to the various components. The Court does not start with a blank canvas and examine all the possible elements that could be brought together in order to craft an alternative and less burdensome rule.

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70 *McCLoy* (2015) 257 CLR 178; [2015] HCA 34; *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555–6 [94]–[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); [2011] HCA 4.

71 *McCloy* (2015) 257 CLR 178, 217 [79]; [2015] HCA 34 (French CJ, Kiefel, Bell and Keane JJ).

72 Ibid 209–10 [54]–[56].

73 Ibid 210 [57].

74 *Unions NSW* (2013) 252 CLR 530, 556 [44]; [2013] HCA 58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis* (2013) 249 CLR 92, 214 [347]; [2013] HCA 4 (Crennan, Kiefel and Bell JJ).

75 *Banerji* (2019) 267 CLR 373, 401–2 [35]; [2019] HCA 23 (Kiefel CJ, Bell, Keane and Nettle JJ).

Equally, neither the body exercising the power, nor the Court in examining alternatives, is required to preference or privilege political communication. The freedom is not a right, and the decision maker is not required to maximise its enjoyment. So, for example, in assessing whether to permit a person to leave their home for exercise, the authorised officer was not required to start with the proposition that freedom of political expression must be given priority.

163 The notion that some leeway is involved is not merely a function of the fact that reasonable minds might differ, but is informed by the constitutional features of a representative democracy. That is why Edelman J explained:

> It is not merely sufficient to identify a law which could achieve the Parliament's purpose to the same degree but with a lesser burden upon political communication. The presence of adjectives such as "obvious" or "compelling" in the descriptions of such alternatives allows latitude for parliamentary choice in the implementation of public policy.[76]

164 As already noted, and putting to one side its potential application to non-statutory executive power,[77] the implied freedom operates as a limitation on legislative power. To that extent, it will bite when the legislation in issue is enacted. However, the impact of the limitation, and the related question of validity, will not fall for adjudication until it gives rise to a concrete dispute capable of being brought by a person with sufficient interest and resolved through the exercise of federal judicial power. Some legislation operates to affect rights, interests, and liabilities once it is made and is capable of giving rise to a concrete dispute. In other cases, that will only occur when a statutory power, conferred under the enabling Act, is exercised. It follows that, depending on the form of the legislation, constitutional questions may not arise unless and until a power conferred by the legislation is exercised.

165 Depending on the nature of the constitutional limitation, a law may be valid in some of its operations, and invalid in others. That is unlikely to be the case where the issue is the existence of a constitutional head of power to enact the law, but may be the case where validity depends on considerations of the law's practical and legal effect, and

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76 *LibertyWorks* [2021] HCA 18, [202].

77 For example under s 61 of the *Constitution*.

thus where the limitation is not absolute and may depend on matters of form. That may be the case in relation to the implied freedom of communication.

166 Even where the constitutional test to be applied is settled, as it is in the case of the implied freedom,[78] these matters have the potential to introduce a number of complexities into any analysis as to validity. First, in a context that involves the exercise of both legislative and executive power – at what point is the constitutional analysis to be applied? Second, where the exercise of power, be it legislative or administrative, is 'distributive' and can have a valid or an invalid operation depending on its context – is the validity of the provision to be saved by a process of 'reading down' or 'disapplication', and if so, is that process one of construction, severance or something else? It is the former question that is critical to the present proceeding.

167 As the following analysis of the cases establishes, for the purpose of the implied freedom, where there is both an exercise of legislative power and administrative power, the *McCloy* analysis is, generally speaking, to be applied at the level of the legislative power. The specific exercise of power at the level of the executive, is relevant only to identify the power in issue, and perhaps illustrate its legal and practical effect. It will also provide the concrete setting for the application of judicial power.

The level of analysis: the authorities

Miller v TCN Channel Nine Pty Ltd

168 *Miller v TCN Channel Nine Pty Ltd*[79] concerned s 92 of the Constitution. The *Wireless Telegraphy Act 1905* (Cth), was a Commonwealth law that regulated the erection and use of telecommunication transmitters. Section 6 of that Act made it an offence to erect, maintain or use a transmitting station without an authorisation. Section 5 conferred a discretion on the Commonwealth Minister to confer an authorisation. One

78 *McCloy* (2015) 257 CLR 178, 200 [23]; [2015] HCA 34 (French CJ, Kiefel, Bell and Keane JJ).

79 (1986) 161 CLR 556; [1986] HCA 60 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ) ('*Miller*').

issue concerned how the discretion in s 5 interacted with s 92 of the Constitution, which prohibits burdens on interstate trade and commerce.

169 The case was complicated by the thicket surrounding s 92, which would not be cleared until *Cole v Whitfield*.[80] However, for present purposes the analysis of Brennan J on the interaction between constitutional protections or freedoms (in *Miller* s 92) and discretionary powers is important. Brennan J came to the question by asking:

> Is the discretion conferred by s. 5 upon the Minister so wide that the Minister may exercise it in a manner inconsistent with s. 92? A discretion which might be exercised in a manner obnoxious to the freedom guaranteed by s. 92 is a discretion wider than the Constitution can support and an attempt to confer such a discretion must fail.[81]

170 Brennan J noted that the discretion was cast in very broad terms and was not confined by statutory criteria. He said:

> Yet the s. 5 discretion must be exercised bona fide in furtherance of the purpose for which it was given. Of necessity, the area of the discretion must be large: the nature of the subject to be regulated requires that the discretion be wide. But it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account. Nor can the discretion be exercised to discriminate against interstate trade, commerce and intercourse. That is because a discretion must be exercised by the repository of a power in accordance with any applicable law, including s. 92, and, in the absence of a contrary indication, 'wide general words conferring executive and administrative powers should be read as subject to s. 92'.[82]

171 He concluded that the discretion was effectively confined, so that an attempt to exercise the discretion inconsistently with s 92 would not only fall outside the constitutional power – but equally outside statutory power. Judicial review is available to restrain any attempt to exercise the discretion in a manner obnoxious to the freedom guaranteed by s 92.

172 As will be seen, that analysis underpins the current understanding of the relationship between a constitutional limitation and the exercise of a discretionary power.

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80 (1988) 165 CLR 360; [1988] HCA 18 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

81 *Miller* (1986) 161 CLR 556, 611; [1986] HCA 60.

82 Ibid 613–4 (citations omitted).

Wotton v Queensland

173 In *Wotton v Queensland*,[83] the plaintiff was on parole following a period of imprisonment. The conditions of his parole, which were imposed pursuant to a broadly expressed statutory discretionary power, included that he not attend public meetings on Palm Island or receive any payment for dealing with the media. He brought a challenge to the conditions in the High Court on the basis that they infringed the implied freedom of communication about government or political matters.

174 In rejecting the plaintiff's challenge, the High Court accepted the submission of the Commonwealth that had the following steps:

(a) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power;

(b) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law;

(c) rather, the question is whether the repository of the power has complied with the statutory limits;

(d) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case does not raise a constitutional question, as distinct from a question of the exercise of statutory power.[84]

175 The High Court accepted further, that if the power or discretion is susceptible of exercise in accordance with the constitutional restriction upon legislative power, then the legislation conferring that power or discretion is effective in those terms. No

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83 (2012) 246 CLR 1; [2012] HCA 2 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Wotton*').

84 Ibid 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

question arises of severance or reading down of the legislation.[85]

Comcare v Banerji

176 In *Banerji*,[86] Gageler J summarised the reasoning in *Wotton.* He said:

> *Wotton v Queensland* establishes that the validity of a law which burdens freedom of political communication by empowering an exercise of an administrative discretion is to be determined by asking in the first instance whether the burden is justified across the range of potential outcomes of the exercise of that discretion. If the burden is justified across the range of potential outcomes, that is the end of the constitutional inquiry. The law is valid and the validity of any particular outcome of the exercise of discretion is to be gauged by reference solely to the statutory limits of the discretion. There is no occasion to consider whether the scope of the discretion might be read down in order to ensure that the law is within constitutional power. There is in consequence no occasion to consider whether a particular outcome might fall within the scope of the discretion as so read down, and there is accordingly no occasion to consider whether a particular outcome falls within the scope of the discretion having regard to the implied freedom.[87]

177 The approach taken in *Wotton* was also recently summarised by four justices of the High Court in *Commonwealth of Australia v AJL20*:[88]

> When the Executive executes a statute of the Commonwealth, as opposed to exercising its common law prerogatives and capacities or whatever authority is inherent in s 61 of the Constitution, the constitutional question is whether the statutory authority conferred on the Executive is within the competence of the Parliament; the statutory question is whether the executive action in question is authorised by the statute. If the statute, properly construed, can be seen to conform to constitutional limitations upon legislative competence without any need to read it down to save its validity, then it is valid in all its applications, and no further constitutional issue arises. The question then is whether the executive action in question was authorised by the statute, with that question to be resolved by reference to the statute as a matter of administrative law.[89]

Palmer v Western Australia

178 The interaction between the implied freedom and administrative decisions was recently considered by the High Court in *Palmer*,[90] which like the present case, involved restrictions imposed under health legislation in response to the COVID-19

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85 Ibid[23].
86 (2019) 267 CLR 373; [2019] HCA 23 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
87 Ibid 421–2 [96] (citations omitted).
88 [2021] HCA 21 (Kiefel CJ, Gageler, Keane and Steward JJ).
89 Ibid [43] (citations omitted) (Kiefel CJ, Gageler, Keane and Steward).
90 [2021] HCA 5 (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

pandemic.

179 Section 56 of the *Emergency Management Act 2005* (WA) ('*the EM Act*') authorised the responsible minister to declare that a state of emergency exists. The minister could only make a declaration if he or she:

> (a) has considered the advice of the State Emergency Coordinator; and
>
> (b) is satisfied that an emergency has occurred, is occurring or is imminent; and
>
> (c) is satisfied that extraordinary measures are required to prevent or minimise –
>
> (i) loss of life, prejudice to the safety, or harm to the health, of persons or animals

180 An emergency was defined to mean 'the occurrence or imminent occurrence of a hazard which is of such a nature or magnitude that it requires a significant and coordinated response'.[91] The meaning of 'hazard' included 'a plague or an epidemic'. A state of emergency declaration remained in force for three days but could be extended for a period of no more than 14 days, and further extended from time to time.

181 During a state of emergency, the *EM Act* empowered an authorised officer to exercise general powers including to 'take, or direct a person or a class of person to take, any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with the emergency'.[92] In addition, the State of Emergency Coordinator[93] acting under s 67 could 'direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area'. Pursuant to that power, the State of Emergency Coordinator issued the *Quarantine (Closing the Border) Directions (WA)* which, subject to some limited exceptions, had the effect of closing the WA border.

182 The first plaintiff was a resident of Queensland and wished to enter Western Australia

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91 *Emergency Management Act* s 3 definition of "emergency" ('*EM Act*').
92 *EM Act* sub-s 72A(2).
93 *EM Act* s 10.

for the purpose of conducting his business operations in that State.[94] Pursuant to the border closure direction, he was refused entry and issued a proceeding in the High Court alleging that the directions contravened s 92 of the Constitution and in particular the 'intercourse' limb of s 92. Following the finding of facts by a judge of the Federal Court on remitter, the following question was stated for the opinion of the Full Court of the High Court:

> Are the Quarantine (Closing the Border) Directions (WA) and/or the authorising *Emergency Management Act 2005* (WA) invalid (in whole or in part, and if in part, to what extent) because they impermissibly infringe s 92 of the Constitution? [95]

183 The High Court answered the question as follows:

> On their proper construction, ss 56 and 67 of the *Emergency Management Act 2005* (WA) in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic comply with the constitutional limitation of s 92 of the Constitution in each of its limbs.
>
> The exercise of the power given by those provisions to make paras 4 and 5 of the Quarantine (Closing the Border) Directions (WA) does not raise a constitutional question.
>
> No issue is taken as to whether the Quarantine (Closing the Border) Directions (WA) were validly authorised by the statutory provisions so that no other question remains for determination by a court.

184 The reasons for that answer were given in four sets of reasons.

185 Chief Justice Kiefel and Keane J held that the principle question reserved for the Court can and should be answered by reference to the authorising provisions of the *EM Act*, rather than by reference to any particular exercise of those statutory powers. In doing so, their Honours applied *Miller* and *Wotton* to conclude that the attack on the direction raised no constitutional question because the constitution arose at the level of the statute and not at the level of the exercise of a power under the statute.

186 Their Honours recognised that '[i]n some cases difficult questions may arise because

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94 The second plaintiff was a company with interests in iron ore projects in Western Australia. The first plaintiff was the Chairman and Managing Director of the second plaintiff.

95 *Palmer* [2021] HCA 5. An additional question about costs also arose.

the power or discretion given by the statute is broad and general.'[96] Self-evidently, Kiefel CJ and Keane J did not regard those difficult questions as arising in the plaintiff's challenge to the *EM Act*. Their Honours applied the implied freedom analysis at the level of the particular provisions of the *EM Act* that had been used to make the directions and found them valid.[97]

187 In addressing the validity of the provisions that authorised a restriction on movement of persons within and into Western Australia, Kiefel CJ and Keane J accepted that s 67 could discriminate against interstate movement by preventing it – to that extent, the provision effects a burden on the freedom.[98]

188 Their Honours noted that the purpose of the provisions of the *EM Act* were to protect the health of residents of Western Australia.[99] They concluded that a law restricting the movement of persons into a State is suitable for the purpose of preventing persons infected with COVID-19 from bringing the disease into the community.[100] Further, the limitations on the exercise of the powers suggest that these measures are a considered, proportionate response to an emergency such as an epidemic. They rejected an argument that there were adequate alternative means to achieve the purpose, and concluded that the provisions of the *EM Act* were adequate in their balance.

189 Gageler J also considered the appropriate level of analysis. He concluded that, in some circumstances, it may be appropriate to converge the analysis by asking the hypothetical question: if the subordinate legislation in issue had been enacted as legislation, would that legislation have been compliant with the constitutional guarantee in issue?[101] He gave two (perhaps overlapping) examples. First, where a statutory provision that is so broadly expressed as to require it to be read down as a matter of statutory construction to permit only those exercises of discretion that are

96 Ibid [68].
97 Ibid [69]–[82].
98 Ibid [72].
99 Ibid [74].
100 Ibid [77].
101 Ibid [124].

within constitutional limits.[102] Second, his Honour observed that it may be prudent to focus on the specific exercise of power if the potential operation is very broad and the specific exercise of power clear and severable. In other words, prudence, informed by the principle that narrowly confines constitutional adjudication to the particular case, might suggest caution in concluding that a broadly expressed general law may be valid across its myriad of potential operations.[103]

190 Like the Chief Justice and Keane J, Gageler J concluded that the analysis was to be done at the level of the statute. He concluded

> The problem with conflating the statutory and constitutional questions in that manner, however, was that treating the Directions as if they had been enacted as Western Australian legislation failed to acknowledge the constitutional significance of critical constraints built into the scheme of the Act which sustained the Directions. The hypothetical analysis simplified the constitutional question to the point of obscuring the manner of its answer.[104]

191 Applying the analysis at the level of the statute, Gageler J upheld the validity of sections 56 and 67 of the *EM Act* insofar as they authorised the giving of a direction prohibiting movement of persons into Western Australia.[105] He observed that the provisions are 'sufficiently constrained in their terms to allow a conclusion to be reached that imposition of a burden of that nature meets the requisite standard of justification across the range of potential outcomes.'[106]

192 In reaching his conclusion, Gageler J noted that ends or purposes of the provisions was managing the adverse effects of a plague or epidemic of a nature that requires a significant and coordinated response.[107] The means by which that was to occur were 'hedged with constitutionally significant qualifications'.[108] He had regard to the need for a declaration of emergency, and the manner of making such a declaration and its

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102 Ibid [122] citing *Miller* (1986) 161 CLR 556, 613–4; [1986] HCA 60; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 373 [104]; [2005] HCA 44 ('*APLA*'); *Wotton* (2012) 246 CLR 1, 9–10 [10]; [2012] HCA 2; *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217, 282 [91]; [2012] HCA 12.

103 *Palmer* [2021] HCA 5, [123].

104 Ibid [126].

105 Ibid [152].

106 Ibid [127].

107 Ibid [153].

108 Ibid [154].

temporal limitations. His Honour concluded:

> What is significant is that the purpose of emergency management is the sole purpose for which the power of direction can be exercised. And the discretion to exercise the power for that purpose is subject to the standard implied condition that it can only ever be exercised by the authorised officer reasonably on the basis of the information available to the authorised officer.
>
> The result is that, whilst the discretionary power of direction can extend to authorise the giving of a direction which on its face or in its practical effect imposes a differential burden on interstate intercourse (which might or might not be in trade or commerce), the power can only ever be exercised reasonably for the sole purpose of managing a designated emergency in a designated emergency area for so long as there is in force a state of emergency declaration, of the continuing need for which the Minister must periodically be stringently satisfied.[109]

193 Justice Gordon noted that the plaintiff did not challenge the validity of ss 56 and 67 of the *EM Act*, nor did the plaintiff contend that the express statutory conditions for the exercise of the power to make the state of emergency declaration under s 56 or the directions under s 67 had not been met.[110] Her Honour applied the approach in *Wotton* to frame the question as being whether, on their proper construction, ss 56 and 67 of the *EM Act* comply with the constitutional limitation, without any need to read the Act down to save its validity in its application to the case at hand. She said that question could be posed as whether the provisions 'by their terms, confer a power that is so constrained that its exercise cannot be obnoxious to the freedom'.[111]

194 Justice Edelman, who also joined in the orders made, addressed the level of analysis somewhat differently. After setting out the stated question and answer given, Edelman J observed that the answer was built upon two premises. First, questions of constitutional validity should be determined at the level of an empowering statute, leaving questions concerning the validity of actions taken under the statute, including regulations, directions and administrative action, to be resolved by reference to whether the valid statute empowers that action.[112]

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109 Ibid [164]–[165].
110 Ibid [200].
111 Ibid [202].
112 Ibid [224].

195 The second, is that the answer given did not 'affirm the validity' of ss 56 and 67 of the *EM Act* 'in all their applications'.[113] He concluded that, in some but not all cases, a court can determine validity of statutory provisions in all their applications.[114] However, a court should rarely adjudicate on validity in that all-encompassing way where 'statutory provisions are open-textured – where their interpretation requires them to be "applied distributively" to numerous different circumstances – and do not expressly incorporate sufficient limitations as to be facially compliant with the *Constitution*'.[115]

196 Within the two extremes of assessing validity based on all potential applications of the provisions or based on the exercise of power in a particular case, Edelman J acknowledged what is in effect a middle ground, which focused on the direction of the general kind made in the particular case. He said the answers given by the Court focused upon the application of the legislation to facts falling within a category based upon circumstances of the same general kind as those before it.[116]

The level of the analysis: the principles

197 It follows from these authorities that, generally speaking, the question is to be asked at the level of the legislation and directed to the particular provisions in issue, and not in respect of the exercise of power purportedly authorised by the legislation. It may be appropriate, or necessary, in some cases to apply the analysis at the level of the executive power. For example, where the power is conferred in very broad terms, such as where there are no statutory criteria and the subject matter is potentially wide, it may be appropriate to converge the analysis by asking the hypothetical: would the exercise of power be valid if it were enacted as legislation?[117]

198 In a challenge based on the implied freedom, the proposition that is sought to be

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113 Ibid [226].
114 Ibid citing *Wotton* (2012) 246 CLR 1; [2012] HCA 2.
115 Ibid [227] (citations omitted).
116 Ibid [230] and [234].
117 *APLA* (2005) 224 CLR 322, 373 [103]–[104]; [2005] HCA 44 (Gummow J); *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 594; [1954] HCA 29 (Fullagar J); *Palmer* [2021] HCA 5, [68] (Kiefel CJ and Keane J) and [122] (Gageler J).

tested, and the first question asked, is whether in all its potential operations, a law is valid, or conversely, whether in one or more of its operations it infringes the implied freedom. In the context of a very broad general power without express limits informed by constitutional considerations,[118] it may not be easy to identify all of the potential operations let alone conclude that in every case the law will be valid. Where the court is faced with a clear and discrete example of its operation, a court 'might well proceed to answer the statutory and constitutional questions compendiously by focusing on the particular exercise of statutory discretion without embarking on a consideration of whether the provision conferring the discretion is compliant or non-compliant in all its applications.'[119]

199 A conclusion that a law is valid in all its operations, though undoubtedly broad, is not as freewheeling as it may sound. First, one is only concerned with the applications or operations that may burden the freedom. In *Palmer*, Gageler J identified the matter in issue as whether the provisions are valid insofar as they impose a discriminatory burden. Here, the issue is whether sub-ss 200(a) and (d) are valid insofar as they may burden political communication. A conclusion that those provisions are valid in all their operations, means, simply put, that if a decision maker stays within the guiderails, or 'hedging duties'[120] set by the legislation, then any exercise of the power insofar as it results in a burden will be justified for the purposes of the implied freedom. At that point, the Constitution can be put to one side and the issue addressed by asking whether the decision maker complied with the essential statutory preconditions. The point being, that at the level of the exercise of power, you do not get to, or more accurately have already passed, the constitutional question because, on its proper construction, a decision that conformed to the statutory power could not be obnoxious to the implied freedom.[121] Of course, the factors that keep a decision within power, including adherence to purpose, proportionality and reasonableness, may not be far removed from those that inform the anterior constitutional question of

118 *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 594; [1954] HCA 29 (Fullagar J).
119 *Palmer* [2021] HCA 5, [123] (Gageler J).
120 *Commonwealth of Australia v AJL20* [2021] HCA 21 [45] (Kiefel CJ, Gageler, Keane and Steward JJ).
121 *Miller* (1986) 161 CLR 556, 611; [1986] HCA 60 (Brennan J).

legislative validity but they remain conceptually distinct.

200 Although the possibility to do so exists, there are a number of reasons why, generally speaking, it will not be appropriate to analyse the freedom at the level of the executive power. They include, first, that it tends to distract from the primary focus of the immunity which is a limitation on legislative power. Second, it heightens the risk of wrongly treating the immunity as a right and not a limitation. As Brennan J said in *ACTV*, 'the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation'.[122] By focusing on the consequences of the exercise of the power and whether it is justified by reference to a given factual context, the analysis is liable to shift towards a rights based framework.

201 Third, and this is a point emphasised by Gageler J in *Palmer,* by 'converging' the analysis and in effect moving straight to the exercise of power, relevant constitutional limitations contained within the statute may be ignored or not given sufficient prominence. As Gageler J observed, the approach may fail 'to acknowledge the constitutional significance of critical constraints built into the scheme of the Act'.[123] Such limits although controlling, may not find expression in the particular exercise of power and may easily be overlooked.

202 Even in those cases, such as *Wotton*, *Banerji* and *Palmer*, where the question of validity was addressed at the level of the statute, it does not always follow that the facts that inform, or form part of, the constitutional test will necessary be irrelevant at the level of the decision maker who exercises the statutory power. For example, in *Wotton* the plurality said that 'it would be incumbent upon the [decision maker] to have regard to what was constitutionally permissible', and the reasoned decision of the decision maker could be the subject of judicial review.[124] In *Banerji*, the plurality concluded that the decision maker did not have to turn his or her mind to the implied freedom

122 (1992) 177 CLR 106, 150; [1992] HCA 45.
123 *Palmer* [2021] HCA 5, [126].
124 *Wotton* (2012) 246 CLR 1, 16 [32]; [2012] HCA 2 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

but added:

> So to conclude does not mean that the implied freedom may not be a relevant consideration in the exercise of different discretions under other legislation. Whether it is may depend on the terms of the legislation and the nature and scope of the discretion.[125] .

203 Where the implied freedom is relevant in this limited way, the distinction between the constitutional and statutory may seem a little hazy. However, even in those cases where the implied freedom is relevant to the decision maker in some way, it does not mean that a court is to ask itself whether had the decision been primary legislation it would have been invalid.[126] In this case, the plaintiff does not seek to challenge the Directions on judicial review grounds of the kind mentioned in *Wotton* and *Banerji*. Her case requires this Court to apply the constitutional test immediately and directly to the Directions.

204 The individual circumstances in which the exercise of power arises are also relevant in other ways. First, they ensure that the controversy as to validity that the court is called on to determine is not theoretical or abstract and relatedly, that the moving party has a sufficient interest in the subject matter of the proceeding. As well, they may provide an example of the practical and legal effect of the law that may not be obvious from the terms of the legislation.[127] For that reason, even where the question is asked of the legislation, it is necessary to ask whether the law is valid insofar as it involves the exercise of the particular power in issue. That limitation can be seen in the answers given in *Palmer*.[128] The natural inclination to focus on the facts of the case at hand must not distract from the ultimate question of legislative validity.

The level of analysis: applied

205 The plaintiff submits that this is one of those occasions where the analysis should be applied at the level of the Directions. I disagree. Authority, and in particular *Palmer,* is against the plaintiff's submission on this critical point.

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125 *Banerji* (2019) 267 CLR 373, 406 [45]; [2019] HCA 23 (citations omitted) (Kiefel CJ, Bell, Keane and Nettle JJ).

126 *APLA* (2005) 224 CLR 322, 373 [103]–[104]; [2005] HCA 44 (Gummow J).

127 *Brown* (2017) 261 CLR 328, 360 [90]; [2017] HCA 43 (Kiefel CJ, Bell and Keane JJ).

128 See also formulation of Gageler J and Edelman J in *Palmer* [2021] HCA 5.

206 It is convenient to address separately the powers in sub-ss 200(1)(b) and (d) of the *PHW Act*.

207 The power in sub-s 200(1)(b) to restrict movement is not broad or general in the sense described by Kiefel CJ and Keane J in *Palmer*. Indeed, its terms are very close to s 67 of the *EM Act*. Of course it has the potential for a very wide ranging operation, and the forms in which it might be exercised might vary considerably depending on the circumstances. Movement may be restricted directly, by requiring people to stay at home or not leave a defined area, or indirectly, for example by closing shops, businesses or schools. However, the power is clear, namely to restrict movement short of detention. The criteria, the context in which the power arises, and the manner of its exercise is tightly prescribed. The power is not limited merely by general conceptions of purpose, scope and context.

208 Further, to accept the plaintiff's invitation to analyse the Directions themselves in terms of the implied immunity would downplay the 'constitutional significance of critical constraints built into the scheme' which are discussed below.[129] The only scope for invalidity is in respect of a burden that is within the decisional area authorised by the legislation but nevertheless not justified under the Constitution having regard to the implied freedom. The starting point of any analysis must be that there is compliance with the *PHW Act*, and therefore the limitations found in the Act are crucial. In that context, the constitutional question is whether a decision authorised by the *PHW Act* under sub-s 200(1)(b) can be obnoxious to the implied freedom.

209 As the defendants submitted, no member of the Court in *Palmer* determined the validity of the directions by directly applying the *McCloy* test to them. The plaintiff relies on the separate reasons for judgment of Gageler J and Edelman J, but neither supports her approach.

210 As already noted, Gageler J did not apply the 'composite hypothetical approach', largely because the powers in the two relevant sections of the *EM Act* were hedged

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129 *Palmer* [2021] HCA 5, [126] (Gageler J).

with significant limitations. The approach taken by Edelman J, which was somewhat qualified when compared with that taken by the other members of the Court, also applied the test to the statute. The limitation his Honour adopted was by confining the relevant operation of the statute to a state of emergency constituted by a hazard in the nature of a plague or epidemic, and which was undertaken to prevent loss of life or threat to health and safety. In doing so, Edelman J identified what he considered to be the relevant operation of the statutory power. That relevant operation was not the making of the specific direction but was the exercise of the power in s 67 in an emergency arising from a pandemic.

211 In my opinion, the analysis adopted in *Palmer* must be applied, and the constitutional questions relevant to a restriction on movement imposed under sub-s 200(1)(b) must be asked at the level of the statute.

212 The power in sub-s 200(1)(d) is perhaps of a different kind to that in sub-s 200(1)(b) as it authorises 'any direction' that meets the statutory criteria. There are two reasons why it may not be prudent to assess the validity of sub-s 200(1)(d) in relation to all its potential operations. First, the power is a very general power. It is difficult to identify all of the kinds of directions that might be made under that paragraph, and no reason to conceive that its potential operation is limited to making directions of the kind seen in the Directions. For example, it is conceivable that a direction under sub-s (d) might specifically target communication ranging from directions to avoid misleading or false representations about vaccines or cures, to more broad directions designed to avoid undercutting government health messaging. Second, because the Directions are also supported by sub-s 200(1)(b), any success that the plaintiff may have in confining sub-s 200(1)(d) would not avail her.

213 However, ultimately I am of the view that the validity of any burdens on political communication that sub-s 200(1)(d) might impose can and should be analysed at the level of the statute. In every case, the power in sub-s 200(1)(d) is significantly constrained. Although it authorises 'any other direction', the breadth of the power is immediately cut down by the requirement that the authorised officer believes that the

direction is reasonably necessary to protect public health.

214 The power in sub-s 200(1)(d) is in some respects not dissimilar to the power to place conditions on parole considered in *Wotton*. In that case, the section authorised conditions 'the [parole] board reasonably considers necessary'.[130] *Banerji*, concerned prohibitions on public servants expressing political opinions even though they were not enforceable under the criminal or civil law. Gageler J observed that the power conferred a discretion that was capable of imposing a direct and substantial burden on political communication.[131] Nevertheless, the implied freedom analysis was applied at the level of the statute.[132]

215 The defendants submit that sub-s 200(1)(d) is not engaged and the case can be disposed of without addressing it. The relevant restrictions in the present case, namely the requirement to stay home, the distance rule, the time rule and the limits on public gatherings, are all supported by sub-s 200(1)(b). For that reason, if sub-s 200(1)(b) is valid in all its potential operations, it would not matter whether there may be an operative constitutional limit on sub-s 200(1)(d). There is thus some force in the defendants' submissions. Nevertheless, it is convenient to also address sub-s 200(1)(d), as arguably some aspects of the Directions are based on that general power and the matter has been fully argued. In many respects the argument concerning both provisions significantly overlap.

216 The plaintiff submits that even when analysing the legislation, it is appropriate and necessary to have regard to the particular terms of the Directions and their impact on political communication. She says that this approach is supported by *Palmer*. In that respect she says that, when in the reasons of Kiefel CJ and Keane J, their Honours address adequacy of balance, their Honours say they 'accepted that the restrictions are severe' but justified.[133] The plaintiff submits this is a reference to the particular restrictions in place, and demonstrates that the particular exercise of power is relevant

130 *Wotton* (2012) 246 CLR 1, 15 [26]; [2012] HCA 2 (French CJ, Gummow, Hayne, Crennan and Bell JJ).
131 *Banerji* (2019) 267 CLR 373, 422 [97]; [2019] HCA 23 (Gageler J).
132 Ibid 405–6 [44] (Kiefel CJ, Bell, Keane and Nettle JJ).
133 *Palmer* [2021] HCA 5, [81].

to the reasoning.

217 I reject that submission. The reference to 'the restrictions' being severe is plainly a reference to the kind of restrictions authorised by s 67 of the *EM Act*. That is made clear by their earlier observation that the validity 'can and should be answered by reference to the authorising provisions of the *EM Act* rather than by reference to any particular exercise of those statutory powers'.[134]

218 To similar effect, Gordon J's reference to the particular facts of the pandemic (as found by Rangiah J) was no more than an example of the type of pandemic that might need a response under the *EM Act* and the difficulty of crafting an alternative scheme in that context.[135] As already observed, none of the justices treated the facts of the particular decisions as relevant to the validity of the provisions.

Are sub-ss 200(1)(b) and (d) valid in all their relevant operations?

219 Although Directions No 14 recites both sub-ss 200(1)(b) and (d), the critical burden of the direction is to restrict the movement of those persons who are covered by it. In many ways, the statutory powers in issue in this case, and the context in which they may be exercised, closely resemble those considered by the High Court in *Palmer*. I regard both the reasoning in *Palmer* and the outcome in that case, as of direct relevance to the issues in this case. In short, at the level of the respective statutes I am unable to distinguish *Palmer*. I shall refer to aspects of the reasoning in *Palmer* when dealing with the various issues.

Burden

220 The provisions are capable of burdening political communication.

221 It may be accepted that powers to restrict the movement of people, and making other directions that a government official considers reasonably necessary to protect the public, have the potential to significantly limit political communication.

222 A restriction on movement may impinge on political communication in at least two

134 Ibid [63].
135 Ibid [208]–[209].

ways. First, political communication is often expressed collectively by coming together to protest. Insofar as a restriction on movement prevents joining with others, political communication may be significantly limited.[136] Second, going into public places may provide the opportunity for political expression in a way that staying home cannot, and the mere fact of being present may communicate a political opinion.[137] The silent vigil of the Quakers provides an example. Confining people to their homes or imposing curfews is often enough seen as an instrument of avoiding or repressing dissent or expressions of political opinion.

Purpose

223 In this case, the purpose of s 200 must be discerned from the context as a whole. It is not informed simply by a bland recitation that its purpose is the protection of public health or the avoidance of public health risks. The purpose is to reduce or eliminate serious public health risks in the context of an emergency that has been declared by a responsible minister and reported to the Parliament. It is not in contest that the purpose is compatible with the maintenance of responsible and representative government.

224 In *Palmer*, although the *EM Act* was capable of applying to various emergencies, the issues were confined to the power to give directions to prohibit the movement of persons within, into, or out of the emergency area, in the context of an emergency arising from a hazard relevantly defined to include a plague or an epidemic.[138]

225 The High Court held that the protection of the public from infectious disease or managing the adverse effects of a plague or epidemic of a nature that requires a significant and coordinated response was a compatible purpose.[139] The same holds true for sub-ss 200(1)(b) and (d) of the *PHW Act*.

226 Indeed, public health and safety in the face of a pandemic of the magnitude and

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136 *Brown* (2017) 261 CLR 328; [2017] HCA 43 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

137 *Levy v Victoria* (1997) 189 CLR 579, 595; [1997] HCA 31 (Brennan CJ).

138 *EM Act* ss 3, 56, 67.

139 *Palmer* [2021] HCA 5, [74]–[75] (Kiefel CJ and Keane J), [153] (Gageler J), [205] (Gordon J), [280] (Edelman J).

danger involved here is a purpose of government of the first order. Its importance and the lengths that a government may go to avoid such risks is demonstrated by the fact that quarantine, and the executive detention that it may involve, is an exception to the basal principle that the power to order that a citizen be involuntarily confined in custody is part of the judicial power exercisable as punishment on conviction for a criminal offence.[140] The importance of protecting the community from infectious disease can, in an appropriate case, justify legislation authorising the deprivation of liberty at the hands of the executive.

Justification: are the provisions appropriate and adapted?

227 The ultimate question at this point of the analysis is whether the provisions are appropriate and adapted. As will appear, it is my view, that sub-ss 200(1)(b) and (d) have a confined scope that ensures that any exercise of those powers is tailored to meeting the statutory purpose. The question of justification is not whether a restriction on movement is justified or might be imposed differently, but whether restrictions on movement that are made in an emergency, pursuant to an authorisation under s 198 and which the authorised officer considers is reasonably necessary to protect public health, is justified. In considering questions of justification, it would be wrong to analyse the powers as if they were absolute.

Suitability

228 It has long been understood that a means of reducing infection in the context of infectious disease is preventing people coming into contact with infected people by confinement or by restricting movement. As Latham CJ observed in *McCarter v Brodie* the essence of quarantine is that 'the actual movement of persons ... is restricted or altogether prohibited'.[141]

229 In Victoria, restrictions on movement, short of detention, has a long and relevant history. In 1919 to 1920, the world was afflicted by an influenza pandemic of influenza

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140 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

141 (1950) 80 CLR 432, 455; [1950] HCA 18.

A(H1N1) or 'Spanish flu'. The death toll reached tens of millions of people.

230 In order to control the spread of infectious disease, the *Health Act* 1915 was amended by the *Health Act (No 2)* 1915. Among other things, the amendments allowed for regulations to be made prescribing the conditions and circumstances under which 'carriers' or 'contacts' may be isolated or required to submit to such treatment as may be specified by an officer of the Department of Public Health who is a medical practitioner or by an officer of health of a council. A 'contact' was defined to mean:

> any person who within the previous twenty-one days has been in contact with or in close proximity to a person suffering from a dangerous infectious or contagious disease or who has been in any place specified under the provisions of section one hundred and seventy-six of the Principal Act or in any house tenement or premises where there has been within the previous twenty-one days a person suffering from a dangerous infectious or contagious disease.[142]

231 The *Health Act* 1915 was further amended by the *Health Act* 1918 to address the emerging threat of the Spanish flu. It conferred on an official the power to declare:

> any specified area to be an infected area; and no person 'shall leave such area until the said chairman is satisfied that such person is not liable to convey any dangerous infectious or contagious disease; and the said chairman may take such steps as are necessary to prevent any person unlawfully leaving such , area or to enforce the return to such area of any person who unlawfully leaves the same or to secure the isolation of such person in some other place.

232 Regulations were made closing down 'all theatres, picture theatres, music or concert halls, and all public buildings where persons assemble for purposes of entertainment of instruction', within a 15-mile radius from the Post Office at the corner of Elizabeth and Bourke Streets. These regulations were then applied to any 'infected area' across the state, which was to be a 15-mile radius around where someone had been infected.[143]

233 By further regulations, it was provided that persons were deemed to 'assemble in excessive numbers when more than ten persons congregate in a manner so as to leave

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142 *Health Act* 1915 *(No 2)* s 4.

143 Victorian Government (1919) Government Gazette, no. 16, p. 207; Victorian Government (1919) Government Gazette, no. 18, pp. 251–252; See *Ben Huf and Holly Mclean, 'Epidemics and Pandemics in Victoria: Historical Perspectives'* (Research Paper No 1, Parliamentary Library and Information Service, Parliament of Victoria, May 2020).

less than 25 superficial feet available for each individual present'.[144] On 12 February 1919, all other bars, registered clubs and bottle shops were closed and on 20 February, group meetings of larger than 20 were prohibited, except in churches (provided facemasks were worn), workplaces or, oddly, given the closure of drinking in hotels, restaurants and dining rooms.[145]

234 These regulations, made more than a century ago, make the obvious point that restricting movement is seen to be an effective means of supressing the transmission of certain kinds of infection. It is certainly rationally connected to the purpose. Further, the movement of people may be restricted by requiring people to stay in certain places or locations, or by reducing the type and range of places where people may go or gather, such as retail shops, hotels, restaurants, businesses, schools and the like. Sub-sections 200(1)(b) and (d) authorise either or both mechanisms.

235 Given the nature of an emergency that gives rise to a serious risk to public health and the state of knowledge about the means by which the serious risk might be eliminated or abated, a general power, such as that given by sub-s 200(1)(d), to make any direction that an authorised officer believes to be reasonably necessary, is rationally connected to the achievement of the legitimate purpose.

236 The manner of the exercise of the powers also ensures that they remain faithful to the compatible purpose and reinforce their suitability.

237 First, it is plain from its heading and its text, that s 200 authorises 'emergency powers'. In order for the power to be enlivened, the Minister must have made a declaration of emergency arising from circumstances causing a serious risk to public health.

238 The requirement that there be an emergency and the repository of the powers are as

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144 Victorian Government (1919) Government Gazette, no. 27, 579.

145 Victorian Government (1919) Government Gazette, no. 35, 661; Victorian Government (1919) Government Gazette, no. 18, pp. 251–252; See *Ben Huf and Holly Mclean, 'Epidemics and Pandemics in Victoria: Historical Perspectives'* (Research Paper No 1, Parliamentary Library and Information Service, Parliament of Victoria, May 2020).

important as they were in *Palmer*.[146] The need for an overarching declaration of emergency emphasises that the powers that are authorised arise in a context where a coordinated response and substantial resources may be required to meet a particular and serious challenge. Although the term 'emergency' is not defined, it is plainly not without content. The contrast with public health orders, which provide for less drastic measures, and which are not subject to the same limits, is instructive as to the scope of the provision. Seen in their context, the emergency powers are available where the other, less burdensome or more limited and targeted powers under the *PHW Act* may not suffice.

239 Conferring the power on a minister, who is expressly required to report to the Parliament reflects that, within constitutional structures, it is the executive that 'is the arm of government capable and empowered to respond to a crisis'.[147] Importantly, s 198 requires that the Minister consult, and that the declaration be published and reported directly to Parliament.

240 It is also important that the geographic area affected must be identified and the time period in which a state of emergency may subsist is limited, with the effect that the time in which emergency powers may be exercised is also circumscribed.[148] Although the exercise of emergency powers may have a profound effect, their operation cannot continue beyond the emergency period. The emergency powers do not represent ongoing statutory powers that are available to be exercised from time to time as the executive sees fit. The making of a declaration is amenable to judicial review.[149]

241 Second, in order for emergency powers to be exercised, the CHO must authorise an authorised officer to exercise them. That power is closely tied to the need to address the emergency. For that reason, the exercise of the power is tethered to the fulfilment

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146 [2021] HCA 5, [77] (Kiefel CJ and Keane J), [155]–[158] (Gageler J); [174], [207]-[208] (Gordon J) and [283] (Edelman J).

147 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [233]; [2009] HCA 23 (Gummow, Crennan and Bell JJ); *Palmer* [2021] HCA 5, [155] (Gageler J).

148 *Palmer* [2021] HCA 5, [77] (Kiefel CJ and Keane J), [159]–[160] (Gageler J), [175] and [207]–[208] (Gordon J) and [284] (Edelman J).

149 *Wotton v Queensland (No 4)* [2015] FCA 1075 (Mortimer J).

of the legitimate purpose.

242 Third, sub-ss 200(1)(b) and (d) themselves contain important limitations.

243 The power to restrict movement, like the power to detain, is purposive and, although sub-s 200(1)(b) is not expressly subject to a requirement that the restriction be reasonably necessary, it can only be exercised where the CHO has given an authority under s 199. It follows that the burden will arise only where the direction or requirement is necessary, in the context of the relevant serious risk to public health.

244 The requirement in (d) that the direction be reasonably necessary is also important. Although that requirement is not synonymous with 'reasonably appropriate and adapted', it sets a high bar and was treated by the plurality in *Wotton* as being 'akin' to the constitutional requirement.[150] In that case, the requirement that the exercise of power be reasonably necessary for the achievement of the legitimate purpose kept the Act within the limits of the constitutional limitation on legislative power.

245 In considering the limitations that exist, I take into account the precepts that generally govern administrative decisions. They include considerations of reasonableness,[151] logic and rationality,[152] and absence of an extraneous purpose.[153] In doing so, I reject the submission of the plaintiff that the only relevant limitations are those appearing expressly in the legislation being scrutinised. In *Miller*, Brennan J observed the potential overlap between statutory and constitutional questions, and the extent that the requirements of a lawful decision served to keep any exercise of power within constitutional bounds.[154] In *Palmer*, Kiefel CJ and Keane J referred to the fact that the power to restrict movement had to accommodate a requirement that it be exercised proportionately.[155]

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150 *Wotton* (2012) 246 CLR 1, 16 [32]–[33]; [2012] HCA 2 (French CJ, Gummow, Hayne, Crennan and Bell JJ).
151 *Banerji* (2019) 267 CLR 373, 418 [84]; [2019] HCA 23 (Gageler J).
152 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350 [26] and 351 [30]; [2013] HCA 13 (French CJ).
153 *Thompson v Randwick Municipal Council* (1950) 81 CLR 87; [1950] HCA 33 (Williams, Webb and Kitto JJ).
154 (1986) 161 CLR 556, 613–5; [1986] HCA 60.
155 [2021] HCA 5, [80] (Kiefel CJ and Keane J). See also [161]–[164] (Gageler J), [176] and [207]–[208] (Gordon J) and [285] (Edelman J).

246 In my view, the provisions are suitable in the relevant sense.

Necessity

247 Under this limb of the analysis, the question is whether there are obvious and compelling alternatives that would impose less of a burden. It is at this point, that the plaintiff places much of her argument at the level of the Directions. She had little to say in relation to the necessity of the statutory provisions.

248 At the level of the statute, it is untenable to suggest that express carve outs from the power to restrict movement or give other directions so as to allow for persons to engage in political communication would give effect to the protective purpose to the same degree.[156] The insertion of the limitation proposed by the plaintiff, would in effect, expressly qualify the powers in sub-ss 200(1)(b) and (d), so that they could only be exercised in a way that allowed for the expression of political opinion. This underestimates the difficulty of defining what would qualify as political communication.[157] Gleeson CJ referred to the vagueness of concepts such as 'political debate' and words spoken in 'the course of communication about governmental or political matters.'[158] Seeking to explain such concepts in the context of directions designed to avoid interpersonal interaction is obviously fraught. It is equally not practicable to allow people to conduct political speeches and distribute political material without restriction, and at the same time attempt to minimise or avoid interactions with other people.

249 Moreover, a carve out for expressions of political opinion would involve an exception that is greater than that which the Constitutional freedom protects. The Constitution affords no right to engage in political communication and only limits burdens that are unjustifiable in the relevant sense. Qualifying the exception to accord with the freedom so as to catch only unjustified limitations would however, only increase the uncertainty of the provisions.

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156 Ibid [80] (Kiefel CJ and Keane J).

157 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 89 [218]; [2013] HCA 3 (citations omitted) (Crennan and Kiefel JJ);

158 *Coleman v Power* (2004) 220 CLR 1, 30 [28]; [2004] HCA 39 (Gleeson CJ).

Adequate in its balance

250 The plaintiff submits that stepping back and looking at the means by which the purpose is sought to be achieved, the provisions simply go too far. I cannot accept that submission.

251 Sub-sections 200(1)(b) and (d), when read in their context, and with all of the limitations that are attached, are plainly a justified pair of provisions well calibrated to meeting the challenges that might arise in dealing with a serious threat to public health that gives rise to an emergency, and which calls for the exercise of emergency powers.

252 It follows that no question of reading down arises. Insofar as the emergency powers in sub-ss 200(1)(b) and (d) might authorise a burden on political communication, then provided that there is compliance with the statutory restrictions, both express and implied, the burden will be justified and no invalidity arises. To adopt the language from *Miller*, the terms of the provisions are so constrained that their exercise cannot be obnoxious to the implied freedom.[159]

253 Acceptance of the plaintiff's submissions would require the Court to accept that even where: the Minister has, on the advice of the CHO, declared a state of emergency; the CHO has considered it necessary to eliminate or reduce a serious risk to public health to authorise a properly trained and qualified person to exercise the emergency powers; and an authorised officer has exercised the powers in accordance with the *PHW Act*, the Parliament of Victoria was precluded by the implied freedom of political communication from empowering the authorised officer to impose such restrictions without expressly allowing for the expression of political opinion. The submission cannot be accepted.

254 It follows that the provisions are valid in all their potential operations. There being no separate legislative challenge, the proceeding must be dismissed.

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159 (1986) 161 CLR 556, 607; [1986] HCA 60 (Brennan J); *Palmer* [2021] HCA 5, [202] (citations omitted) (Gordon J).

Alternative – are the Directions valid?

255 In case I am wrong about the level of analysis, I turn to consider the validity of the Directions using the methodology and level of analysis that the plaintiff invites this Court to adopt. That is, at the level of the Directions themselves.

256 The plaintiff submits that the Directions impose a burden on political communication and that they could, and should, have been drafted so that a person could engage in political communication in three alternative ways, which are reflected in the declarations that she seeks. They are:

(a) Permitting a person to engage in political communication at the same time, and subject to the same limitations, as apply to existing permitted reasons to leave home;[160]

(b) Providing for engagement in political communication as an additional permitted reason to leave home, again subject to the same conditions;[161] and

(c) Allowing people to organise and attend public gatherings for the purpose of engaging in political communication.[162]

257 She submits that the evidence establishes that these alternatives could have been permitted with no additional transmission risk or, if they did give rise to any additional risk, that risk could effectively be managed to an acceptable level as demonstrated by the conditions surrounding other permitted reasons to leave the home.

258 The first two of the plaintiff's formulations relate to what she described as 'solitary political communication', that is, they involve a person leaving their place of residence and engaging in political communication by themselves, or perhaps with one other person. The example given was a person leaving their home to erect a protest sign outside their home. The first was described in argument as the 'dual purpose' model,

160 Declaration 4 FAOM referable to Directions No 14 Cl 5(1) and Cl 10.
161 Declaration 3 FAOM referable to Directions No 14 Cl 5(1) and Cl 10.
162 Declarations 5, 6 and 7 FAOM referable to Directions No 14 Cl 11(3) and Stay Safe Directions Cl 5(1) and Cl 11(5).

in that, it allows for the combination of political expression and an existing permitted purpose.

259 The third formulation involves public gatherings, and again, she submits that by failing to permit people to gather to engage in political communication, it rendered each Direction invalid, as it offended the implied freedom.

260 The existence of these three alternatives are, most clearly, relevant to the question of whether there are obvious and compelling alternatives to the impugned Directions that would be less burdensome on the implied freedom. That is, they are primarily relevant to the question of necessity. However, the plaintiff also submits that, in some respects, they are relevant to whether there is a rational connection between the Directions and the freedom (suitability), and whether the Directions simply go too far (balance). As is logical, many of the factors that led me to conclude that the statutory provisions were valid will apply with equal force to the Directions.

Burden

261 The defendants accept that Directions No 14 burdens political communication insofar as it prevents persons leaving their home, and therefore prevents them engaging in political opinion away from their home. They were correct to do so.

262 The fact that persons are allowed to leave for one or more specified reasons does not increase or ameliorate the burden, although obviously they make the requirement to stay at home less onerous and more practicable, a matter to which I shall return.

263 Further, the restrictions on public gatherings in both Directions No 14 and the Stay Safe Directions, which do not permit a gathering for the purpose of engaging in political communication also burdens the freedom.

264 The defendants submit that although there is a burden, it is significantly qualified.

265 First, it is limited as to time. The Directions can only remain in force for the duration of a declaration of emergency which is limited to four weeks. Although that period can be extended, it remains finite, it was no more than a total of six months as at the

date Directions No 14 was made, but this has subsequently been extended to 21 months.

266 Second, they say any burden is indirect. The Directions do not target speech and any burden is merely a corollary or consequence of a general ban on leaving home.

267 Third, they say that the Directions No 14 does not limit the many ways of engaging in political communication from home, a matter significantly advanced by social media.

268 Fourth, as already addressed above, they submit that Cl 5 of Directions No 14 does not prohibit engaging in political communication at the same time as one of the permitted reasons. That is, they submit that the dual purpose model is already allowed for under the Directions.

269 In my opinion, Directions No 14 and, to a lesser extent, the Stay Safe Directions burden political communication in a significant way even though they do not do so directly and suppression of political expression is not a purpose or objective of the Directions. Although the burden is temporally limited, nevertheless it erects a significant obstacle to engaging in political activity. They condition the time, place and, to an extent, the manner of political communication.

Purpose

270 The defendants submit that the Directions are made for a compatible purpose. The plaintiff does not contest that proposition. I am satisfied that the Directions were made for the purpose of combating, by eliminating or reducing, a serious public health risk constituted by the COVID-19 pandemic and that this purpose is compatible with the Constitution, and the effective functioning of the system of representative and responsible government manifested in the structure and text of the Constitution.[163]

271 The Directions conform to the purpose of the statutory provisions and are compatible on the same basis.

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163 *Banerji* (2019) 267 CLR 373, 441–2 [164]; [2019] HCA 23 (Edeleman J).

Suitability

272 The plaintiff submits that insofar as Directions No 14 prevents a person leaving the home for the purpose of engaging in political opinion, whether in combination with a permitted purpose or on its own, Directions No 14 lacks a rational connection with its purpose of reducing the risk of transmission. That is because, she submits, the evidence showed:

(a) that it is not the reason people leave but what they do once they are outside of the home that informs risk;

(b) leaving to engage in political opinion is no riskier, in terms of transmission risk, than any of the permitted reasons, and therefore it is irrational to allow exercise or buying takeaway food but not allow solitary political communication; and

(c) any risk could be managed to an acceptable level by the imposition of conditions of the kind imposed on existing permitted reasons.

273 The defendants submit that the Directions are capable of achieving their purpose by limiting the extent to which persons come into close contact with each other and therefore reduce the risk of exposure and transmission.

274 In my opinion, the Directions bear a rational connection to the achievement of their purpose. First, they restrict the reasons for leaving home and therefore the occasions on which people might leave their home and interact with other persons. In the context of a very infectious disease, airborne and aerosol transmission, and pre-symptomatic and asymptomatic transmission, it is rational to require everyone to stay at home so as to minimise interactions. The existence of some exceptions to the general requirement to stay home does not render the failure to include one touching on political communication irrational, or sever the connection that the ban has to the attainment of the purpose.

275 Equally, it is rational to limit the circumstances in which people may gather both in private and in public. Public gatherings provide a clear opportunity for transmission, including in the case of outdoor gatherings. The evidence showed that, in 2020,

outdoor gatherings presented a significantly lower risk than indoor gatherings, but they were not without risk. I note the risk has changed with the Delta variant.

276 It is also to be recalled that the plaintiff does not contend that the Directions are not authorised by the *PHW Act* in its terms. She does not contend that the Directions are legally unreasonable, made for an improper purpose or otherwise invalid. Although these matters are not precise analogues for the constitutional question of suitability in the context of the implied freedom, given that the *PHW Act* has a relevant single purpose of addressing a serious risk to public health and safety in the context of an emergency, it is impossible to see how a ban on leaving home (which is the relevant burden here) is not suitable.

277 As Edelman J explained in *LibertyWorks*:

> considerations of overreach are irrelevant to this stage of the structured proportionality analysis. Considerations that might suggest overreach are part of the assessment of whether the means adopted were reasonably necessary. They are not part of the assessment of suitability. Even provisions which apply their purpose in an overreaching manner are, almost by definition, rationally connected with their purpose.[164]

278 The Directions are suitable in the relevant sense.

Necessity

279 In my opinion, the hypothetical alternatives of either expressly allowing a dual purpose or adding engaging in political communication to the existing Directions, does not create an obvious and compelling alternative that is equally as effective as the Directions.

280 Dealing with her first two options which would allow a person to leave their residence for the purpose of engaging in solitary expression of political opinion, the logic underpinning her argument was that Directions No 14 allows persons to leave their home for a variety of reasons that balance meeting the needs of persons and the risk of spreading infection. The factual premise to the argument is that the risk of allowing people to leave for a specified reason would not change if people were allowed to

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164 *LibertyWorks* [2021] HCA 18, [239] (citations omitted).

leave for dual reasons, or the additional reason of engaging in political communication, or the risk could be managed.

281 In overview at the factual level, she submits that:

(a) there is no evidence that leaving home for the reason of engaging in political communication, of itself creates a higher risk of contracting or transmitting COVID-19 than any other reason permitted by Directions No 14 and the Stay Safe Directions;

(b) the evidence establishes that the purpose of a particular activity does not affect its underlying risk profile save to the extent it might provide information about conduct. What matters when it comes to risk, is the person's conduct/behaviour (including whether it is possible to engage in the activity while socially distanced and wearing a mask), the duration of the activity, and the physical environment in which the activity is conducted;

(c) the evidence demonstrates no rational or scientific basis for prohibiting a person who seeks to leave their home for a permitted reason from doing so if that person also seeks to leave for the reason of engaging in political communication;

(d) the evidence demonstrates that there is no scientific basis for prohibiting political communication while allowing other exceptions to the Directions, such as leaving the home to purchase takeaway coffee; and

(e) the evidence does not establish that, simply by adding any additional reason to leave home or exception to the public gathering restrictions, the risk of transmission would necessarily be greater.

282 The plaintiff relies on the evidence of Dr Alpren to establish that engaging in political communication per se does not increase the risk of transmission, and that in respect of a person who is otherwise complying with the applicable rules, there is 'no scientific basis' for concluding that the person ought to be treated differently on the basis that

they also intend to wear a t-shirt or hold a sign containing a political message.

283 The plaintiff submits that the risk of transmission is addressed by physical distancing, and by reducing the opportunity for persons to be in proximity with other persons. She says that there is no epidemiological reason to distinguish between leaving home for political communication (which was not permitted) and at least some of the other reasons for which those in the restricted area were permitted to leave. In that respect, she says that Dr Alpren accepted that a person who left their home to purchase takeaway coffee from a local café would be more likely to interact with others than a person leaving their house solely to place a protest sign on the edge of their street.

284 She says that providing for an additional reason to leave would not 'necessarily' have diluted the effectiveness of the Directions. In that respect, she refers to Professor Bennett's evidence that movement of itself does not increase the risk of transmission.

285 I reject the submission. As Dr Alpren observed, adding to the reasons that a person may leave their home may result in people leaving home more frequently and give rise to an increased risk of transmission. In this context, it is to be recalled that the disease was known to be highly infectious and there was significant community transmission at the time Directions No 14 was made. A single infected person can cause an outbreak. The ability to leave to engage in political communication adds a 'pull factor' that is not found in the Directions. To allow a person to leave for the avowed purpose of engaging in political communication may add an incentive to leave the home on one or more occasions than they would otherwise have left.

286 To the extent that the argument is premised on the reason a person leaves and their conduct being independent variables, I reject it. As Professor McLaws said, the purpose for which a person engages in conduct may tell you something about what the conduct might be. I accept that evidence. It is not to the point that it is possible to conceive of expressions of political opinion that are solitary and are less risky than some forms of exercise. It is equally possible that an individual protester may engage in yelling or chanting or, even if silent, serve as a focal point for interactions with other

members of the community who may agree or disagree, perhaps strongly, with the message being propagated.

287 Testing the risk of transmission by comparing particular scenarios such as buying coffee at a café and erecting a protest sign close to a person's home is of little value when assessing how a population might react. To calibrate risk by comparing a few anodyne examples that might fall within a particular category, would, in the context of a pandemic, border on folly. A precautionary approach would be to measure the risk by reference to the full range of conduct that might occur under the cover of a particular reason to leave. In the context of political expression, it is impossible to ignore that political debate is often raucous, divisive and lacking in civility.[165] In the context of the current pandemic, topics of public debate have included the need for any restrictions, vaccination, and the genuineness of the threat posed by the virus. It would not advance the freedom very far to say that expressions of political opinion should be permitted but its content should be constrained.

288 Professor Bennett's opinion as to the relative risk of public gatherings for a permitted reason and for engaging in political communication, was based on the assumption that all other things were equal. The assumptions Professor Bennett adopted included those as to behaviour, mode of transport, and compliance with restrictions. Given the enormous range of activities that might come under the umbrella of engaging in political communication, the assumptions were not and could not be established in fact. That is sufficient to place little or no weight on the evidence.

289 Even if I was satisfied on the evidence adduced in this Court that the risk of transmission involved in a person leaving home to engage in political opinion is the same as leaving for a permitted purpose such as to go to collect takeaway food, that would not take the plaintiff very far at all.

290 The argument ignores the context in which the powers fell to be exercised. Sub-sections 200(1)(b) and (d) are powers available to be deployed to meet a serious public

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165 *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

health risk in the context of a declared emergency. They will inevitably involve matters of judgment. As they were in this case, they will often be exercised in times of crises and uncertainty. Assessments of risk and ascertaining the consequences of one course of action over another will rarely yield precise answers. Given what was known about COVID-19, any prediction as to risk was inherently uncertain and any decision responding to risk needed to take into account the appetite for risk in the context of a declared emergency.

291 As Gordon J observed in *Palmer*

> the search for some alternative legislative means for dealing with the epidemic is futile, given the tightly constrained statutory indicia, and in circumstances where the disease was highly contagious and potentially deadly, the vector was human and the disease could be transmitted to others, sometimes many others, by a person who was asymptomatic.[166]

292 In that context, it was certainly open to the authorised officer who crafted Directions No 14 to conclude that adding a reason might increase risk of transmission, and an alternative formulation that changed the menu of permitted reasons would not be neutral. In approaching any assessment of risk and in working out what would be a permitted reason to leave, it was also open to the decision maker to apply the precautionary principle. So much was provided by s 6 of the *PHW Act*, and it accords with the nature of the pandemic in which information was evolving. In the context of uncertainty it is not possible to conclude that, from the perspective of risk, even the smallest changes would leave an equally effective and workable alternative.

293 In any event, the Directions do not simply address the risk of transmission. Although the purpose of the Directions is to reduce or eliminate viral transmission, they allow for a range of activities, subject to conditions, and therefore cannot be seen to eliminate all risk of ongoing interaction and ongoing risk of transmission. They represent a package of measures, informed by an assessment that: requiring people to stay home will reduce risk of transmission, activities outside of the home may carry different risks, and risks may be minimised by conditions. Equally, issues of compliance and

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166 [2021] HCA 5, [208] (citations omitted).

the satisfaction of basic needs must have loomed large. In turn, compliance is affected by the extent that the Directions can easily be understood and accepted. Allowing people to exercise, to leave for essential work or for certain activities assists in making the requirement to stay home more tolerable and therefore might reasonably be seen to aid compliance. They involve matters of judgment and degree which are properly reposed in the executive.

294 Although given in a different constitutional setting, the following observations of Roberts CJ on which the defendants rely, are apt:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." ... When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." ... Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.[167]

295 To adopt those observations here is not to introduce notions of deference or underplay the role of this Court in applying the Constitutional test, and to that end, make findings on constitutional facts. The adjudication on the validity of the legislation and executive action purportedly taken under it, is the sole province of the judiciary which cannot be squeamish about its task. However, any search for alternatives that are obvious, compelling, equally effective and practicable must take into account the actual context in which decisions are made and the respective roles played by the three branches of government. Even the assessment of risk, and the appetite for it, are matters of judgment on which there is no single correct answer. The evidence in this Court showed that expert opinion depends a great deal on the assumptions that are adopted. Inviting comparisons in the risk profile of various permitted activities and various means of political communication, as was undertaken in both the cross examination and argument, could be a never ending and ultimately barren exercise.

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167 *South Bay United Pentecostal Church v Newsom* 140 S Ct 1613, 1613-1614 (2020) (citations omitted). See also *Geller v De Blasio*, 2020 WL 2520711 (S.D.N.Y. May 18, 2020), *3; *Dolan & Ors v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786, [7].

The process did not support the contention that the Directions were irrational or that an alternative could easily be created or must have been apparent to the authors of the Directions.

296 The formulation proposed by the plaintiff of allowing a person 'to engage in political communication' would also introduce a high level of uncertainty that would be counterproductive to the effectiveness of the measures as a whole. It is obviously essential that any directions requiring people to stay at home, but allowing them to leave in certain limited circumstances, be clear, capable of being understood and accepted across the community. Allowing people to leave to 'engage in political communication' does not provide a clear or easily understood option. The concept of political communication in the context of the implied freedom is both broad and vague. Equally, how people may express communication covers a very wide range of potential conduct.

297 The plaintiff's submissions on her proposed alternatives were formulated at a general level, and she frankly accepted in argument that matters of 'fine detail' would need to be worked through. In that context, it is significant that the plaintiff was unable to articulate the precise conditions that ought be imposed. It will be recalled that the conditions that were imposed in relation to leaving for work were different to those relating to exercise. The plaintiff did not identify which should be applied to political communication. It is not unimportant to observe that each of the permitted activities had their own express provisions that had an eye to ready comprehension. Inserting another reason to leave or to gather, without these items of detail, would be inconsistent with the structure and purpose of the Directions.

298 The point is even clearer in relation to the revisions the plaintiff propounds in relation to public gatherings. Simply put, changing Directions No 14 to allow public gatherings for political communication is not an obvious or compelling alternative. Indeed, in many respects it would run counter to the purpose and structure of the Directions No 14. The same, insurmountable, problems as those found in relation to her first two options persist. They include the uncertainty of the carve out, the

increased risk associated with greater reasons to gather and the failure to articulate the relevant restrictions that would apply.

299 The plaintiff sought comfort in the form of directions imposed in New South Wales which, at some point in time, expressly allowed for public demonstrations. However, they provide no support to the plaintiff's case. They were imposed at a different time and in a different context, where the extent of community transmission in New South Wales was low or absent. Those circumstances cannot be compared to those that existed in Victoria between August and November 2020. In identifying possible alternatives, the problem confronting the plaintiff is not merely one of drafting complexity, although that is significant enough to reject them, but the Directions are a package of measures that respond to risk and reflect an assessment of how the community would respond. I am not satisfied that the formulations advanced by the plaintiff are as equally effective and practicable.

300 Even at the time of the Stay Safe Directions, there was evidence of community transmission. The position in New South Wales was sufficiently different as to render the restrictions imposed in another State an unsafe comparator. Again, to allow for political protests in the Stay Safe Directions would not be an obvious and compelling alternative.

Adequacy of balance

301 It must be a rare case in which a court finds that an exercise of power is rationally connected to a legitimate purpose, and for which there are no obvious and compelling alternatives, is nevertheless invalid because the law is manifestly outweighed by the adverse effect on the implied freedom.[168] In assessing the equation, the fact that the impugned exercise of power has a 'powerful public, protective purpose assumes a special importance'.[169] The present is not such a case.

302 As was the case in *Palmer*, 'it cannot be denied that the importance of the protection

168 *Banerji* (2019) 267 CLR 373, 402–3 [38]; [2019] HCA 23 (Kiefel CJ, Bell, Keane and Nettle JJ).
169 *LibertyWorks* [2021] HCA 18, [85] (Kiefel CJ, Keane and Gleeson JJ).

of health and life amply justifies the severity of the measures' whether those measures are assessed at the level of the statute or the Directions.[170]

Conclusion

303 The plaintiff has failed to make out her challenge to the validity of the Directions. The proceeding must be dismissed.

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[170] *Palmer* [2021] HCA 5, [81] (Kiefel CJ and Keane J).