

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

Not Restricted

S ECI 2021 03931

SIMON HARDING and others according to the Schedule Plaintiffs

v

BRETT SUTTON (in his capacity as Chief Health Officer) Defendants
and others according to the Schedule

VICTORIAN EQUAL OPPORTUNITY AND HUMAN Intervener
RIGHTS COMMISSION

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 3 November 2021
DATE OF JUDGMENT: 11 November 2021
CASE MAY BE CITED AS: Harding v Sutton
MEDIUM NEUTRAL CITATION: [2021] VSC 741

PRACTICE AND PROCEDURE - Interlocutory injunction - Application to suspend the operation of mandatory vaccination directions made under *Public Health and Wellbeing Act 2008* (Vic) in so far as they affect certain plaintiffs - Whether Court has power to suspend operation of *Public Health and Wellbeing Act 2008* (Vic) - Court has no such power - Application to restrain first defendant from making any further directions in so far as they affect certain plaintiffs - Whether form of injunction sought sufficiently precise to enable compliance - Proposed form of injunction imprecise and uncertain - Whether serious question to be tried - Serious question established on two grounds of review - Balance of convenience not in favour of granting interlocutory relief - Application dismissed.

PRACTICE AND PROCEDURE - Application for determination of a separate question before trial regarding applicability of s 38(1), *Charter of Human Rights and Responsibilities Act 2006* (Vic) - Proposed separate question would not determine outcome of proceeding - Potential overlap in evidence to be called on separate question and trial - May cause delay and fragmentation - Application dismissed - *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 47.04.

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Mr M Clarke QC with
Dr J Harkess and
Ms V Plain

NOH Legal Pty Ltd

For the Defendants

Ms R Orr QC, Solicitor-General
for Victoria, with
Ms S Fitzgerald and
Mr T Wood

Matthew Hocking,
Victorian Government Solicitor

For the Intervener

Ms K Evans

Victorian Equal Opportunity
and Human Rights Commission

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HER HONOUR:

- 1 On 16 March 2020, Victoria's Minister for Health declared a state of emergency in Victoria in relation to the COVID-19 pandemic. As is by now notorious, the COVID-19 virus is a highly infectious disease that may cause serious illness or death in people who are infected. Once the virus takes hold in a community, the rate of infection may increase exponentially.¹
- 2 The state of emergency remains in place, having been extended by further declarations made at roughly four week intervals. The most recent declaration was made on 21 October 2021 and ends on 18 November 2021. The emergency declarations have enlivened wide-ranging emergency powers under s 200(1) of the *Public Health and Wellbeing Act 2008* (Vic) (**Public Health Act**). Those powers have been used extensively during the COVID-19 emergency, to make directions that have restricted the activities and movement of the entire Victorian community in order to limit transmission of the virus and protect public health. Many of these directions have intruded on freedoms that most Victorians have previously been able to take for granted.
- 3 In this proceeding, Simon Harding and 128 other plaintiffs² challenge the lawfulness of a number of directions made by the defendants in the exercise of their emergency powers under s 200(1)(d) of the Public Health Act, concerning mandatory vaccination against the COVID-19 virus (**Vaccination Directions**). The defendants are Brett Sutton, the Chief Health Officer appointed under the Public Health Act, and Deborah Friedman and Benjamin Cowie, each of whom gave directions as Acting Chief Health Officer at different times.
- 4 In their further amended originating motion dated 3 November 2021, the plaintiffs seek orders quashing the Vaccination Directions, and interlocutory and permanent

¹ *Cotterill v Romanes* [2021] VSC 498, [1], [13]-[19].

² The number of plaintiffs has fluctuated since the proceeding was commenced on 21 October 2021, with a number of additional plaintiffs joined as parties, and a smaller number removed. There are 129 plaintiffs named in the further amended originating motion filed 3 November 2021.

injunctions restraining the defendants from making similar directions in future. They also seek declarations that the Vaccination Directions are unlawful and invalid, including because they are incompatible with various human rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The grounds on which the plaintiffs seek this relief are, in summary:

- (a) **Ground 1** - Breach of the Charter – acting incompatibly with one or more human rights contained in the Charter, namely those set out in ss 8(2), 8(3), 10(b), 10(c), 13, 14(1), 14(2), 15(1), 15(2), 16(1), 16(2), 17(1), 17(2), 19(1), 21(1), 21(2) and 21(3), and failing to give proper consideration to these rights;
- (b) **Ground 2** - Acting Under Dictation – acting under the direction of and at the behest of the Premier of Victoria;
- (c) **Ground 3** - No Power – exceeding the limits of the power conferred by s 200(1)(d) of the Public Health Act;
- (d) **Ground 4** - Improper Purpose – exercising power under s 200(1)(d) of the Public Health Act for a legislative purpose, which is not a purpose for which the power was conferred;
- (e) **Ground 5** - Improper Delegation – delegating powers under s 200(1)(d) to other persons, without lawful authority;
- (f) **Ground 6** - Unreasonableness/Illogicality/Irrationality – acting unreasonably in making the Vaccination Directions, including because they are not reasonably proportionate to the public health risk presented by COVID-19 and operate in an arbitrary manner.

5 The plaintiffs sought interlocutory orders suspending the application of the Vaccination Directions in relation to 109 of the plaintiffs. Additionally, the plaintiffs sought an interlocutory injunction restraining Professor Sutton from giving any further directions to the same or similar effect, pending final hearing and

determination of the proceeding. I decided not to grant the interlocutory relief sought. I accepted the defendants' submission that the Court does not have power to suspend the operation of the Public Health Act, which gives effect to directions given under s 200(1)(d). The form of the injunction sought against Professor Sutton was neither precise nor certain, and could not be granted for that reason. Further, while the plaintiffs established serious questions to be tried in relation to Grounds 1(a) and 4, the balance of convenience was against granting the interlocutory relief sought. I ordered on 5 November 2021 that the plaintiffs' summons be dismissed.

6 For their part, the defendants applied for the trial of a separate question in relation to Ground 1: whether s 38(1) of the Charter applied to the act of making or the decision to make the Vaccination Directions. I decided that the proposed question should not be determined separately, before trial, and on 5 November 2021 I ordered that the defendants' summons be dismissed.

7 These are my reasons for those decisions.

Public Health Act

8 The purpose of the Public Health Act is to enact a legislative scheme that promotes and protects public health and wellbeing in Victoria.³ The objective of the Public Health Act is set out in s 4:

- (1) The Parliament recognises that—
 - (a) the State has a significant role in promoting and protecting the public health and wellbeing of persons in Victoria;
 - (b) public health and wellbeing includes the absence of disease, illness, injury, disability or premature death and the collective state of public health and wellbeing;
 - (c) public health interventions are one of the ways in which the public health and wellbeing can be improved and inequalities reduced;
 - (d) where appropriate, the State has a role in assisting in responses to public health concerns of national and international

³ *Public Health and Wellbeing Act 2008* (Vic) (**Public Health Act**), s 1.

significance.

- (2) In the context of subsection (1), the objective of this Act is to achieve the highest attainable standard of public health and wellbeing by –
 - (a) protecting public health and preventing disease, illness, injury, disability or premature death;
 - (b) promoting conditions in which persons can be healthy;
 - (c) reducing inequalities in the state of public health and wellbeing.
- (3) It is the intention of Parliament that in the administration of this Act and in seeking to achieve the objective of this Act, regard should be given to the guiding principles set out in sections 5 to 11A.

9 Sections 5 to 10 set out the guiding principles for the administration of the Public Health Act: the principle of evidence based decision-making, the precautionary principle, the principle of primacy of prevention, the principle of accountability, and the principle of proportionality.⁴

10 The administration of the Public Health Act is provided for in Pt 3. The Chief Health Officer is appointed under s 20, and has the functions and powers set out in s 21. The Secretary to the Department of Health may appoint authorised officers under s 30.

11 Emergency powers are provided for in Pt 10, Div 3 of the Public Health Act. Section 198(1) enables the Minister for Health, 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* (Vic), to ‘declare a state of emergency arising out of any circumstances causing a serious risk to public health’. A declaration under s 198 may continue in force for a period not exceeding four weeks, and may be extended by another declaration for further periods not exceeding four weeks.⁵ Generally, the total period that an emergency declaration continues in force cannot exceed six months. In the case of the COVID-19 pandemic, the maximum total

⁴ Section 11 provides that s 111 specifies the principles that are to apply for the purposes of the application, operation and interpretation of Part 8 – Management and control of infectious diseases, micro-organisms and medical conditions. Section 11A provides that s 185C specifies the principles that are to apply for the purposes of the application, operation and interpretation of Part 9A – Safe access to premises at which abortions are provided.

⁵ Public Health Act, ss 198(7)(b)–(c).

period of the emergency declaration is 21 months.⁶

- 12 As mentioned, the Minister for Health declared a state of emergency in Victoria in relation to the COVID-19 pandemic on 16 March 2020. As the legislation currently stands, the state of emergency cannot be extended beyond 16 December 2021, which is the date 21 months after the state of emergency was first declared. The Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 is currently before the Parliament of Victoria. If enacted, it will insert a new Pt 8A into the Public Health Act that will provide a specific regulatory framework for managing pandemics, in place of the emergency powers in Pt 10, Div 3.
- 13 Section 199(2)(a) empowers the Chief Health Officer, for the purpose of eliminating or reducing the serious risk to public health, to authorise ‘authorised officers’ appointed by the Secretary to exercise any of the public health risk powers⁷ and emergency powers. This power is enlivened if a state of emergency exists under s 198 and the Chief Health Officer believes that it is reasonably necessary to grant an authorisation to eliminate or reduce a serious risk to public health.⁸ An authorisation under s 199 may be given orally or in writing, but if it is given orally it must be confirmed in writing as soon as reasonably practicable.⁹
- 14 Section 200 specifies the ‘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

⁶ Public Health Act, s 198(7)(c).

⁷ The public health risk powers are specified in s 190 of the Public Health Act.

⁸ As to the interaction between s 199 and s 200, see *Cotterill*, [53]–[57].

⁹ Public Health Act, ss 201(1)–(2).

reasonably necessary to protect public health.

- (2) Unless subsection (3) applies, before any person is subject to detention under subsection (1)(a), an authorised officer must briefly explain the reason why it is necessary to detain the person.
- (3) If in the particular circumstances in which the power to detain the person is to be exercised, it is not practicable to briefly explain the reason why it is necessary to detain the person before the power is exercised, the authorised officer must do so as soon as is practicable.
- (4) Before exercising any emergency powers under this section, an authorised officer must, unless it is not practicable to do so, warn the person that a refusal or failure to comply without a reasonable excuse, is an offence.
- (5) An authorised officer must facilitate any reasonable request for communication made by a person subject to detention under subsection (1)(a).
- (6) An authorised officer must at least once every 24 hours during the period that a person is subject to detention under subsection (1)(a) review whether the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
- (7) An authorised officer must as soon as is reasonably practicable give written notice to the Chief Health Officer –
 - (a) that a person has been made subject to detention under subsection (1)(a);
 - (b) that following a review under subsection (6) a person is to continue to be subject to detention under subsection (1)(a).
- (8) A notice under subsection (7) must include –
 - (a) the name of the person being detained; and
 - (b) a brief statement as to the reason why the person is being, or continues to be, subject to detention under subsection (1)(a).
- (9) The Chief Health Officer must as soon as is reasonably practicable advise the Minister of any notice received under subsection (7).
- (10) Despite subsection (7), if the authorised officer is the Chief Health Officer, the Chief Health Officer must, as soon as is reasonably practicable –
 - (a) advise the Minister in writing that a person has been made subject to detention under subsection (1)(a) or that following a review under subsection (6) a person is to continue to be subject to detention under subsection (1)(a); and
 - (b) include in the advice the name of the person being detained and

a brief statement as to the reason why the person is being, or continues to be, subject to detention under subsection (1)(a).

15 Section 203 provides that it is an offence not to comply with a direction given under s 199:

- (1) A person must not 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 section 199.

Penalty: In the case of a natural person, 120 penalty units;

In the case of a body corporate, 600 penalty units.

- (2) A person is not guilty of an offence against subsection (1) if the person had a reasonable excuse for refusing or failing to comply with the direction or requirement.

Vaccination Directions

16 The *COVID-19 Mandatory Vaccination Directions (No 1)* – the first of the directions the subject of this proceeding – were given by Professor Sutton on 7 September 2021. They obliged an operator of a residential aged care facility to collect, record and hold vaccination information about workers scheduled to work at the facility, and to take reasonable steps to prevent unvaccinated workers from entering or remaining on their work premises for the purposes of working at the facility. During September and October 2021, these directions were replaced by a succession of directions in relation to ‘specified facilities’, which imposed obligations on operators of residential aged care facilities, construction sites, healthcare facilities and education facilities.

17 As at 3 November 2021, the most recent of the directions in relation to ‘specified facilities’ were the *COVID-19 Mandatory Vaccination (Specified Facilities) Directions (No 11)*, which were given by Professor Sutton on 29 October 2021 and were to end on 18 November 2021.¹⁰ They obliged an operator of a specified facility to collect, record and hold vaccination information about any worker scheduled to work at the facility.¹¹ They also obliged an operator of a specified facility to take all reasonable

¹⁰ On 5 November 2021, these directions were revoked and replaced by the *COVID-19 Mandatory Vaccination (Specified Facilities) Directions (No 12)*, which also end on 18 November 2021.

¹¹ *COVID-19 Mandatory Vaccination (Specified Facilities) Directions (No 11)*, cl 4(1).

steps to ensure that a worker who was unvaccinated did not enter, or remain on, the premises of the specified facility for the purposes of working at the facility.¹² If an operator did not hold vaccination information about a worker, the operator was required to treat the worker as if the worker was unvaccinated.¹³

- 18 The Specified Facilities Directions (No 11) provided that a worker is ‘unvaccinated’ if the worker has not received a dose of a COVID-19 vaccine and is not an ‘excepted person’.¹⁴ The dose deadlines for specified facilities were set out in Schedule 1, as follows:

	First dose deadline	Second dose deadline
Residential aged care facility	1 October 2021	15 November 2021
Construction site	2 October 2021	13 November 2021
Healthcare facility	29 October 2021	15 December 2021
Education facility	25 October 2021	29 November 2021

An ‘excepted person’ was defined as a person who holds ‘acceptable certification’ from a medical practitioner that the person is unable to receive a dose, or a further dose, of a COVID-19 vaccine due to a medical contraindication or an acute medical illness.¹⁵

- 19 The *COVID-19 Mandatory Vaccination (Workers) Directions (No 1)* were given by Professor Cowie on 7 October 2021. They obliged an employer to collect, record and hold vaccination information about workers scheduled to work outside their ordinary place of residence, and prohibited an employer from permitting a worker who was unvaccinated to work for the employer outside the worker’s ordinary place of residence. During October 2021, these directions were replaced by a succession of

¹² Specified Facilities Directions (No 11), cl 5(1).

¹³ Specified Facilities Directions (No 11), cl 5(3).

¹⁴ Specified Facilities Directions (No 11), cl 9(4).

¹⁵ Specified Facilities Directions (No 11), cl 9(5). An ‘acceptable certification’ is defined in cl 9(6).

directions in relation to specified categories of ‘workers’.

- 20 As at 3 November 2021, the most recent of the directions in relation to ‘worker’ were the *COVID-19 Mandatory Vaccination (Workers) Directions (No 6)*, which were given by Professor Sutton on 29 October 2021 and were to end on 18 November 2021.¹⁶ They applied to the categories of workers specified in Schedule 1, including custodial workers, manufacturing workers, public sector workers, retail workers, and transport workers.
- 21 The Workers Directions (No 6) obliged an employer to collect, record and hold vaccination information about a worker who was, or may be, scheduled to work outside the worker’s ordinary place of residence.¹⁷ An employer of a worker was prohibited from permitting a worker who was unvaccinated to work for that employer outside the worker’s ordinary place of residence.¹⁸ If an employer did not hold vaccination information about a worker, the employer had to treat the worker as if the worker was unvaccinated.
- 22 Key definitions in the Workers Directions (No 6) were the same as those in the Specified Facilities Directions (No 11), including the definitions of ‘unvaccinated’ and ‘excepted person’. The second dose deadline for all workers covered by the Workers Directions (No 6) was 26 November 2021.

The plaintiffs

- 23 As mentioned, there are 129 plaintiffs who bring this proceeding. A smaller group of 109 plaintiffs were the subject of the application for interlocutory relief pending the hearing and determination of the proceeding. That group of **applicant plaintiffs** comprises people who work in healthcare, construction, transport, education, corrections, and a range of other occupations. Most of the applicant plaintiffs are employees, some are self-employed, and some own businesses that employ other

¹⁶ On 5 November 2021, these directions were revoked and replaced by the *COVID-19 Mandatory Vaccination (Workers) Directions (No 7)*, which also end on 18 November 2021.

¹⁷ *COVID-19 Mandatory Vaccination (Workers) Directions (No 6)*, cl 4(1).

¹⁸ Workers Directions (No 6), cl 5(1).

people.

24 Each of the applicant plaintiffs made an affidavit outlining their circumstances and their reasons for choosing not to receive a COVID-19 vaccine. These affidavits were supplemented by three affidavits of the plaintiffs' solicitor, Omar El-Hissi, which conveyed his instructions from many of the applicant plaintiffs about their employment status.¹⁹ The following paragraphs are based on those affidavits, and reflect the evidence as at 3 November 2021.

Healthcare

25 Simon Harding works as a corrections officer for G4S, a role he has held for about four years. He works in a hospital environment at St Augustine's, a division of St Vincent's Hospital where prisoners receive medical care while in custody. He is married with three young children, and his family rely on his income. His wife is not able to work due to a disability. He has been placed on unpaid leave since 15 October 2021, and believes that he will lose his job if he does not receive a COVID-19 vaccine. No other alternatives have been offered to him, although he is willing to undergo rapid antigen testing before entering and remaining on hospital premises. The threat of losing his job is highly stressful, and is the only reason why he would contemplate taking a COVID-19 vaccine. Mr Harding explained in his affidavit why that was so:²⁰

I do not believe that it is necessary for me to get vaccinated for COVID-19. I am a relatively healthy person. I adopt a healthy lifestyle. I have decided not to submit to a COVID-19 vaccination at the present time. I am not a person who is anti-vaccination in general. I have had vaccinations in the past as a child and as an adult and I have also had my children vaccinated with usual vaccines. I was comfortable having those vaccines as they had a long history of safety data backing them and have been in use for many years prior. However, I have consciously chosen not to take the COVID-19 vaccination at this point in time, because I am concerned about the potential short term and long-term side effects of the vaccine and the current lack of long-term safety data. I am unable to provide informed consent to have the vaccination due to a lack of safety data.

...

¹⁹ Third affidavit of Omar El-Hissi dated 28 October 2021, [18], fourth affidavit of Omar El-Hissi dated 28 October 2021, [6], and fifth affidavit of Omar El-Hissi dated 29 October 2021, [9].

²⁰ Affidavit of Simon Harding dated 21 October 2021, [16], [18]-[20], [26].

I believe that it is the personal choice of a person whether to be vaccinated against COVID-19 or not. As an individual I take my health and safety against COVID-19 very seriously. I keep up to date with the COVID-19 rules and to the best of my knowledge, I have complied with every rule imposed upon me by the Victorian Government to date. I keep to myself and maintain social distancing where possible. I ensure that my family and I isolate ourselves from others. When we need to go shopping, I scan in with QR codes. I wear face masks when out in public. I wear PPE gear while at work.

However, when it comes to vaccination for COVID-19, I choose not to be vaccinated because I believe that I have a basic human right in Australia to bodily integrity and to voluntarily consent to medical treatment. I cannot give informed and [voluntary] consent to medical treatment if I am threatened with the loss of my employment if I decline the medical treatment particularly given the absence of reliable long term safety data related to the vaccines.

Until such time as there is sufficient clinical data and years of testing completed with respect to the COVID-19 vaccinations, I will be unable to provide informed consent to the COVID-19 vaccinations. I am concerned about the general side effects of the vaccines and the general health risks associated with taking the vaccine.

...

I also believe that my medical file including my vaccination status constitutes private and sensitive information and documents which I do not wish to provide to my employer when requested to do so.

26 These views are shared by the other applicant plaintiffs, who all attest that they do not believe it is necessary for them to get vaccinated, they hold concerns about the COVID-19 vaccines, and they feel unable to provide informed consent to being vaccinated. Their individual circumstances are described briefly in the following paragraphs.²¹

27 [2] Candice Wheaton works as a registered nurse at Cabrini Health. She has worked at Cabrini Health for about three and a half years, and as a nurse for about nine years. She has not been able to attend work since 29 October 2021. She has been stood down without pay and will remain so unless she gets a COVID-19 vaccine. She believes that she will lose her job if she does not get vaccinated against COVID-19. She has concerns about the COVID-19 vaccines, particularly in relation to the potential impact on her

²¹ The number in square brackets at the start of each paragraph corresponds with each plaintiff's number in the schedule of parties.

fertility.

- 28 [5] Corrinne Brighthope works as a community mental health clinician at Mind Australia, a role she has held since March 2021. She is also a sole trader providing support to individuals with a disability and mental health diagnosis. She is a single mother with one dependent, a son aged 19, who lost the opportunity to continue with an engineering apprenticeship due to the pandemic. She has been stood down without pay since 15 October 2021, and believes that she will lose her job if she does not receive a COVID-19 vaccine.
- 29 [6] Violet Polonski works as a mental health clinician at Alfred Health in the Child Youth Mental Health Services. She has been employed by Alfred Health for about 11 years. Her income, combined with her husband's, is used to cover a range of expenses including IVF treatment. She and her husband are currently undergoing their final round of IVF embryo transfer, which has been a source of considerable financial and emotional strain for them. She has decided not to receive a COVID-19 vaccine at present for medical reasons associated with her IVF treatment and fertility. On 15 October 2021, Ms Polonski was placed on paid leave. She is awaiting a meeting with her employer's human resources department, but believes that disciplinary action will be taken against her, up to the termination of her employment, if she does not receive a COVID-19 vaccine. The threat of losing her job is highly stressful. That stress is compounded by her current IVF treatment.
- 30 [7] Sylvia Jobson is employed by Austin Health in the roles of registered nurse and perioperative clinical nurse specialist. She has worked as a registered nurse at Austin Health for about 13 years. She is married with three young children. She has been stood down with pay since 15 October 2021, and believes that she will lose her job unless she takes a COVID-19 vaccine.
- 31 [8] Ashleigh Marchese works as a nurse on a full-time basis at Thomas Embling Hospital, Fairfield. Ms Marchese has been working as a nurse for about one year. She is married and, at the time of swearing her affidavit on 28 October 2021, she was nine

weeks pregnant with her first child. At that time she was on annual leave, and expected that her annual leave would expire at the beginning of November, following which she would be stood down without pay. She believes that she will lose her job if she is not vaccinated, although she has told her employer that she is pregnant and concerned about having the vaccine for that reason. She is concerned about the safety data underpinning the COVID-19 vaccines and the potential impact on her pregnancy.

32 [10] Semo Sasa Toleafoa works as a Residential Youth Care Worker for 24Hour Priority Care. He signed his employment contract on 30 September 2021, one day before receiving notification from his employer regarding mandatory vaccination requirements. He is married with six children under the age of seven. He has not received any shifts since he was required to receive a first dose of a COVID-19 vaccine in accordance with the relevant Vaccination Directions. He believes that he will lose his job if he does not receive a COVID-19 vaccine.

33 [11] Jacqueline Ridgway works as a Grade 4 Advanced Musculoskeletal Physiotherapist at Peninsula Health. She has been employed by Peninsula Health for over 18 years. She also works in an administrative role with Victorian State Home Loans. She has been employed by Victorian State Home Loans for about 15 months. She is married with two children, aged 11 and 12, and she is the main provider for her household. She has been stood down by Peninsula Health since 29 October 2021. She says that disciplinary action will be taken against her if she does not receive a COVID-19 vaccine, which may include the termination of her employment. She is able to continue her administrative role with Victorian State Home Loans, however the salary she derives from that position is not enough to support her family.

34 [12] Glenn Broderick works as a medical equipment technician for Cabrini Health, where he has worked for almost 15 years. He is married with two dependent children, aged 18 and 19. He has been unable to attend work since 29 October 2021, and says he will face disciplinary proceedings due to not being vaccinated, which may result in the termination of his employment.

- 35 [13] Petros Galanoulis works as a community mental health practitioner at Mind Australia, a role he has held for just over two years. As well as supporting himself, he cares for his two elderly parents. After receiving correspondence from his employer in relation to compliance with mandatory vaccination requirements on 11 October 2021, he had the first dose of a COVID-19 vaccine. He feels that he received that dose under duress, and does not consent to having the second dose. He will be unable to continue to attend work, and believes that he will lose his job, if he does not receive the second dose of a COVID-19 vaccine by 26 November 2021. The threat of losing his job is highly stressful, and is the only reason why he got the first dose.
- 36 [14] Margaret Supel works as a registered nurse and a registered midwife at Monash Health. In or around August 2020, she became an Associate Nurse Manager of a COVID-19 drive through screening clinic at Casey Fields. She is a single mother with two dependent children. One of her children is a special needs child diagnosed with autism. While on approved annual leave, she received correspondence from her employer in relation to compliance with mandatory vaccination requirements. She understands that, at the conclusion of her leave, she will be stood down without pay. She believes that, on her return, disciplinary action will be taken against her because she has not taken a COVID-19 vaccine, and that she may lose her job.
- 37 [15] Patricia Perez-Reigosa works as a receptionist/clerk for Eastern Health, a role she has held for about ten years. She is married with one dependent child, aged 20, and her family rely on her income. She and her husband care for her mother, who lives with them and suffers from Alzheimer's disease. Because she has not been vaccinated, she has been stood down from her role and is not permitted to attend work. On 18 October 2021, she received a show cause letter from Eastern Health, which included an invitation to a meeting on 20 October 2021. Ms Perez-Reigosa believes that she will lose her job if she does not receive a COVID-19 vaccine.
- 38 [16] Dimitrius Tryfonopoulos holds a position as a Visiting General Surgeon at Mildura Health Private Hospital. He has held this position for about 17 years, having

practised as a doctor for 26 years. He is married with two children, and his family rely on his income. He has been unable to attend work since 29 October 2021, and will be stood down without pay unless he receives a COVID-19 vaccine. He feels that he has been left with no choice but to get the first dose of a COVID-19 vaccine. If he does not do this, he believes that he will lose his job. He is concerned that he will let down his patients if he loses his job. He is an active, practising Greek Orthodox Christian and objects to taking a COVID-19 vaccine on religious grounds. He says that it is against his religious beliefs to be injected with a vaccine that contains cells that trace back to aborted foetuses. His spiritual father has advised him against taking a COVID-19 vaccine.

39 [17] Karen McFetridge works as a mental health clinician for Ballarat Health Services, a role she has held since July 2021. She also works as a subcontractor to Headspace, and has done so for about four years. She is also a yoga instructor and business owner. She is a single mother and has two children, both aged nine. Her employment with Ballarat Health Services will be terminated unless she provides evidence of having received the first dose of a COVID-19 vaccine by 1 November 2021. When she made her affidavit on 22 October 2021, Ms McFetridge had a booking to receive a first dose of a COVID-19 vaccination before 29 October 2021, which was causing her a high degree of stress. It is not clear whether she went ahead and received the vaccine.

40 [18] Roxanne van Hoorn works as a disability support worker for Home@Scope, a role she has held for just over one year. She has been stood down from work since at least 29 October 2021. She believes that she will lose her job if she does not get vaccinated. She holds concerns about the COVID-19 vaccines, including in relation to the potential impact on her personal reproductive health.

41 [119] Theodora Bitsolas works as a registered nurse at Monash Health, a role she has held for 16 years. She has also worked as a registered nurse at Holmesglen Private Hospital on a casual basis since 2017. She is an active, practising member of the Orthodox Church, and says that being subjected to a mandatory COVID-19

vaccination would be contrary to her religious beliefs. On 15 October 2021, she received correspondence from Holmesglen Private Hospital advising that her employment would be terminated on 29 October 2021 if she did not provide evidence of receiving a dose of a COVID-19 vaccine by that date. She is presently working from home for Monash Health, however she expects to be stood down in November 2021. She believes that she will lose her job with Monash Health if she does not receive a COVID-19 vaccine.

42 [122] Aimee Churcher works as a Clinical Midwifery Specialist for Peninsula Health. She has worked for Peninsula Health since February 2009. She is in a de facto relationship and has two children, aged seven and four. She provides shared financial support to her family. Her partner is also facing unemployment due to the Vaccination Directions. She has several concerns about the COVID-19 vaccines. In particular, she is concerned about the severe side effects of myocarditis and pericarditis, as she has a significant family history of heart disease. In her work she is passionate about informed consent and the right to refuse treatment, which is the core of healthcare. She believes that obtaining consent that is not informed and under duress is a violation of human rights. She says that she has experienced pressure and harassment from her employer, and was made to listen to a speech from a vaccinologist to try to sway her decision. She has been stood down with pay since 28 October 2021, and says that disciplinary action is pending against her unless she receives a dose of a COVID-19 vaccine. She believes that she will lose her job if she does not receive a vaccine.

43 [123] Elizabeth Foley works as a Division 1 registered nurse at Cabrini Health on a casual basis. She has worked at Cabrini Health since 2009. She is married with three children, aged seven, five and two. She provides shared financial support to her family. Since at least 16 October 2021, she has not been given any shifts. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine.

- 44 [124] Kristy Watson works as a midwife/midwifery clinical educator at Peninsula Health. She is married with three children, and her family rely on her income. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine. She has been stood down with pay since 29 October 2021, and says that disciplinary action and an investigation are pending, with the termination of her employment the likely outcome if she does not receive a dose of a COVID-19 vaccine.
- 45 [125] Melanie Oliver works as a registered midwife on a part-time basis for Peninsula Health, Frankston Hospital. She has worked for Peninsula Health since 2010. She is married and provides financial support to her spouse and their three young children. She considers that she cannot give informed and voluntary consent to a COVID-19 vaccine if she is threatened with the loss of her employment. She has been advised by Peninsula Health that failure to comply with the direction to receive a COVID-19 vaccine may impact her employment, up to and including termination. She has been stood down with pay since 28 October 2021 and is facing disciplinary action and investigation, which will likely be followed by termination of her employment.
- 46 [126] Michelle Saxon works as an associate midwife unit manager and clinical midwife specialist on a permanent part-time basis for Peninsula Health. She has worked for Peninsula Health since 2015. She is married and provides support to her three children. She has been advised by Peninsula Health that failure to comply with a direction to receive a COVID-19 vaccine may impact her employment, up to and including termination. She has been stood down with pay since 29 October 2021 and is facing disciplinary action and investigation, which will likely be followed by termination of her employment.
- 47 [133] Rebecca Taylor is employed as an associate midwifery unit manager on a permanent part-time basis for Peninsula Health, Frankston. She has a partner and two adult children. She has been advised by Peninsula Health that failure to comply with the direction to receive a COVID-19 vaccine may impact her employment, up to and

including termination. She has been stood down with pay since 28 October 2021 and is facing disciplinary action and investigation, which will likely be followed by termination of her employment.

Construction

48 [19] Sebastian Otis works as a service technician at TSD/Reece, a role he has held for about three years. He takes issue with the COVID-19 vaccines on several bases, including because he has been a vegan for decades. He says he was required to take annual leave on 15 October 2021 because he had not received a COVID-19 vaccine. He remains on leave. He believes that he will surely lose his job if he does not receive a COVID-19 vaccine.

Transport

49 [52] Casey Cameron is a train service officer – principal driver specialist employed by Metro Trains. Mr Cameron commenced working for Metro Trains in March 2021. He is married and provides financial support to his wife. He has been advised by his employer that it will not be possible to continue with his employment without being vaccinated.

50 [55] Ian Begg works as a truck driver for Cope Sensitive Freight. He has worked for his employer for three years. He has a partner who is dependent on his income. He has been stood down without pay and believes that he will lose his job if he does not receive a COVID-19 vaccine.

51 [56] Mark Pearson works as a warehouse coordinator for Sampson Express. He has worked for his employer since January 2021. He is separated with two children, for whom he pays child support amongst other things. One of his children has been diagnosed with ADHD and ASD, and so he already has plenty on his plate. He understands that he will not be allowed on site to work unless he has received at least one dose of a COVID-19 vaccine by 15 October 2021. He is presently on stress leave without pay, which he advises is due to stress caused by mandatory vaccination requirements. He believes that he will lose his job if he does not receive a COVID-19

vaccine.

52 [59] Eugene Katsos works as a train driver for Metro Trains. He has worked for Metro Trains since January 2017. As well as supporting himself, he provides financial support to his elderly mother, who currently needs professional care to manage her day-to-day tasks, and to his sister, who is a single mother of four. His employer has advised that it may not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

53 [72] Andrew Terkely works as a train driver for Metro Trains. He has worked for Metro Trains since July 2011. He is married with two children, and he provides financial support to his family. He has been stood down without pay and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

54 [73] Blake Sorensen works as a train driver for Metro Trains. He has worked for Metro Trains since January 2017. He is married with two children, and he provides financial support to his family. He has been stood down without pay since 6 November 2021, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

55 [74] Connie Prasad works as a train driver for Metro Trains. She has worked for Metro Trains since January 2010. She is married with two children, and her family rely on her income. Her husband is recovering from a serious surgery and is receiving treatment for cancer. She also provides financial support to her extended family overseas. She has been stood down without pay since 22 October 2021, and has been told that she will not be permitted to return to work unless vaccinated. Her employer has advised that it will not be possible to continue with her employment without

having a COVID-19 vaccine, and she believes that she will lose her job if she does not do so.

56 [75] Coupar Hind works as a locomotive driver for V/Line Corporation. He has worked for V/Line Corporation since June 2014. He is married and has a child. He provides financial support to his family. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

57 [76] Danielle Arcaro works as a train driver for Metro Trains. She has worked for Metro Trains since May 2014. She is in a de facto relationship and has one child with her partner. Her family rely on her income. She has been stood down without pay, and will not be permitted to return to work unless vaccinated. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine. She is currently breastfeeding her son and her health is her top priority so that she may continue to do so.

58 [77] Darren Adams works as a train driver for Metro Trains. He has worked for Metro Trains since August 2011. He is responsible for caring for his father. He is currently on annual leave but will be stood down without pay from 14 November 2021, after which time he will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

59 [78] David Cowasji works as a train driver for Metro Trains. He has worked for Metro Trains since January 2006. He is divorced and has one child living with him. He provides financial support to his son, who is a full-time student. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His

employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

60 [79] Douglas Elliott works as a signal works assistant for Metro Trains. He has worked for Metro Trains since February 2008. He is currently accessing his long service leave entitlements. When they run out on 21 December 2021 he will be stood down without pay. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

61 [80] Elena Vrondelieva works as a part-time shift driver for Metro Trains. She has worked for Metro Trains since August 2021. She is in a de facto relationship, has three children, and her family rely on her income. She has been stood down without pay and will not be permitted to return to work unless vaccinated. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine.

62 [81] Geoffrey Pope works as a station officer for Metro Trains. He has worked for Metro Trains since February 2000. He is recently separated and has two children. His eldest child has type 1 diabetes. He provides financial support to his ex-partner by way of child support, and his children rely on his income. The recent finalisation of his Family Court proceedings has changed his asset position, and so he must earn an income. He is presently on annual leave. He will be stood down without pay from 13 November 2021, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

63 [82] Jamie Bardelmeyer is a train driver and on-site trainer for Metro Trains. He commenced working for Metro Trains about eight years ago. He provides financial

support to his fiancée and their two young children. He has been advised by his employer that it will not be possible to continue with his employment without being vaccinated. He has been stood down without pay since 15 October 2021. His fiancée has also been stood down without pay as a result of refusing to take a COVID-19 vaccine. He says that the stress associated with his current employment situation has caused sleeplessness, headaches, nausea, palpitations and irritability.

64 [83] Heather Elder works as a train driver for Metro Trains. She has worked for Metro Trains since January 2019. She is in a de facto relationship, has one child, and provides financial support to her family. She has been stood down without pay, and will not be permitted to return to work unless vaccinated. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine.

65 [84] Ioannis Tsagalidis works as a train driver for Metro Trains. He has worked for Metro Trains since August 2016. He is married with two children, and he and his wife are expecting another baby in November 2021. His family rely on his income. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

66 [85] John Horvath works as a train driver for Metro Trains. He has worked for Metro Trains since September 2006. He is married with three children, and his family rely on his income. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

67 [86] Joshua Panettieri works as a train driver for Metro Trains. He has worked for Metro Trains since July 2016. He is married with three children, aged nine, seven and three. His family rely on his income. He has been stood down without pay, and will

not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

68 [87] Justin Bryant works as a train driver for Metro Trains. He has worked for Metro Trains since November 2018. He is in a de facto relationship, and provides some financial support to his partner. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

69 [88] Kerry Whittle works as a train driver for Metro Trains. She has worked for Metro Trains since August 2019. As well as supporting herself, she provides financial support to her de facto partner. She has been stood down without pay, and will not be permitted to return to work unless vaccinated. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine. She was scheduled to have an employment review in the first week of November 2021. The threat of losing her job and income is causing her distress. After several conversations with her doctor, she does not believe that it is necessary for her to receive a COVID-19 vaccine. She holds concerns about the COVID-19 vaccines, including in relation to the potential impact on her endometriosis.

70 [89] Larry Pineda works as a train driver for Metro Trains. He has worked for Metro Trains since January 2010. He is married, and his immediate and extended family rely on his income. In addition to his wife, he provides financial support to his mother, who is aged 75, and to other extended family members in the Philippines. His mother is unwell and lives with two of his dependent nephews. He contributes to his nephews' tuition fees. He will be stood down without pay at the conclusion of his current sick leave. He will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment

without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

71 [90] Marinko Jezabek works as a train driver for Metro Trains. He has worked for Metro Trains since September 2005. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

72 [91] Nicholas La Pouple works as a signal maintenance technician for Metro Trains. He commenced working for Metro Trains in July 2017. He is married with three children, and he provides financial support to his family. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

73 [92] Reece Pipka works as a train driver for Metro Trains. He has worked for Metro Trains since November 2018. He is in a de facto relationship, has one child, and provides financial support to his family. He has been stood down without pay, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

74 [93] Robert Williamson works as a train driver for Metro Trains. He has worked for Metro Trains since October 2014. He is married and has one son, aged 22. His wife and son rely on him for financial support. He was stood down without pay from 6 November 2021, and will not be permitted to return to work unless vaccinated. His employer has advised that it will not be possible to continue with his employment without having a COVID-19 vaccine, and he believes that he will lose his job if he does not receive a vaccine.

75 [94] Rochelle Pineda works as a shift driver trainee for Metro Trains, where she has worked since August 2021. She is married. She provides financial support to her family, including her sister, who has not had a stable income since the beginning of the pandemic, and her elderly parents. She has been stood down without pay, and she will not be permitted to return to work unless vaccinated. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine.

76 [95] Wendy Robinson works as a train driver for Metro Trains. She has worked for Metro Trains since November 2010. Her employer has advised that it will not be possible to continue with her employment without having a COVID-19 vaccine, and she believes that she will lose her job if she does not receive a vaccine. She has been stood down without pay, and had an employment review scheduled for 29 October 2021. The outcome of that review is unknown to the Court.

77 [132] Simon Bird is employed full-time as a truck driver for GR Warehousing and Distribution, a role he has held for just over two years. He has a partner who is currently on unpaid maternity leave, so he is the primary income earner for his family. He understands, having read the *COVID-19 Mandatory Vaccination (Workers) Directions (No 5)*, that he will not be allowed to go to work if he has not received at least one dose of a COVID-19 vaccine before 22 October 2021. As a soon to be parent, he is facing one of the most difficult decisions of his life.

78 [135] Simon Overall works as a train driver on a job-share basis for Metro Trains. He has worked for Metro Trains since 1998. He is married and provides financial support to his wife and their 14 year old child. He has been advised by Metro Trains that it will not be possible to continue with his employment without being vaccinated. He believes that he will lose his job if he does not take a COVID-19 vaccine.

Education

79 [32] Mark Micallef is a primary school teacher at Woodville Primary School, Hoppers Crossing. He has worked as a teacher for about four years. Mr Micallef shares expenses with his partner. The Department of Education has advised that he will not be allowed to attend the school campus unless he is vaccinated. He was notified by the Department of Education that he could use his annual leave entitlements up until January 2022. However, he exhausted his annual leave entitlements by 2 November 2021. He believes that he will lose his job if he does not receive a COVID-19 vaccine. At the time of making his affidavit, Mr Micallef had booked an appointment to receive a COVID-19 vaccine, as he otherwise risked losing his job.

80 [34] Shahnee Bannan is a primary school teacher at Berwick Chase Primary School. She has been working as a teacher for six years, including approximately three years in her current role. Ms Bannan is the primary income earner in her household and her fiancé is undertaking an apprenticeship. She believes she will lose her job if she does not receive a COVID-19 vaccine, and her household will be without primary income. She and her fiancé were planning for a baby, following their wedding in 2022, but they have put those plans on hold in light of her current employment situation. She holds concerns about the implications of the COVID-19 vaccines on her fertility, and about side-effects of the vaccines given a family history of heart conditions, cancer and stroke. As at 28 October 2021, Ms Bannan was on personal leave. She believes she will be stood down without pay unless vaccinated. The school principal has advised that the Department of Education will begin a termination process if she is not vaccinated before the 2022 school year.

81 [35] Reuben Tierney is a secondary school teacher at Marian College, Ararat, where he has worked since January 2021. He is married and has one child, aged 18 months. He was directed not to attend school after 25 October 2021 unless he could demonstrate compliance with the Vaccination Directions, and has been placed on leave without pay until further notice. He believes he will lose his job if he is not vaccinated, and therefore his household will be without his income.

82 [38] Belinda Cetnar works as a relief teacher on a casual basis, one to two days per week on average, at various Victorian schools. She has been working as a teacher since 2004. She and her husband have two dependent children and a dependent nephew who lives in their care. Mrs Cetnar states that she is due to have surgery to remove a lump and half her thyroid, and that the mental and emotional strain of potentially losing her job is compounded by her health condition. As at 28 October 2021, Mrs Cetnar was no longer being offered any shifts and as a result is not earning an income.

83 [40] Belinda Cetnar's husband, Jack Cetnar, is also a plaintiff to this proceeding. Mr Cetnar works as a horticulturalist on a full-time basis at Crest Education, a role he has held for approximately 12 years. Mr Cetnar has been stood down without pay since 25 October 2021 and he expects to have his employment terminated at the end of November unless he is vaccinated.

84 [39] Jade Farren is employed in three roles. She has been a TAFE teacher at Federation University since July 2021, a TAFE trainer and assessor at GenU since April 2021, and a yoga trainer and assessor at Byron Yoga since June 2021. She is a single mother of a 10 year old child. She believes that she will lose at least one of her jobs if she does not receive a COVID-19 vaccine. Ms Farren says she will be permitted to work from home until December 2021 but, following that, her employment will be terminated unless she receives a dose of a COVID-19 vaccine.

85 [43] Kirra Rowe is a full-time primary school teacher at St Mary's College, Seymour, where she has worked since January 2021. She provides financial support to her de facto partner. Her employer has advised that it will not be possible for her to continue with her employment without being vaccinated. She has been stood down without pay and believes she will lose her job if she does not receive a COVID-19 vaccine.

86 [136] Ana Liza Overall is an assistant early childhood educator at Imagination Garden. She has worked as an assistant educator since 2018. She is married with one child, aged 14. Ms Overall says she will be stood down from her job if she does not receive

a COVID-19 vaccine. She will be able to access her annual leave initially but, once that runs out, she will not receive any income. She does not believe she will be able to find alternative employment in the education industry.

Corrections

87 [47] Gavin Wootten has been employed by the Department of Justice as a prison officer for about three years, and works across the Melbourne Assessment Prison, the County Court and the Supreme Court. He is a single father to three. He and his ex-wife have shared care of their three children, aged 19, 10 and eight years old. He pays child support and provides financially for his children. He was notified on 14 October 2021 that he would not be allowed to enter the workplace after 15 October 2021 unless he had been vaccinated. Mr Wootten has been stood down on part-pay and believes that he will lose his job if he does not take a COVID-19 vaccine.

88 [50] Dijana Ibrahim is a prison officer employed by Corrections Victoria, within the Department of Justice. She has been employed by Corrections Victoria for approximately 15 years. Ms Ibrahim is a single mother to two adult children who rely on her income. On 22 October 2021, Ms Ibrahim received the first dose of the AstraZeneca vaccine out of fear of losing her employment. Ms Ibrahim believes that she acted under duress when receiving the vaccine, and does not give her informed consent to have a second dose. Her employer has advised that, unless she receives a second dose of a COVID-19 vaccine, she will not be permitted to work and her employment will likely be terminated.

89 [127] Daniel Wells is employed by G4S as a correctional officer in the Tactical Operations Group at Port Phillip Prison. He has worked for G4S since 2008. He provides financial support to his five children. He has received the first dose of a COVID-19 vaccine, due to the 'psychological and financial pressure' placed on him by the State of Victoria and his employer. Mr Wells says he does not give consent to having the second dose of a COVID-19 vaccine and has been advised by his employer that he will be stood down without pay unless he receives his second dose by

26 November 2021.

90 [128] Darren Beckett works as a correctional officer (supervisor) on a full-time basis for G4S. He commenced working for G4S in 2014. He is in a de facto relationship, has two young children, and provides financial support to his partner and children. He has received the first dose of a COVID-19 vaccine, and says that he 'was forced to have it ... or lose [his] job'. Mr Beckett says he does not provide his informed consent to receiving a COVID-19 vaccine and he would not receive the vaccine unless threatened with loss of employment.

91 [129] Lance McNamara has worked as a correctional officer on a full-time basis for G4S for approximately four years. His income provides financial support for himself and his dog. Mr McNamara was advised by his employer that his employment will likely be terminated on 1 November 2021.

92 [130] Tanya McEwan is employed by G4S as a K9 handler on a full-time basis, located at Port Phillip Prison. Ms McEwan has a two year old son. She was advised by G4S that she will not be able to continue with her employment without being vaccinated. Ms McEwan was stood down without pay from 4 November 2021, and will not be permitted to return to work unless she is vaccinated. She believes she will lose her job if she does not take a COVID-19 vaccine.

93 [131] Katie Bradshaw has been employed by the Department of Justice as a prison officer since 2019. On 13 October 2021, she was advised by the Department that she will not be permitted to attend the workplace unless she is vaccinated by 26 November 2021. Ms Bradshaw will be stood down without pay from 26 November 2021 unless her WorkCover claim is assessed favourably in the interim, and otherwise will not be permitted to return to work unless vaccinated.

Other occupations

94 [26] Matthew Wood-Ingram works as a supervisor for Bluescope Steel. He has a partner and two teenage dependents. His partner is medically retired and does not

work, and so he is the primary income earner for his family. He will be unable to attend work from 25 November 2021, and will be stood down without pay, unless he has been vaccinated by that date. He believes that he will lose his job if he does not receive a COVID-19 vaccine.

95 [27] Estelle Villalobos works for Ozcare Bio Active as a scientist and quality assurance manager, a role she has held for about one year. She is also a consultant for the manufacturing industry. She is married with three teenage dependents. Her family rely heavily on her income. Her husband is managing cancer. She is also a carer for her sister in law, who is also suffering from cancer. Her employer has given her limited permission to undertake alternative working arrangements pending the determination of this proceeding. She otherwise believes that she will lose her job if she does not receive a COVID-19 vaccine.

96 [41] Melinda Spencer is employed by Gippsland Lakes Complete Health as a bushfire recovery support worker, a role she has held since about February 2020. Ms Spencer is a mother to three children, an 11 year old and eight year old twins. Her employer has advised her that all staff must show proof of vaccination by 15 October 2021 or confirmation of a booking before 29 October 2021 to continue working. She believes that she will lose her job if she does not receive a COVID-19 vaccine as she will not be able to complete the duties of her position. Ms Spencer has felt very pressured by constant inquiries about her vaccination status. She had an appointment to receive a vaccination on 22 October 2021, but rescheduled it to 17 November 2021 after she had a panic attack. Despite having been diagnosed with an auto immune condition, she has been unable to obtain a medical exemption. Ms Spencer expects to have her employment terminated in the coming weeks unless she is vaccinated.

97 [42] Mellanie McNamara works for the Commonwealth Bank of Australia as a customer service specialist. She has been employed by the Commonwealth Bank for approximately eight years. Ms McNamara is a single mother and she provides for her two children aged 12 and 11 years. Her employer has notified her that she is not to

attend the workplace unless she is vaccinated, and she believes she will lose her job if she does not take a COVID-19 vaccine.

98 [44] Adam Mitchell is employed as a cooker operator with Saputo Dairy Australia. He has worked for Saputo Dairy Australia for approximately five years. He is the primary income earner for his wife and their three young children. His employer has advised that he will not be permitted to enter the work premises from 15 October 2021 if he has not provided proof of vaccination. He is worried about finding alternative employment that does not require him to be vaccinated, especially given he lives in regional Victoria, where it is more difficult to find job opportunities.

99 [48] Andrew Mitrovic is employed by Oracle CMS as a customer services officer and emergency services operator. He has worked for Oracle since May 2018. Mr Mitrovic has been stood down without pay since 15 October 2021. He says he had requested sick leave from 9 October 2021, but his employer refused this request and instead requires him to be vaccinated.

100 [49] Branka Plakalovic is employed by GenU in a post placement support role. She has been employed by GenU for almost five years. She lives with her elderly mother who is unemployed and relies on her income in addition to a disability support payment. She says she booked in to receive the first dose of a COVID-19 vaccine as she was distressed about the prospect of losing her employment. Ms Plakalovic was permitted to work from home until 1 November 2021, but may be stood down from her job unless she receives a dose of a COVID-19 vaccine.

101 [51] Noor Khoshaba has been employed by CSL Behring for almost seven years, and is currently a team leader in the position of biotech manufacturing assistant. He provides financial support to his wife and parents, and he is concerned that he will be unable to do so if he loses his job. Mr Khoshaba was stood down without pay from 15 October 2021 with disciplinary action pending, which he expects may result in the termination of his employment.

- 102 [53] Sumit Aneja is employed by Alfred Health as a security guard and team leader, based at Caulfield Hospital on a full-time basis. He has been employed by Alfred Health since 2008. He is also employed by Monash Health as a security officer at Dandenong Hospital on a casual basis. He is married with two children, and is the sole income earner for his household. Mr Aneja says he has been stood down with pay from 15 October 2021, and based on discussions with his employer expects his employment may be terminated.
- 103 [54] Andrew Sticca is employed by CSL as a biotech manufacturing associate, a position he has held for approximately four years. He is married with two children. His family rely on his income, in addition to his wife's income. He says he asked CSL to provide any data or reports to inform his decision to have the vaccine, however he has not been provided with any meaningful information. Mr Sticca has been stood down with pay from 15 October 2021, with disciplinary action pending. He expects that this will result in termination of his employment.
- 104 [57] Wendy Jongerius works as a human resources adviser for LYB Operations & Maintenance Pty Ltd and has been employed by this company for nearly 25 years. As well as supporting herself, she provides ad-hoc financial support to her sister. Ms Jongerius says she has not been permitted to work on site, but her employer has permitted a temporary arrangement to work from home.
- 105 [58] Alice Bejan is employed as a receptionist by Combatfit, a role she has held for two years. As well as supporting herself, she provides financial support to her mother who suffers from severe arthritis. At the time of making her affidavit on 28 October 2021, she was 27 weeks pregnant with her first child. She holds concerns about the potential impact of COVID-19 vaccines on her unborn child. Ms Bejan says that she cannot attend work unless she is vaccinated.
- 106 [60] Dion Douglas is a gym manager and trainer. He has worked as a trainer since about 2008. He and his partner are expecting a baby in January 2022 and he is concerned about his ability to look after his family if he loses his job. Mr Douglas says

that he cannot attend work unless he is vaccinated.

- 107 [61] Terry Jongerius works as an operator/technician at Loy Yang B Power Station, where he has worked for 28 years. He is married and his wife depends on his income. Mr Jongerius says he has been stood down without pay, and will not be permitted to work unless vaccinated. He is concerned about losing his employment, which will affect his superannuation because he is close to retirement age.
- 108 [62] Sandra Sancic works in a manufacturing/wholesale role on a casual basis for ASC Trading, where she has been employed for two years. Ms Sancic says she is under threat of losing her employment, however her employer has given her permission to undertake an alternate working arrangement pending the determination of this proceeding.
- 109 [65] George Parthimos is employed by CSL Behring as a biotech manufacturing assistant, a role he has held for the past seven years. He financially supports his 16 year old daughter. He is concerned about the side effects of the vaccines as his son and step-daughter experienced adverse reactions following their first dose. He asked CSL to provide any data or reports to inform his decision to have the vaccine, however he says he has not been provided with any meaningful information. Mr Parthimos has been stood down without pay from 15 October 2021, with disciplinary action pending. He expects that this will result in termination of his employment.
- 110 [68] Daniel Palmer is employed by Ozcare Bio Active as a blender. He has been employed by Ozcare Bio Active for over 14 years. Mr Palmer believes he may lose his job if he does not get vaccinated. He states that the only reason he is taking a COVID-19 vaccine is under direct threat of losing his employment, as he is concerned about his ability to look after his children if he loses his job.
- 111 [70] Margaret Maruszak works as a part-time sales assistant at Myer Chadstone. She has been employed with Myer for 16 years. She has been stood down on numerous occasions over the last two years as a result of the Government restrictions. She is

concerned about losing her job and finding alternative employment, especially as she is close to retirement age and it would be difficult for her to reskill. Ms Maruszak says that she will be unable to return to work once non-essential retail re-opens and therefore she will not be able to earn an income. Her employer has required evidence of having received a first dose of a COVID-19 vaccination by 22 October 2021, and a second dose by 26 November 2021. She believes she will lose her job if she does not get vaccinated.

112 [71] Tracey Seif is employed as a retail store manager on a full-time basis and she has been continuously employed for 8 years. She is married with one child. She does not believe it is necessary for her to get vaccinated, and the only reason she is contemplating getting a COVID-19 vaccine is under direct threat of losing her employment. Ms Seif believes she will lose her job if she does not take a COVID-19 vaccine.

113 [96] Kelly Seif has been employed as a fitness coach for the last 30 years. In addition to his wife and child, his sister and mother rely on his income. Mr Seif says that he cannot return to work and is currently stood down without pay. He will not be permitted to return to work unless vaccinated, and believes that he will lose his job.

114 [97] Jamie Lee Abdallah is employed as a gym manager and trainer. He has been working as a trainer since about 2011. The gym has been mostly closed for the past 18 months due to Government restrictions. He is married with a child, aged seven months. Mr Abdallah says that he cannot return to work unless vaccinated and he is currently stood down without pay.

115 [98] Haysem Abdallah is employed as a gym manager and trainer. He has been working as a trainer since about 2011. The gym has been mostly closed for the past 18 months due to Government restrictions. Mr Abdallah says that he cannot return to work unless he is vaccinated and he is currently stood down without pay.

- 116 [117] David Young is a Detective Sergeant with Victoria Police. He has been employed by Victoria Police for approximately 39 years. He mostly works at the West Geelong Police Station in the Geelong Sexual Offences and Child Abuse Investigation team. His wife and their two children rely on his income. He received the first dose of a COVID-19 vaccine after forming the view that he would lose his job if did not receive a vaccine. He has been a police officer for his whole life and is worried about finding other work that does not require him to be vaccinated. Mr Young will be unable to continue to work if he does not receive his second dose by 26 November 2021. He does not provide his informed consent to have the second dose.
- 117 [118] Philma Kairembora works as an employment consultant with Karingal Saint Lawrence. She has been employed with Karingal Saint Lawrence for about three years and has worked in the industry for 13 years. She has one son who is unable to work due to major health issues and who is solely dependent on her income. Ms Kairembora says that she expects to be stood down from November 2021, however she has been permitted to work from home on a temporary basis.
- 118 [121] David Howell is employed by the Department of Justice and Community Safety as a senior business analyst in the Financial System and Support Unit. He has been employed with the Department of Justice since 2000. He is married with five children. He has three step-children who reside with him and his wife, and two children who live with their mother, to whom he provides maintenance. Mr Howell says that he is not permitted to return to work until he is vaccinated and he must remain on leave – he can access paid leave initially, following which he will be on unpaid leave.
- 119 [134] Angela Vukovic is a receptionist and sales representative employed on a part-time basis by Sting Gym, Dandenong. Ms Vukovic has been employed by Sting Gym, which is her husband’s business, for 10 years. She has worked in the industry for over 20 years. She and her husband have three adult children. Ms Vukovic financially supports her son, who is on a pension, and her sister. She will be unable to return to work if she does not receive a COVID-19 vaccine. Ms Vukovic contracted COVID-19

in October 2020 and made a full recovery. She considers that she is 'generally immune against further contracting the virus in future'. She therefore believes it is not necessary for her to get vaccinated.

Self-employed

120 [102] Tennille de Boer is a beauty therapist who has operated her business from a rented salon premises since 2015. Ms de Boer's business has been mostly closed for the last 18 months due to Government restrictions. She has two children, aged 14 and nine years, who rely solely on the income she earns from her business. Ms de Boer says that she is unable to re-open her business and cannot earn an income as a result of not being vaccinated against COVID-19.

121 [106] Nicholas Ambrus is a gym manager and trainer, and has worked as a trainer since around 2013. The gym has been mostly closed for the last 18 months due to Government restrictions. Mr Ambrus cannot return to work and cannot continue to operate his sole trader business.

122 [107] Jasmin Zecevic is a director of Jaslo Pty Ltd, a company he established 30 years ago that provides plastering services. Mr Zecevic's wife and four children rely upon the income that he earns from this business. Mr Zecevic's company has adopted a COVID-19 safe plan, and workers on site wear PPE and practice social distancing. He says he cannot return to site and cannot continue to operate his sole trader business unless he is vaccinated.

123 [108] Joseph Haddad works as a contractor in the gym industry, with a focus on management and coaching services. He is married with two young children, and he is concerned about potentially losing his business and not being able to support his family. Mr Haddad says he cannot return to work and cannot continue to operate his sole trader business.

124 [111] Justin Macquet swore an affidavit on behalf of Australasian Poly Welding Pty Ltd, a plaintiff in this proceeding. Mr Macquet is a director of that company, which

was established eight years ago and provides welding services. He has an 11 year old son, who relies on the continued operation of the business. Mr Macquet says he cannot properly operate his business as his unvaccinated employees cannot attend the business and he cannot work in the industry.

125 [112] George Clancey is a self-employed remedial therapist, who has operated her business on a mobile basis for about 10 years. Her business has been mostly closed for the last 18 months due to Government restrictions. Ms Clancey also works part-time as an administrative assistant with Reed Holdings Pty Ltd, a role she has held for about two years. She has three children, one of whom lives with her and depends on her income. Ms Clancey says that she cannot operate her business as a remedial therapist unless she is vaccinated.

126 [113] Michael Smith is a self-employed personal trainer and myotherapist. He has been working as a personal trainer since 2004 and he is in the process of incorporating myotherapy services into his business. His business has been mostly closed for the last 18 months due to Government restrictions. He is planning for a child with his partner in the near future. He holds concerns about the impact of the vaccines on their fertility, and the possible effects on children in-utero and beyond. He is also concerned about side effects such as myocarditis and pericarditis as he considers this could impact his ability to conduct his business. Mr Smith has taken measures to operate his business in accordance with a COVID-19 safe plan and he is willing to operate his personal training business with other restrictions, such as limited class sizes, outdoor settings and social distancing. Mr Smith says that he cannot operate his business and earn an income unless he is vaccinated.

Business owners with employees

127 [99] Daniel Inati is a director of Dandy Smash Repairs Pty Ltd, which trades as Automotive Smash Repairs and focuses on vehicle service and smash repairs. The company was established in 2010 and has six employees. Mr Inati states that the company has adopted a COVID-19 safe plan, and that employees wear PPE while on

site and practice social distancing. Mr Inati draws an income from the company, and he financially supports his wife and two children. In a personal capacity, he does not wish to receive a COVID-19 vaccine and he shares the concerns raised by Mr Harding. In addition, he is concerned about losing his business and about the impact of the Vaccination Directions on him as an employer, including for the following reasons:

- (a) he believes that his employees should be able to choose whether to have a vaccine or not without coercion by their employer;
- (b) he does not want to ask employees for evidence of their vaccination status, as he believes they have a right to privacy concerning such information;
- (c) he does not want to be compelled by the Government to access, collect and store employees' private medical information;
- (d) he is concerned that an employee might sue him or the company in case they feel coerced or forced into taking a vaccine solely to avoid losing their employment; and
- (e) he is also concerned that an employee might sue him or the company for discrimination, breach of privacy legislation or personal injury if the employee suffers an adverse reaction to a vaccine, whether temporary or permanent.

128 These views are shared by the following plaintiffs who also own their own business, and who are concerned about the directions both from a personal perspective and in their capacity as employers.

129 [100] Benjamin Hajj is the owner of Peninsula Smash Repairs, which focuses on vehicle service and smash repairs. Mr Hajj draws an income from the business, and he financially supports his wife and three children. Peninsula Smash Repairs was established in 2007 and has four employees. Mr Hajj is concerned about staffing levels in circumstances where employees cannot work on site unless they are vaccinated. Mr Hajj says he cannot properly operate his business as not all of his employees are

permitted to attend the business premises. As a result, he has to turn down work while his fixed overhead costs remain.

130 [103] Anthony Scarcella swore an affidavit on behalf of ASC Trading Pty Ltd, a plaintiff in this proceeding. Mr Scarcella is a director of that company, which trades as 'Go Pure' and focuses on manufacturing and distributing supplements. The company was established in 2013 and currently employs three people. Mr Scarcella is married with two children under eight years of age, and his family rely on the continued operation of the company. Mr Scarcella says he cannot properly operate his business as unvaccinated employees will be unable to attend the premises.

131 [104] Rosina Mimmo swore an affidavit on behalf of 3 Apostles Pty Ltd, a plaintiff in this proceeding. Ms Mimmo has operated restaurants and cafés since the 1980s, and her company currently operates a restaurant called 'Manhattan in Mornington'. The company employs 12 people in various positions. Ms Mimmo is married with three adult children, and her family relies on the continued operation of the business. Ms Mimmo says she cannot properly operate her business as unvaccinated employees will not be able to attend the work premises.

132 [109] Samantha Parkin is an officer of Squidzy Pty Ltd, which operates a restaurant called 'Sambreros Tex-Mex Cantina'. The company employs 12 people and it has taken measures to operate the restaurant in accordance with a COVID safe plan. Ms Parkin is married with an adult son, and her family relies on the income and the continued operation of the restaurant. Ms Parkin says that she cannot properly operate her business as unvaccinated employees will not be able to attend the work premises.

133 [110] Audrey Mosig is the office manager for Southside Constructions Pty Ltd, a company that provides concreting services. The company was established four years ago and employs 15 people. Ms Mosig is married with a seven month old child, and her family rely upon the continued operation of the business.

134 [114] George Lyras is a director of KB Prestige, a company established in 2012 which focuses on vehicle service and smash repairs. Mr Lyras derives income from the business, and his wife and three children rely on the continued operation of his business. Mr Lyras says that he is currently unable to properly operate his business.

135 [116] Marco Farinaccio swore an affidavit on behalf of Seven Asteria Pty Ltd, a plaintiff in this proceeding. Mr Farinaccio is a director of that company, which trades as 'Oakleigh Market Meat' and employs five people. Mr Farinaccio obtained his qualification as a butcher in about 1980. He is married with five adult children, two of whom live with him, and his family relies on the continued operation of the business. Mr Farinaccio has taken measures to operate his business in accordance with a COVID safe plan. Mr Farinaccio says that he cannot properly operate his business as unvaccinated employees will not be able to attend on site. He is also concerned about potential financial penalties if he does not operate in accordance with the directions.

Plaintiffs' summons

136 By summons filed on 26 October 2021, the plaintiffs sought interlocutory injunctions restraining Professor Cowie from relying upon, acting on or giving effect to the Vaccination Directions that were then in effect, in so far as they applied to the plaintiffs. The plaintiffs amended their summons twice, with leave, so that the interlocutory relief sought at the hearing on 3 November 2021 was for orders that:

1. The operation of the First Defendant's Covid-19 Mandatory Vaccination (Workers) Directions (No 6) (including any amendment or substitution thereof) (Workers Direction) insofar as they affect the Plaintiffs 26, 27, 41-44, 47-62, 65, 68, 70-100, 102-104, 106-114, 116-119, 121-132, 134-136 to this Proceeding (as at the date of this order) be suspended pending final hearing and determination of the proceeding, or until further order of the Court.
2. The operation of the First Defendant's Covid-19 Mandatory Vaccination (Specified Facilities) Directions (No 11) (including any amendment or substitution thereof) (Specified Facilities Direction) insofar as they affect the Plaintiffs 1, 2, 5-8, 10-19, 32, 34, 35, 38-40, 133 to this Proceeding (as at the date of this order) be suspended pending final hearing and determination of the proceeding, or until further order of the Court.

3. The First Defendant be prohibited from making, or authorising to be made, any further directions under s 200(1)(d) of the Public Health and Wellbeing Act 2008 (Vic) insofar as they affect the Plaintiffs described in Orders 1 and 2 in terms that are the same as, or similar to or in substitution of the Covid-19 Mandatory Vaccination (Workers) Directions (No 6) and the Covid-19 Mandatory Vaccination (Specified Facilities) Directions (No 11) pending final hearing and determination of the proceeding, or until further order of the Court.

137 I will refer to the Workers Directions (No 6) and the Specified Facilities Directions (No 11) as the **Impugned Directions**.

138 The principles to be applied in determining whether to grant an interlocutory injunction are well established. The plaintiffs summarised the relevant principles as follows:²²

The Court has a wide discretion in relation to granting interlocutory prohibitive injunctions and it may be exercised if the Plaintiff demonstrates the following:²³

- (a) There is a serious question of law to be tried. There must exist a cause of action based on some recognized legal or equitable right: *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [8], [88]-[91]; and in the context of seeking interlocutory injunctive relief, the “serious question to be tried” must be a question the determination of which in favour of the plaintiff would require the grant of an injunction in one form or another at trial: *Murphy v Lush* (1986) 65 ALR 651; *National Mutual Life Assn of Australasia Ltd v GTV Corp Pty Ltd* [1989] VR 747 at [751];
- (b) The balance of convenience favours granting an injunction in favour of the Plaintiff, because the injury likely to be suffered if the injunction were refused, outweighs the injury which the Defendant will suffer if the injunction were granted.²⁴ The underlying principle of this element is: “Does granting the injunction carry a lower risk of injustice than withholding it?”: *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499 at 502; and
- (c) Damages would be an inadequate remedy: *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [19]; *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 and cases

²² Outline of submissions of the plaintiffs dated 28 October 2021, [16]-[19].

²³ Citing *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, [10], [19] (Gleeson CJ and Crennan J), [65]-[72] (Gummow and Hayne JJ) (*ABC v O’Neill*); *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622-3; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, [24]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

²⁴ Citing *ABC v O’Neill*, [65] (Gummow and Hayne JJ); *Beecham Group*, 623; *Australian Exhibitions and Conferences Pty Ltd v Australian Exhibition Services Pty Ltd* [2001] VSC 226.

there cited.

In *Bradto Pty Ltd v Victoria* (2006) 15 VR 65, the Victorian Supreme Court of Appeal, per Maxwell P and Charles JA concluded that it is desirable that a single test be applied in all cases of application for an interlocutory injunction and that neither authority of principle required that there be a special test in the case of mandatory relief. Their Honours stated (at [35]) as follows:

“[35] In our view, the flexibility and adaptability of the remedy of injunction as an instrument of justice will be best served by the adoption of the Hoffman approach. That is, whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”, in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial.”

The purpose of an interlocutory injunction is ordinarily to preserve the Plaintiff’s rights the subject of the claim, the status quo, until the hearing of the main action: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 396.

The risk of hardship to third parties may be a relevant consideration in the determination [of] whether to award damages or grant an injunction: *Gedbury Pty Ltd Michael David Kennedy Autos* [1986] 1 Qd R 103.

139 The defendants did not dispute the correctness of this summary, but raised questions about the Court’s power to grant the relief sought in paragraphs 1 and 2 of the plaintiffs’ further amended summons, and the form of the relief sought.

Power

140 The defendants submitted that the Court does not have power to grant the interlocutory relief sought in paragraphs 1 and 2 of the further amended summons. They pointed out that neither paragraph was framed as an interlocutory injunction – neither sought to restrain any person from doing any act or thing, or require a person to do any act or thing. Rather, they sought the ‘suspension’ of the ‘operation’ of the Impugned Directions in so far as they affect the applicant plaintiffs.

141 The defendants argued that the Impugned Directions did not exist in the abstract and had no independent legal effect. Rather, they depended for their force and effect on the Public Health Act, in particular s 203, which makes it an offence for a person to refuse or fail to comply with a direction given to the person under s 200.²⁵

²⁵ Citing *Palmer v Western Australia* (2021) 95 ALJR 229, [120] (Gageler J).

Paragraphs 1 and 2 of the plaintiffs' further amended summons in effect sought to suspend the operation of s 203 of the Public Health Act, in so far as it affects the applicant plaintiffs. The defendants submitted that the Court does not have power to suspend or stay the operation of a statutory provision.²⁶

142 The plaintiffs responded that the Court had inherent jurisdiction to grant the relief sought. They referred me to *Re Dunn*,²⁷ which confirmed that the 'Supreme Court of Victoria has always had, in the most full and ample manner, similar jurisdiction to that possessed by the Court of King's Bench in England',²⁸ and to s 85 of the *Constitution Act 1975* (Vic). They also relied on orders made recently by the Supreme Court of Queensland in two proceedings: one brought by police officers against the Commissioner of the Queensland Police Service, and another proceeding brought by health workers against the Director General of Queensland Health. In both proceedings, interlocutory orders were made suspending the operation of vaccination directives in relation to the applicants.

143 I accept the submission of the defendants that the Court has no power to suspend the operation of Impugned Directions in so far as they affect the applicant plaintiffs. The Impugned Directions were given by Professor Sutton under s 200(1)(d) of the Public Health Act, and were given force and effect by other provisions of that Act.²⁹ In particular, s 203(1) makes it an offence to fail or refuse to comply with a direction of an authorised officer given to a person in the exercise of a power under an authorisation given under s 199 of the Public Health Act.

144 The authorities referred to by the plaintiffs did not meet the argument that the full and ample jurisdiction of the Court does not extend to a power to stay or suspend the operation of a statute. I am persuaded by the reasoning of Payne J in *Council of the*

²⁶ Citing *Council of the City of Ryde v Azizi* [2019] NSWSC 1605, [170], [174]-[175]; *Williment v Federal Commissioner of Taxation* (2010) 190 FCR 234.

²⁷ [1906] VLR 493 (*Re Dunn*).

²⁸ *Re Dunn*, 502.

²⁹ *Palmer*, [120] (Gageler J).

*City of Ryde v Azizi*³⁰ that, absent some enabling statutory provision, the Court has no such power. The High Court's exposition of the inherent supervisory jurisdiction of a Supreme Court of a State in *Kirk v Industrial Court of New South Wales*³¹ does not suggest otherwise.

145 The orders made by the Supreme Court of Queensland, in the two proceedings currently before that Court, were made under s 29(2)(a) of the *Judicial Review Act 1991* (Qld), which provides power to suspend the operation of a decision under review. In Victoria, the equivalent provision is s 9 of the *Administrative Law Act 1978* (Vic), which gives the Court power to suspend the operation of an administrative decision 'in order to prevent irreparable damage pending judicial review'. However, this proceeding is not brought under the Administrative Law Act. It is brought in the Court's inherent jurisdiction to supervise executive decision-making by way of judicial review. No statutory power is available to support the orders sought in paragraphs 1 and 2 of the plaintiffs' further amended summons.

146 The defendants accepted that the Court has power to grant an interlocutory injunction of the kind sought in paragraph 3 of the plaintiffs' further amended summons. However, they argued that an injunction should not be ordered in the terms sought, on grounds of form and merit.

Form

147 The defendants submitted that there were a number of 'fundamental defects' in the framing of paragraph 3 of the plaintiffs' further amended summons.

(a) First, it was insufficiently precise to allow Professor Sutton to know whether any future direction he might make under s 200 of the Public Health Act would be 'similar to' one of the Impugned Directions. The imprecision in the language used would place him at risk of being in contempt of court in relation to future directions concerning mandatory vaccination of workers, without any criteria

³⁰ [2019] NSWSC 1605, [170], [174]–[175]. See also *Williment v Federal Commissioner of Taxation* (2010) 190 FCR 234, [3].

³¹ (2010) 239 CLR 531, [97]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

for judging whether the direction was ‘similar to’ one of the Impugned Directions.

- (b) Second, the relief claimed assumes that the Chief Health Officer ‘authorises’ the making of further directions, when the Public Health Act confers no such power. Rather, the Chief Health Officer can, and has, exercised the power in s 199 to authorise ‘authorised officers’ to exercise the emergency powers in s 200 of the Public Health Act. Those authorised officers are free to exercise the powers in s 200 if the relevant statutory criteria are satisfied, without any further ‘authorisation’ by the Chief Health Officer.
- (c) Third, a prohibition on making further directions ‘insofar as they affect’ the applicant plaintiffs would be insufficiently precise for Professor Sutton to understand the constraint on his emergency powers. The Impugned Directions apply directly to operators of specified facilities and certain employers, and ‘affect’ the applicant plaintiffs who are workers only indirectly. How could future directions be framed so as not to affect the applicant plaintiffs, when no obligations are presently imposed on most of them?

148 In support of these submissions, the defendants referred me to authorities that stressed the importance of certainty and precision in the framing of any injunction, whether interlocutory or final, given that a person who does not comply with an injunction may be liable for contempt of court.³²

149 The plaintiffs did not really respond to these submissions, other than relying on the Court’s inherent jurisdiction to grant injunctions and the form of the injunctions granted in the two Queensland proceedings. They did not seek to refine or clarify the wording of paragraph 3 in response to the matters raised by the defendants, despite an invitation to do so.³³

³² *Nexus Mortgage Securities Pty Ltd v Ecto Pty Ltd* [1998] 4 VR 220, 221–2 (Tadgell JA), 222–3 (Ormiston JA); *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51, 54, 56–7.

³³ Transcript, 3 November 2021, 52:13–53:8; see also 61:4–14.

150 I agree with the defendants that the form of the injunction sought in paragraph 3 of the plaintiffs' further amended summons is so imprecise and uncertain that it could not be the subject of an order, breach of which would be punishable as a contempt of court. I accept their submission that an order prohibiting Professor Sutton from making any further mandatory vaccination directions that affect the applicant plaintiffs 'in terms that are the same as, or similar to or in substitution of' the Impugned Directions could not be complied with or enforced with sufficient certainty.

151 The main difficulty with paragraph 3 is the lack of any precision as to how the applicant plaintiffs might be excluded from the operation of any future mandatory vaccination directions. It was entirely unclear how future directions might be framed in a way that did not 'affect' the applicant plaintiffs, given the various and differing ways in which they are affected by the Impugned Directions. In particular, paragraph 3 did not distinguish between those applicant plaintiffs who own a business, who had direct obligations under the Workers Directions (No 6), and the majority of applicant plaintiffs who are employees, and were indirectly affected by the obligations imposed by the Impugned Directions on their employers. No employer of any applicant plaintiff, or operator of any specified facility, is identified in paragraph 3. In a few cases, this is not even apparent from the evidence relied on by the plaintiffs. As one example, Belinda Cetnar works as a casual relief teacher at 'various Victorian schools', only one of which is named in her affidavit.³⁴

152 Again, the injunctions granted in the two Queensland proceedings do not assist in resolving the imprecision and uncertainty of paragraph 3 of the plaintiffs' further amended summons. Both proceedings concern directives given by public sector employers that apply directly to, respectively, police officers in the Queensland Police Service and employees of Queensland Health. In those circumstances, there is little difficulty in excluding the named applicants from the operation of the directives, 'including any amendment or substitution thereof'. The Impugned Directions have a

³⁴ Affidavit of Belinda Cetnar dated 21 October 2021, [5]. See also [82] above.

very different scope and operation from the directives that are the subject of the two Queensland proceedings.

Serious questions to be tried

153 I consider that the plaintiffs have established serious questions to be tried in relation to Ground 1(a) and Ground 4. That is, they have an arguable case that:

- (a) In making the Impugned Directions, Professor Sutton acted in a way that was incompatible with:
 - (i) the right not to be subjected to medical treatment without full, free and informed consent, in s 10(c) of the Charter; and
 - (ii) the right not to have their privacy unlawfully or arbitrarily interfered with, in s 13(a) of the Charter; and
- (b) In making the Impugned Directions, Professor Sutton purported to exercise power under s 200(1)(d) of the Public Health Act for a legislative purpose, which was not a purpose for which the power was conferred.

154 On the present state of the evidence, I was unable to find an arguable case in relation to any of the other grounds set out in the further amended originating motion.

155 I explain first why I consider there to be serious questions to be tried in relation to Ground 1(a) and Ground 4, before explaining why that is not the case for the remaining grounds.

Ground 1(a) – Incompatibility with human rights

156 By Ground 1(a) of their further amended originating motion, the plaintiffs contend that, in making the Vaccination Directions, the Defendants acted unlawfully in that they acted in a way that was incompatible with one or more rights contained in the Charter. They list the rights set out in ss 8(2), 8(3), 10(b), 10(c), 13, 14(1), 14(2), 15(1), 15(2), 16(1), 16(2), 17(1), 17(2), 19(1), 21(1), 21(2) and 21(3) of the Charter. Only two of these rights were addressed at the hearing of the interlocutory application – the right

not to be subjected to medical treatment without consent in s 10(c), and the right not to have their privacy unlawfully or arbitrarily interfered with in s 13(a). The plaintiffs did not attempt to articulate how the Impugned Directions limited any of the other human rights listed in Ground 1(a), and so those rights are not considered in these reasons.

157 The plaintiffs' argument in relation to Ground 1(a) was as follows.

- (a) Section 38(1) of the Charter applied to the giving of the Vaccination Directions by the defendants, and required them not to act in a way that is incompatible with one or more human rights.
- (b) The Vaccination Directions limited the plaintiffs' right, in s 10(c) of the Charter, not to be subjected to medical treatment without their 'full, free and informed consent'. The effect of the Vaccination Directions is to prevent the plaintiffs from attending their place of work and to threaten them with loss of their employment, unless they are vaccinated. In circumstances where the plaintiffs are being coerced to submit to vaccination, their consent cannot be 'full, free and informed'.
- (c) The Vaccination Directions also limited the plaintiffs' right, in s 13(a) of the Charter, not to have their privacy unlawfully or arbitrarily interfered with. They oblige employers and operators of specified facilities to collect, record and hold vaccination information about employees, which amounts to an interference with their privacy. The interference is unlawful, based on the plaintiffs' other grounds of review, and arbitrary, because it is disproportionate.
- (d) The defendants bear the burden of demonstrating that these limits on human rights are justified as reasonable and proportionate, under s 7(2) of the Charter. In light of what must be justified, the standard of proof is high and cogent and

persuasive evidence is required.³⁵

158 The defendants accepted that they are public authorities for the purposes of the Charter, and that a public authority that is shown to have limited a human right bears the burden of demonstrating that the limit is justified under s 7(2) of the Charter. However, they disputed that the plaintiffs had established an arguable case in relation to Ground 1(a) on a number of bases.

- (a) First, they submitted that s 38(1) of the Charter did not apply to the giving of the Vaccination Directions, which they characterised as instruments of a legislative character and hence ‘subordinate instruments’.³⁶ The defendants relied on *Kerrison v Melbourne City Council*³⁷ as authority for the proposition that s 38(1) of the Charter does not apply to the ‘act’ of making or to a ‘decision’ to make a subordinate instrument.
- (b) Second, they argued that the Vaccination Directions do not subject any person to medical treatment. They relied on the reasoning in *Kassam v Hazzard*,³⁸ in which Beech-Jones J rejected a submission that mandatory vaccination orders in New South Wales violate any person’s right of bodily integrity.³⁹ His Honour held that a consent to vaccination is not vitiated just because a person agrees to be vaccinated to avoid a general prohibition on movement or to obtain entry to a work site.⁴⁰
- (c) Third, they relied on the internal limitation in s 13(a) of the Charter, and submitted that the plaintiffs had not established an arguable case that the Vaccination Directions involved an unlawful or arbitrary interference with

³⁵ Citing *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [108]; *DAS v Victorian Equal Opportunity and Human Rights Commission* (2009) 24 VR 415, [147]; *R v Momcilovic* (2010) 25 VR 436, [144] (citations omitted); *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, [175] (citations omitted).

³⁶ *Interpretation of Legislation Act 1984* (Vic) s 38 – definition of ‘subordinate instrument’.

³⁷ (2014) 228 FCR 87 (*Kerrison*).

³⁸ [2021] NSWSC 1320 (*Kassam*).

³⁹ *Kassam*, [56].

⁴⁰ *Kassam*, [63].

their privacy.

159 While the points raised by the defendants are substantial, they are not clear beyond argument.

160 As to the first point, I explain later in this judgment why I do not consider the defendants' argument based on *Kerrison* should be determined separately, before trial.⁴¹ For the reasons given there, I consider that there are serious questions to be tried whether the Vaccination Directions are subordinate instruments, and whether s 38(1) of the Charter applies to the act of giving or the decision to give directions under s 200(1)(d) of the Public Health Act.

161 As to the second point, it is clear from the plaintiffs' affidavits that most if not all of them feel that the effect of the Vaccination Directions is to coerce them to consent to being vaccinated in order to be able to continue earning a living and keep their jobs, in circumstances where they would not otherwise consent to the treatment. On that basis I consider there to be an arguable case that the right in s 10(c) of the Charter is limited by the Vaccination Directions. Justice Beech-Jones' rejection of a similar argument in *Kassam* was based on the common law concerning consent to a trespass to the person. It is arguable that the concept of consent at common law is narrower than the 'full, free and informed consent' to medical treatment that is contemplated by s 10(c) of the Charter.

162 As to the right to privacy, as I will explain shortly, there is a serious question to be tried whether the Vaccination Directions were made for an improper purpose, as the plaintiffs allege in their Ground 4. On that basis, it is arguable that any interference with privacy involved in requiring employers to gather vaccination information is unlawful. It is also arguable that the interference is arbitrary, in the sense of not being proportionate to a legitimate aim.⁴² That is, there is a question whether the intrusion into the plaintiffs' privacy of requiring them to provide their vaccination information

⁴¹ See [210] below.

⁴² *PJB v Melbourne Health* (2011) 39 VR 373, [85].

to their employers, despite their objections, is justified by the protection of public health.

163 On that basis, I considered there to be a serious question to be tried whether the Vaccination Directions are incompatible with the rights in ss 10(c) and 13(a) of the Charter, and hence contrary to s 38(1).

Ground 4 - Improper purpose

164 The plaintiffs' fourth ground focuses on the use of the emergency power in s 200(1)(d) of the Public Health Act for a legislative purpose, in the following terms:

In making the Impugned Emergency Directions,⁴³ each Defendant purported to exercise power under section 200(1)(d) of the *Public Health and Wellbeing 2008* (Vic) for a purpose other than a purpose for which the power was conferred, which was unauthorised or improper in that:

- a. the purpose of the Impugned Emergency Directions, at their inception and in their cumulative effect, has been to create a body of rules applicable to the people of Victoria that are designed to create ongoing obligations on employers, and corresponding obligations on workers, to make COVID-19 vaccinations a mandatory requirement in the workplace; and
- b. such a purpose was unauthorised and improper in that:
 - i. the purpose is legislative;
 - ii. the power under section 200(1)(d) cannot lawfully be exercised for a legislative purpose;
 - iii. the legislative purpose amounts to an usurpation of the general law-making function of the Parliament to make the laws of Victoria, and of the delegated law-making function of the Governor in Council to make regulations under Division 6 of Part 11 of the *Public Health and Wellbeing Act 2008* (Vic).

165 As I understand it, the plaintiffs' argument in relation to Ground 4 is that the power to give directions in s 200(1)(d) of the Public Health Act is an administrative power, not a legislative power, and cannot lawfully be used to make subordinate legislation. They characterised the Vaccination Directions as legislative in nature, being complex rules of general application to the community at large. They pointed out that

⁴³ The plaintiffs' further amended originating motion at [16] refers to the Vaccination Directions as 'Impugned Emergency Directions'.

authorised officers under the Public Health Act are unelected public officials, with no express power to make delegated legislation.

166 The defendants embraced the characterisation of the Vaccination Directions as legislative, but contended that there is nothing improper about using the power in s 200(1)(d) to create a body of rules for a confined period during a declared state of emergency.

167 I consider there to be a serious question to be tried in relation to this ground. It is not obvious to me that an emergency power to give directions for the protection of public health necessarily extends to a power to make delegated legislation. It is significant that the Public Health Act does not prescribe any formal requirements for directions given under s 200(1)(d) – they need not be in writing and they need not be published in any way. In addition, they are excluded from the application of the *Subordinate Legislation Act 1994 (Vic)*.⁴⁴

168 The defendants' position about the nature of the power in s 200(1)(d) appears to be different from that taken by the defendant in *Loiello v Giles*,⁴⁵ about the lawfulness of the curfew imposed in Greater Melbourne during August and September 2020 by directions given under sub-ss 200(1)(b) and (d). In that case, the defendant accepted that decisions to give the impugned directions were subject to s 38(1) of the Charter, and did not seek to characterise them as subordinate instruments, or instruments of a legislative character.⁴⁶ This difference in position indicates some uncertainty about the nature and extent of the power in s 200(1)(d), and whether it may properly be exercised for the purpose of making a legislative instrument.

⁴⁴ *Subordinate Legislation Act 1994 (Vic)*, s 3 – definition of 'legislative instrument', para (h); *Subordinate Legislation (Legislative Instruments) Regulations 2021 (Vic)* sch 1 item 87.4.

⁴⁵ (2020) 63 VR 1 (*Loiello*). The defendant in that case was Associate Professor Michelle Giles (in her capacity as Deputy Public Health Commander as authorised to exercise emergency powers by the Chief Health Officer under s 199(2)(a) of the Public Health Act).

⁴⁶ *Loiello*, [208], fn 70.

Ground 1(b) – Proper consideration of relevant human rights

169 Ground 1(b) is expressed in the further amended originating motion as follows:

[The Defendants] otherwise have each failed to give proper consideration to one or more of the engaged Charter rights in that they each failed to:

- i. understand in general terms how each engaged Charter right may have been relevant and how those rights would be interfered with by one or more [of] the Impugned Emergency Directions;
- ii. seriously turn their mind to the possible impact that each Impugned Emergency Direction, in itself or in combination with one or more other directions, may have had on a person's human rights and the implications thereof for the affected persons;
- iii. identify the countervailing interests or obligations in relation to the Impugned Emergency Direction;
- iv. balance competing private and public interests as part of the exercise of justifying the Impugned Emergency Direction.

170 While the plaintiffs made submissions about what is required of a public authority who is obliged by s 38(1) of the Charter to give proper consideration to relevant human rights,⁴⁷ there is at present no evidence to support the contention that the defendants failed to give proper consideration to relevant rights. There is no statement of reasons for giving any of the Vaccination Directions, and for the time being I have no information about the defendants' decision-making processes. In those circumstances, there is no arguable case that the defendants did not comply with the procedural limb of s 38(1) of the Charter in giving the Vaccination Directions.

Ground 2 – Acting under dictation

171 The plaintiffs' second ground is framed in this way:

In making the Impugned Emergency Directions, each Defendant acted under the direction and at the behest of the Premier of Victoria and failed to give any real independent consideration as to whether it was appropriate to make the Impugned Emergency Directions, and accordingly acted outside the limits of the functions and powers conferred on each of them giving rise to jurisdictional error.

⁴⁷ Relying on *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [185]–[186]; *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, [288]–[289] (Tate JA).

172 In support of this ground, the plaintiffs relied on selected quotes from press conferences given by Daniel Andrews, the Premier of Victoria, on 26 August 2021, 22 September 2021, 1 October 2021 and 19 October 2021, as well as a media release issued by the Premier on 1 October 2021.⁴⁸ They contended that this material gave rise to a serious question to be tried that the defendants acted under the dictation of the Premier when giving the Vaccination Directions, without giving the matter any independent consideration. They referred me to the leading authorities concerning the acting under dictation ground of review, including *R v Anderson; Ex parte Ipec-Air Pty Ltd*⁴⁹ and *Minister for Immigration and Multicultural Affairs v Jia Legeng*.⁵⁰

173 I have read the material relied on by the plaintiffs carefully. I cannot agree that it supports their contention that the defendants were acting under the dictation of the Premier in giving any of the Vaccination Directions. It rather indicates that the Chief Health Officer and other public health officials had advised the Premier that vaccination against COVID-19 should be mandatory in certain workplaces, and that the Premier and the Cabinet had accepted and were acting on their advice. I note the following:

- (a) In the passage quoted from the press conference on 22 September 2021, the Premier refers three times to the advice of the Chief Health Officer. The quote starts with the words ‘the requirement to test and be fully vaccinated is the chief health officer’s advice and as I have said to you on so many [occasions] it is in all of our interests to follow the chief health officer’s advice on this’.
- (b) During the press conference on 1 October 2021, the Premier announced that all ‘authorised workers’ in Victoria – who were authorised to leave home to go to work – would have to have at least one dose of a COVID-19 vaccine by 15 October 2021. Again, there are several references to the advice of the Chief

⁴⁸ First affidavit of Omar El-Hissi dated 26 October 2021 (**First El-Hissi affidavit**), [16]–[24], exhibit bundle OEH1.

⁴⁹ (1965) 113 CLR 177, 189 (Kitto J).

⁵⁰ (2001) 205 CLR 507, [62]–[63] (Gleeson CJ and Gummow J) (citations omitted).

Health Officer, Acting Chief Health Officer, and the public health team. In particular:

At 11:50: “we have had overnight and again this morning some serious discussions at a cabinet level and the public health team provided us with some updated advice so I want to take you through some important decisions that have been made this morning ... This is [the] advice from both the Burnet Institute and the advice from the acting chief health officer and the public health team and as all Victorians know and understand if we are provided with that advice we will follow that advice.”

At 54:45: “these are not decisions made by me, these are decisions made by the chief health officer after a proper lawful process of considering proportionality considering the difficulties that we are facing ...”

At 57:40: “I’m not looking to exempt anyone. ... I’m in the business of encouraging and where necessary through orders signed by the CHO mandating people getting vaccinated where they pose significant risk. There is too much at stake. ... You will need to be double-vaxxed as an authorised worker, even when after we get to 80% and the authorisations are no longer there, the mandate, the rule, the CHO directions will stay in place ... cases will still be in issue then.”

- (c) The Premier’s media release of 1 October 2021 confirmed the announcement made at that day’s press conference:

VACCINATION REQUIRED TO PROTECT WORKERS AND VICTORIA

Over the course of the pandemic, when we have needed to limit movement and slow the spread of the virus restrictions have been our primary weapon. Now, with supply of the vaccine finally becoming widely available, we are able to protect all workers who aren’t able to do their essential work from home and protect the roadmap to reopening.

As we move through Victoria’s Plan to Deliver the National Roadmap, we will see more pressure on our health system than we ever have. It is still crucial we continue to protect our health system from being overwhelmed. Our nurses, doctors, ambos and all of our health workers are working their guts out to be there for us and they need us all to do our bit.

On the advice of our public health team, all workers – in Melbourne and regional Victoria – on the Authorised Worker list will require their first COVID-19 vaccine dose by Friday, 15 October in order to continue working onsite. They will need to be fully vaccinated by 26 November.

The advice from the Burnet Institute and all our public health officials

is that vaccination remains our best protection. As authorised workers are currently moving around Victoria the most, it's vital they get vaccinated to protect themselves, their families and all of Victoria.

The 15 October deadline will not apply to workers who already have existing requirements under CHO directions – groups like construction, freight, healthcare, aged care and education will still have to comply with previous advice.

174 Significantly, the plaintiffs adduced no evidence of any statements by any of the defendants as to why they had given the Vaccination Directions at various times since 7 September 2021, and in particular why Professor Sutton gave the Impugned Directions on 29 October 2021. No statement of reasons accompanied any of the directions, and the plaintiffs do not contend that there was an obligation to provide reasons. On the present state of the evidence, there is nothing to support the contention that the Impugned Directions, or any of the Vaccination Directions, were given under the direction and at the behest of the Premier.

Ground 3 – No power

175 The plaintiffs next contend that the Vaccination Directions were beyond the power conferred by s 200(1)(d) of the Public Health Act. Ground 3 reads:

Each of the Impugned Emergency Directions is ultra vires and the Defendants have otherwise each exceeded the limits of their jurisdiction conferred by section 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) in that the Defendants had no power under that statutory provision to make the Impugned Emergency Directions, having regard to:

- a. the natural and ordinary meaning of the words contained in section 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic);
- b. the statutory context in which section 200(1)(d) occurs;
- c. the common law principle of legality;
- d. section 32 of the Charter;
- e. the rights of the Plaintiffs and other residents of Victoria recognised by the Charter, the common law, statute, and international law.

176 The plaintiffs' submission in support of this ground was that s 200(1)(d) must be read in a way that does not permit an authorised officer, including the defendants, to give directions that result in an infringement of fundamental human rights. They relied on

both the common law principle of legality, as explained in *Coco v The Queen*,⁵¹ and s 32 of the Charter.

177 The principle of legality requires that an intention by the legislature to curtail fundamental common law rights and freedoms must be ‘clearly manifested by unmistakable and unambiguous language’.⁵² Section 32 of the Charter requires that, so far as it is possible to do so consistently with its purpose, a statutory provision must be interpreted in a way that is compatible with human rights.

178 On the basis of the submissions put at the interlocutory hearing, I was unpersuaded that there was an arguable case that the emergency power in s 200(1)(d) of the Public Health Act should somehow be read down so as not to authorise any direction that interferes with fundamental rights or freedoms, or human rights. At present, the argument appears to me to overstate the effect of both the principle of legality and s 32 of the Charter, neither of which permit a court to ignore the plain meaning of the statutory text or its evident purpose.⁵³ At this stage of the proceeding, the plaintiffs’ submissions have not engaged with the broad words of s 200(1)(d), the statutory context in which they appear – being Part 10, Div 3 and the Public Health Act more broadly – and the legislature’s purpose in providing for emergency powers to be exercised during a state of emergency involving a serious risk to public health.

179 I note that a very similar argument, based on the principle of legality, was rejected in *Kassam*. Justice Beech-Jones held that the principle of legality did not justify reading down s 7 of the *Public Health Act 2010* (NSW).⁵⁴ Accepting that the impugned orders severely affect freedom of movement, his Honour held that s 7 clearly abrogates that freedom.⁵⁵ His Honour did not consider that any other common law rights and

⁵¹ (1994) 179 CLR 427, 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ) (*Coco*).

⁵² *Coco*, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁵³ See, eg, *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459, [76]–[77] (Gageler J); *Slaveski v Smith* (2012) 34 VR 206, [24].

⁵⁴ *Kassam*, [7], [193]–[199].

⁵⁵ *Kassam*, [198].

freedoms were engaged by the impugned orders.

180 I also note that in *Cotterill v Romanes*,⁵⁶ Niall JA rejected an argument that subs 200(1)(b) and (d) of the Public Health Act were invalid because they impose an impermissible burden on the freedom of political communication implied in the Australian Constitution. While his Honour accepted that the powers could be exercised in ways that burdened the freedom, he concluded that the burden was imposed for a legitimate purpose, and the provisions were reasonably appropriate and adapted to serve a legitimate end.⁵⁷ The reasoning in *Cotterill* stands in the way of the plaintiffs' contention that s 200(1)(d) should be read down so that it does not authorise directions that limit common law and Charter rights and freedoms.

181 It is the case that, as the plaintiffs pointed out, there is no equivalent of s 32 of the Charter in New South Wales, and no submission based on s 32 of the Charter was made in *Cotterill*. However, the plaintiffs have not so far articulated how the application of s 32 would lead to a different outcome in this case.

Ground 5 - Improper delegation

182 The plaintiffs' fifth ground contends that the Vaccination Directions constituted an unauthorised delegation by the defendants of their powers, as follows:

Each of the Defendants has purported to give directions under section 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) that constitute, by their terms, purpose and effect, a purported delegation of the Defendant's power to give directions under section 200(1)(d) to another person, in that:

- a. the directions purport to empower other persons to direct workers to produce vaccination evidence;
- b. the directions purport to empower other persons to direct unvaccinated workers to not enter the workplace;
- c. the directions purport to empower other persons to direct unvaccinated workers to not work outside their ordinary place of residence;

The Defendants have no lawful authority to delegate their powers under s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic).

⁵⁶ [2021] VSC 498.

⁵⁷ *Cotterill*, [219]-[254].

183 This ground was not expanded upon in the plaintiffs' written outline or in oral submissions. Unassisted by any submissions, I have difficulty seeing how the Vaccination Directions could be read to involve any delegation of the defendants' emergency powers. They are expressed to impose certain obligations on employers and operators of specified facilities, and to prohibit them from permitting unvaccinated workers from attending their premises for the purposes of work. They do not use the language of delegation of statutory power. At present I am not satisfied that the plaintiffs have made out an arguable case in relation to this ground.

Ground 6 - Unreasonableness / illogicality / irrationality

184 The plaintiffs' final ground contends that the Vaccination Directions were legally unreasonable. The contention is put in various ways:

In making each of the Impugned Emergency Directions, each Defendant:

- a. acted illogically or irrationally in reaching a conclusion that the directions were reasonably necessary to protect public health;
- b. otherwise acted unreasonably in making the Impugned Emergency Directives in that the Impugned Emergency Directives:
 - i. are not reasonably proportionate to the public health risk sought to be prevented, minimised or controlled; and
 - ii. are made and/or operate in an arbitrary manner.
- c. otherwise acted unreasonably by their failure to comply with section 8 of the *Public Health and Wellbeing Act 2008* (Vic) which imposes an obligation on persons engaged in the administration of the Act, insofar as is practical, to ensure that decisions are transparent, systematic and appropriate;
- d. otherwise acted unreasonably by their failure to comply with section 9 of the *Public Health and Wellbeing Act 2008* (Vic) which imposes an obligation to make decisions and take actions in the administration of the Act:
 - i. that be proportionate to the public health risk sought to be prevented, minimised or controlled; and
 - ii. not in an arbitrary manner;
- e. otherwise acted unreasonably by their failure to take into account material countervailing considerations relevant to the imposition of the Impugned Emergency Directives;

- f. otherwise acted unreasonably by their failure to take into account material considerations, namely the human rights of the plaintiffs contained in the Charter referred to herein.

185 Paragraphs c, d, e and f of Ground 6 are allegations that the defendants failed to take into account mandatory relevant considerations in giving the Vaccination Directions. That is an available ground of review of administrative action,⁵⁸ but there is at present no evidence that supports the allegations made in these paragraphs. At the moment they are no more than assertions that the defendants failed to take into account matters that they were required by the Public Health Act and the Charter to consider.

186 Paragraphs a and b of Ground 6 are framed more recognisably as allegations of legal unreasonableness. A useful summary of the relevant principles in relation to legal unreasonableness is found in the Full Court of the Federal Court's judgment in *Minister for Immigration and Border Protection v Eden*:⁵⁹

First, the concept of legal unreasonableness concerns the lawful exercise of power. Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making. ...

Second, the Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory ... It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision-maker ... Nor does it involve the Court remaking the decision according to its own view of reasonableness.

Third, there are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision-making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an "outcome focused" conclusion without any specific jurisdictional error being identified.

...

Fourth, in assessing whether a particular outcome is unreasonable, it is necessary to bear in mind that within the boundaries of power there is an area of "decisional freedom" within which a decision-maker has a genuinely free discretion ... Within that area, reasonable minds might differ as to the correct decision or outcome, but any decision or outcome within that area is within the bounds of legal reasonableness ... Such a decision falls within the range of

⁵⁸ *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, 39-40 (Mason J).

⁵⁹ (2016) 240 FCR 158, [58]-[60], [62]-[65] (citations omitted).

possible lawful outcomes of the exercise of the power

Fifth, in order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the relevant statute ... The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making ... The evaluation is also likely to be fact dependant and to require careful attention to the evidence ...

Sixth, where reasons for the decision are available, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable ... Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable ... However, an inference or conclusion of legal unreasonableness may be drawn even if no error in the reasons can be identified. In such a case, the court may not be able to comprehend from the reasons how the decision was arrived at, or the justification in the reasons may not be sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes ...

Seventh, and perhaps most importantly, the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. The concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary ... That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. ... The expressions that have been utilised include decisions which are "plainly unjust", "arbitrary", "capricious", "irrational", "lacking in evident or intelligible justification", and "obviously disproportionate". It must be emphasised again, however, that the task is not an *a priori* definitional exercise. Nor does it involve a "checklist" exercise ... Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.

187 In support of Ground 6, the plaintiffs relied on a bundle of articles and other literature that their solicitor had read and downloaded from the internet, and which he had exhibited to two affidavits.⁶⁰ This amounted to more than 1,200 pages of material, and ranged from information about the Pfizer and AstraZeneca vaccines published by

⁶⁰ First El-Hissi affidavit and sixth affidavit of Omar El-Hissi dated 29 October 2021 (**Sixth El-Hissi affidavit**).

government bodies in Australia, the United Kingdom and the United States of America, to articles of uncertain status about the safety and efficacy of COVID-19 vaccines, to international human rights treaties. The plaintiffs referred to some of this material at the hearing of their interlocutory application, namely:

- (a) a vaccine information fact sheet for recipients and caregivers about Cominarty (COVID-19 vaccine, mRNA) and Pfizer-BioNTech COVID-19 Vaccine to prevent coronavirus disease 2019 (COVID-19), apparently downloaded from the website of the Food and Drug Administration in the United States of America;⁶¹
- (b) information for UK recipients and UK healthcare professionals on the Pfizer-BioNTech COVID-19 vaccine and the AstraZeneca vaccine, apparently published on a United Kingdom government website;⁶²
- (c) the COVID-19 vaccine weekly surveillance report for week 42, published by the United Kingdom Health Security Agency on 21 October 2021;⁶³
- (d) a document titled 'ATAGI expanded guidance on acute major medical conditions that warrant a temporary medical exemption relevant for COVID-19 vaccines', downloaded from the website of the Australian Government Department of Health;⁶⁴
- (e) an article titled 'Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings - Barnstable County, Massachusetts, July 2021', published on the website of the US Department of Health and Human Services Centers for Disease Control and Prevention;⁶⁵ and

⁶¹ First El-Hissi affidavit, OEH3-11.

⁶² First El-Hissi affidavit, OEH12-19, OEH20-27, OEH28-37, OEH38-49.

⁶³ First El-Hissi affidavit, OEH81-109.

⁶⁴ Sixth El-Hissi affidavit, OEH19-20.

⁶⁵ Sixth El-Hissi affidavit, OEH21-24.

(f) an article titled 'Transmission of SARS-CoV-2 Delta variant among vaccinated healthcare workers, Vietnam', downloaded from a website called 'papers.ssm.com'.⁶⁶

188 It was not possible for me to draw even provisional conclusions from this miscellany of material from the world wide web. The benefits and risks of the three COVID-19 vaccines approved for use in Australia might be the subject of expert evidence at the trial of the proceeding, as the plaintiffs have foreshadowed. However, no expert evidence was available on the hearing of the plaintiffs' interlocutory application.

189 The impression given by the material listed above is that the Pfizer and AstraZeneca vaccines have been shown to prevent COVID-19, and are highly effective in reducing the risk of serious illness and death from the virus. The material also indicates that there may be side-effects from both vaccines, mostly mild but in rare cases serious, and that neither vaccine is completely effective in preventing transmission of the virus. These are impressions, not firm conclusions, about matters that are properly the subject of expert evidence. Even with the benefit of expert evidence, I anticipate a submission from the defendants that the merit of the Vaccination Directions is a matter about which reasonable minds could differ. It is no easy matter to establish legal unreasonableness in a judicial review proceeding, and the ground is not an occasion to attempt to draw the Court into merits review.

190 Ultimately these are matters to be determined on the evidence at the trial of the proceeding. The material that I have been referred to thus far did not satisfy me that there is a serious question to be tried that the Vaccination Directions were beyond the boundaries of the decisional freedom given to the defendants by s 200(1)(d) of the Public Health Act, manifestly unreasonable, or lacking in any evident intelligible justification.

⁶⁶ First El-Hissi affidavit, OEH50-80.

Balance of convenience

191 Even if there were power to suspend the operation of the Impugned Directions in relation to the applicant plaintiffs, or if they had sought a sufficiently precise injunction to restrain the defendants from giving similar directions in future, I did not consider that the balance of convenience favoured granting interlocutory relief.

192 On one side of the balance of convenience in this case lies the individual interests of the applicant plaintiffs as they are affected by the Impugned Directions, and any future direction in similar terms. On the other side lies not some private interest, but the protection of public health during a state of emergency arising out of circumstances causing a serious risk to public health.

193 The power in s 200(1)(d) of the Public Health Act only exists during a state of emergency declared under s 198, and rests with an officer who has been authorised to exercise emergency powers for the purpose of eliminating or reducing the serious risk to public health. Further, the power in s 200(1)(d) is conditioned on an authorised officer considering the directions reasonably necessary to protect public health. Both of the Impugned Directions commenced with a declaration by Professor Sutton that he considered it reasonably necessary to protect public health to give those directions. The plaintiffs do not allege that Professor Sutton did not form that opinion, and do not contend that it was not genuinely held. While they allege that the opinion was not legally reasonable, the evidence at present does not establish a serious question to be tried in relation to that ground. Future directions in similar terms may only be given if Professor Sutton (or another authorised officer) still considers, at the time the directions are given, that they are reasonably necessary to protect public health.

194 The evidence of the applicant plaintiffs was that they choose not to be vaccinated against COVID-19 at present, for a range of reasons. I accept that they hold real and genuine concerns about the safety and efficacy of the available vaccines. Some of these concerns are general, based on the lack of long-term data in relation to the vaccines, and some relate to their personal circumstances and health. The few plaintiffs who

are pregnant, or trying to conceive, are in a particularly difficult position.

- 195 The applicant plaintiffs who are employees are unable to attend work and, with only a few exceptions, are unable to earn an income while they remain unvaccinated. This has an obvious and immediate impact on their welfare and that of their families and dependents. It appears that some employers are willing to allow the applicant plaintiffs time, and are deferring any decision about whether to dismiss unvaccinated employees. Other employers have taken a firmer stance, and have made it clear that employees who remain unvaccinated can expect to have their employment terminated in the near future.
- 196 The applicant plaintiffs with their own businesses, many of them with employees of their own, had direct obligations under the Workers Directions (No 6). They now have obligations under the *COVID-19 Mandatory Vaccination (Workers) Directions (No 7)*, which replaced the Workers Directions (No 6) on 5 November 2021. Since they choose not to be vaccinated themselves, and do not wish to insist that their employees provide vaccination information and attend work only if vaccinated, they will be unable to operate their businesses. As some of them pointed out, they continue to have fixed operating costs that must be met, without being able to generate income.
- 197 Almost all of the applicant plaintiffs expressed distress at the prospect of losing their employment, and the impact this would have on them, their families, and their way of life. They realise that it will not be easy to find other work in their field that does not require them to be vaccinated. They object to being pressured to be vaccinated, when that is not their choice, and their concerns about safety and efficacy have not been alleviated.
- 198 Viewed individually, it may seem reasonable to exempt an applicant plaintiff from the operation of the Impugned Directions pending hearing and determination of the proceeding. I accept that damages would not be an adequate remedy, if the Vaccination Directions are ultimately found to have been unlawfully given. Indeed, damages are not a judicial review remedy and are not sought by the plaintiffs in this

proceeding.

- 199 Against that is the fact that the Chief Health Officer considered it reasonably necessary for the protection of public health to give the Impugned Directions, and must hold that opinion before giving any similar directions in future. In those circumstances, the risk of hardship to third parties is a weighty consideration.
- 200 Given that the COVID-19 virus is highly infectious, and that the rate of infection may increase exponentially once the virus takes hold in a community, there is an incalculable risk of hardship to third parties. If any of the plaintiffs is permitted to attend work while unvaccinated, there is an increased risk that they might contract COVID-19 and transmit the virus to others at their workplace. In the case of healthcare workers, those at risk include patients in their care, some of whom are likely to be vulnerable to serious illness, even death, if infected. In the case of education workers, those at risk include their students, the youngest of whom are unable to be vaccinated themselves. In all cases, there is an increased risk of transmission to co-workers, who may in turn transmit the virus to their households and families, and more broadly in the community. In the short term, a confirmed case of COVID-19 is likely to disrupt a workplace in which it occurs. In the longer term, there is a risk of serious illness and death among those who contract the virus.
- 201 The plaintiffs submitted that the risk to third parties should not tip the balance of convenience against them, because many of them had expressed their willingness to submit to rapid antigen testing, and to take other precautions such as social distancing and wearing a mask in the workplace. The submission was not persuasive, given the state of the evidence. While many applicant plaintiffs are willing to undergo testing before attending work, they also state that this alternative has not been offered to them by their employers. There was no evidence of any employer's ability or willingness to use rapid antigen testing to screen unvaccinated employees. Those applicant plaintiffs who are employers themselves did not outline how this might be done, or even whether the tests are readily available.

202 The applicant plaintiffs proffered the usual undertaking as to damages, and submitted that this was a factor in favour of the relief sought. The difficulty with relying on their undertaking in this case is that it is not the defendants who may suffer harm, but unidentified third parties of unknown number, some of whom may suffer serious illness or death. The applicant plaintiffs' readiness to pay any damages that might be assessed against them does not, in my view, balance out the risks to third parties of transmission of the COVID-19 virus in workplaces and beyond.

203 Overall, I considered that granting the interlocutory relief sought by the applicant plaintiffs would have carried a higher risk of injustice than withholding it.

Defendants' summons

204 By a summons filed on 28 October 2021, the defendants sought an order under r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) that the following question be tried separately, before the trial of the proceeding:

Does s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* apply to the act of making, or the decision to make, each of the directions given under the *Public Health and Wellbeing Act 2008* identified in the Amended Originating Motion?

205 Rule 47.04(a) of the Rules provides that the Court may order that 'any question in a proceeding be tried before, at or after the trial of the proceeding, and may state the question or give directions as to the manner in which it shall be stated'. The principles that govern the exercise of the discretion in r 47.04 were summarised by the Court of Appeal in *Murphy v Victoria*:⁶⁷

- 1) A separate trial should be ordered under r 47.04 only with great caution and only in a clear case.
- 2) The attraction of trials of issues rather than of cases in their totality, "are often more chimerical than real", so that separate trials should "only be embarked upon when their utility, economy and fairness to the parties are beyond question".
- 3) The advantages of trying separate questions for one party may unfairly disadvantage another party, including because the questions will be determined without the benefit of all the evidence relevant to the

⁶⁷ (2014) 45 VR 119, [28] (citations omitted). See also *Vale v Daumeke* [2015] VSC 342, [31].

proceeding.

- 4) There should be no trial of a separate question on the basis of assumed facts unless the facts are agreed or can readily be determined judicially. Otherwise, the parties remain free to dispute the relevant facts at any later trial.
- 5) As a general rule, it is inappropriate to order that a preliminary issue be isolated for determination unless the determination of the issue in favour of the plaintiff or the defendant will put an end to the action, or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense.
- 6) Factors which tell against making order under r 47.04 include that the separate determination of the question:
 - a) may give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial;
 - b) may result in significant overlap between the evidence adduced on the hearing of the separate question and at trial; possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding; and
 - c) may prolong rather than shorten the litigation.

206 As the defendants submitted, these principles are not a rigid set of rules, and must be applied by reference to the circumstances of each individual case. The discretion in rule 47.04 is to be exercised in accordance with the overarching purpose in s 7(1) of the *Civil Procedure Act 2010* (Vic), which is to facilitate the ‘just, efficient, timely and cost-effective resolution of the real issues in dispute’. The defendants reminded me that there are cases in which the trial of a separate question furthers this purpose.⁶⁸

207 The proposed question has its origins in the decision of the Full Court of the Federal Court of Australia in *Kerrison*, which concerned a local law made under the *Local Government Act 1989* (Vic). The local law prohibited camping in tents in gardens administered by the City of Melbourne. Ms Kerrison and other members of a group known as ‘Occupy Melbourne’ challenged the validity of the local law, including on

⁶⁸ Citing *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [51] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Doyle’s Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* [2021] NSWCA 246, [6] (Bell P), [24] (Leeming JA).

the ground that it was incompatible with the right to freedom of expression in s 15(2) of the Charter. The Full Court held that ‘the making of a subordinate instrument by a public authority is not comprehended by the phrase “to act in a way” in s 38(1) of the Charter’.⁶⁹ As a result, s 38(1) did not apply to the making of the local law, and the Council was not obliged to act compatibly with human rights in making the local law.

208 The defendants’ position is that the Vaccination Directions are subordinate instruments for the purposes of the Charter, because they are instruments of a legislative character.⁷⁰ They rely on *Kerrison* as authority that s 38(1) – or at least its substantive limb, the prohibition on acting in a way that is incompatible with a human right – does not apply to the making of the Vaccination Directions.

209 The defendants urged the determination of the proposed question before trial for a number of reasons.

- (a) It is a pure question of law, which can be determined without the need to assume, agree, or determine facts. In that respect, the proposed question is entirely different from the separate question that was erroneously tried in *Murphy*.
- (b) If the proposed question is answered ‘no’, it will determine a distinct and substantial part of the proceeding, namely Ground 1.
- (c) The determination of the proposed question is likely to save inconvenience and expense. If the plaintiffs establish at trial that the defendants’ actions in giving the Vaccination Directions limited a human right, the burden will shift to the defendants to justify the limitation. The answer to the proposed question will accordingly influence the evidence that is relevant to the proceeding and the way in which the trial will be conducted.

⁶⁹ *Kerrison*, [199].

⁷⁰ *Interpretation of Legislation Act 1984* (Vic), s 38 – definition of ‘subordinate instrument’.

- (d) The parties are agreed that the Vaccination Directions have a legislative character. The essence of the plaintiffs' Ground 4 is that the Vaccination Directions are legislative in nature.
- (e) The proposed question is readily resolved by the application of existing authority, namely *Kerrison*, which I am bound to follow unless I consider it to be plainly wrong.

210 I accept that the proposed question is a pure question of law, which could be answered without having to determine questions of fact. However, there were a number of reasons why I considered that the proposed question should not be determined separately and before the trial of the other issues in the proceeding.

- (a) First, the matters at stake in this proceeding mean that an early trial is highly desirable. The effect of the Vaccination Directions is that the ongoing employment and livelihoods of many of the plaintiffs are at risk because they choose not to receive a COVID-19 vaccine, and there are serious questions to be tried whether the Vaccination Directions were lawfully given. If possible, I intend to list the proceeding for trial before the end of the year. That would not be possible were I to hear and determine the proposed question before trial.
- (b) Second, the answer to the proposed question will not determine the outcome of the entire proceeding. If the answer is 'no', the balance of the proceeding would remain to be determined. If the answer is 'yes', the trial of the separate question would be no more than a time-consuming detour.
- (c) Third, not all of the proposed question is readily resolved by the application of *Kerrison*. As the plaintiffs pointed out, the holding in *Kerrison* was limited to the substantive limb of s 38(1) of the Charter, and concerned the obligation of a public authority not to act in a way that is incompatible with a human right. The question of proper consideration of relevant rights was not at issue in that case.

- (d) Fourth, the defendants appeared to assume that it will not be argued that the relevant holding in *Kerrison* was plainly wrong.⁷¹ The plaintiffs may wish to make that submission. So may the Victorian Equal Opportunity and Human Rights Commission, which has intervened under s 40 of the Charter in relation to the proposed question.
- (e) Fifth, the plaintiffs do not accept that the Vaccination Directions are subordinate instruments. Their fourth ground raises a serious question as to whether the power in s 200(1)(d) can properly be used for a legislative purpose, and hence whether a direction given under that section can be an instrument of a legislative character. Further, they dispute whether directions given under s 200(1)(d) of the Public Health Act are ‘instruments’, given the lack of any requirement as to the form of the directions.
- (f) Sixth, the plaintiffs have foreshadowed an intention to call expert evidence in relation to Ground 6. Expert evidence that is capable of showing that there was no intelligible foundation for a decision is an exception to the general rule that evidence in a judicial review proceeding is limited to the material that was before the decision-maker.⁷² If the plaintiffs are able to adduce admissible expert evidence of that kind, there will be an overlap between the issues of fact that arise in relation to Ground 1(a) and Ground 6. Those issues will have to be determined in any event, in relation to Ground 6.
- (g) Seventh, I was not attracted to the idea that determining the separate question before trial would somehow save the defendants the inconvenience of going into evidence to justify any limitation on human rights imposed by the Vaccination Directions. That suggestion was made in the defendants’ written submissions in support of their summons, although the Solicitor-General

⁷¹ There may also be a question whether the principle in *Farah Constructions Pty Ltd v Say-dee Pty Ltd* (2007) 230 CLR 89, [135] applies here, given that *Kerrison* involved the interpretation of Victorian legislation, as distinct from Commonwealth legislation or uniform national legislation.

⁷² *Mackenzie v Head, Transport for Victoria* [2021] VSCA 100, [153].

retreated from it in oral submissions.⁷³ The matters in dispute in this case are of such a nature that it is appropriate for there to be a full hearing on the merits.⁷⁴ The defendants will have to make a forensic decision whether to go into evidence to demonstrate that the Vaccination Directions are reasonable and proportionate without knowing whether they will ultimately bear the burden of proof on that question.

- (h) Finally, I was concerned that determining the proposed question before trial may lead to fragmentation of the proceeding, with the obvious prospect of an appeal by parties against whom the question is answered.

211 For all of those reasons, I declined to order that the proposed question be tried separately.

⁷³ Defendants' submissions in support of summons for separate question dated 28 October 2021, [14]-[17]; cf Transcript, 3 November 2021, 107:12-29.

⁷⁴ Cf *Civil Procedure Act 2010* (Vic) s 64.

SCHEDULE OF PARTIES

SIMON HARDING	First Plaintiff
CANDICE WHEATON	Second Plaintiff
MIHAELA MARIN	Third Plaintiff
ASHLEIGH MOHOROVICIC	Fourth Plaintiff
CORRINNE BRIGHTHOPE	Fifth Plaintiff
VIOLET POLONSKI	Sixth Plaintiff
SYLVIA JOBSON	Seventh Plaintiff
ASHLEIGH MARCHESE	Eighth Plaintiff
NADIA CELINE	Ninth Plaintiff
SEMO SASA TOLEAFOA	Tenth Plaintiff
JACQUELINE RIDGWAY	Eleventh Plaintiff
GLENN BRODERICK	Twelfth Plaintiff
PETROS GALANOULIS	Thirteenth Plaintiff
MARGARET SUPEL	Fourteenth Plaintiff
PATRICIA PEREZ-REIGOSA	Fifteenth Plaintiff
DIMITRIUS TRYFONOPOULOS	Sixteenth Plaintiff
KAREN MCFETRIDGE	Seventeenth Plaintiff
ROXANNE VAN HOORN	Eighteenth Plaintiff
SEBASTIAN OTIS	Nineteenth Plaintiff
DRAGAN KNEZIC	Twentieth Plaintiff
MIODRAG KNEZIC	Twenty-First Plaintiff
BRANISLAV RADAK	Twenty-Second Plaintiff
TRAVIS EVA	Twenty-Third Plaintiff
DAVID TROIANI	Twenty-Fourth Plaintiff

DAVID TROTMAN	Twenty-Fifth Plaintiff
MATTHEW WOOD-INGRAM	Twenty-Sixth Plaintiff
ESTELLE VILLALOBOS	Twenty-Seventh Plaintiff
CHRIS RUTLAND	Twenty-Eighth Plaintiff
FRANCO BIANCO	Twenty-Ninth Plaintiff
ARIF MLEKIC	Thirtieth Plaintiff
SALVATORE MASCALI	Thirty-First Plaintiff
MARK MICALLEF	Thirty-Second Plaintiff
CAROL BYRNE	Thirty-Third Plaintiff
SHAHNEE BANNAN	Thirty-Fourth Plaintiff
REUBEN TIERNEY	Thirty-Fifth Plaintiff
MARIA DELLIS	Thirty-Sixth Plaintiff
ROSETTA LUCA	Thirty-Seventh Plaintiff
BELINDA CETNAR	Thirty-Eighth Plaintiff
JADE FARREN	Thirty-Ninth Plaintiff
JACK CETNAR	Fortieth Plaintiff
MELINDA SPENCER	Forty-First Plaintiff
MELLANIE MCNAMARA	Forty-Second Plaintiff
KIRRA ROWE	Forty-Third Plaintiff
ADAM MITCHELL	Forty-Fourth Plaintiff
ANGELA SEPULVEDA	Forty-Fifth Plaintiff
JAMES MCCATHIE	Forty-Sixth Plaintiff
GAVIN WOOTTEN	Forty-Seventh Plaintiff
ANDREW MITROVIC	Forty-Eighth Plaintiff
BRANKA PLAKALOVIC	Forty-Ninth Plaintiff

DIJANA IBRAHIM	Fiftieth Plaintiff
NOOR KHOSHABA	Fifty-First Plaintiff
CASEY CAMERON	Fifty-Second Plaintiff
SUMIT ANEJA	Fifty-Third Plaintiff
ANDEW STICCA	Fifty-Fourth Plaintiff
IAN BEGG	Fifty-Fifth Plaintiff
MARK PEARSON	Fifty-Sixth Plaintiff
WENDY JONGERIUS	Fifty-Seventh Plaintiff
ALICE BEJAN	Fifty-Eighth Plaintiff
EUGENE KATSOS	Fifty-Ninth Plaintiff
DION DOUGLAS	Sixtieth Plaintiff
TERRY JONGERIUS	Sixty-First Plaintiff
SANDRA SANCIC	Sixty-Second Plaintiff
GUIDO CARPI	Sixty-Third Plaintiff
LUCIA CARPI	Sixty-Fourth Plaintiff
GEORGE PARTHIMOS	Sixty-Fifth Plaintiff
GARRY HALL	Sixty-Sixth Plaintiff
ZERJON FRANKLIN	Sixty-Seventh Plaintiff
DANIEL PALMER	Sixty-Eighth Plaintiff
CATHERINE FRANCIS-PESTER	Sixty-Ninth Plaintiff
MARGARET MARUSZAK	Seventieth Plaintiff
TRACEY SEIF	Seventy-First Plaintiff
ANDREW TERKELY	Seventy-Second Plaintiff
BLAKE SORENSEN	Seventy-Third Plaintiff
CONNIE PRASAD	Seventy-Fourth Plaintiff

COUPAR HIND	Seventy-Fifth Plaintiff
DANIELLE ARCARO	Seventy-Sixth Plaintiff
DARREN ADAMS	Seventy-Seventh Plaintiff
DAVID COWASJI	Seventy-Eighth Plaintiff
DOUGLAS ELLIOTT	Seventy-Ninth Plaintiff
ELENA VRONDELIEVA	Eightieth Plaintiff
GEOFFREY POPE	Eighty First Plaintiff
JAMIE BARDELMEYER	Eighty-Second Plaintiff
HEATHER ELDER	Eighty-Third Plaintiff
IOANNIS TSAGALIDIS	Eighty-Fourth Plaintiff
JOHN HORVARTH	Eighty-Fifth Plaintiff
JOSHUA PANETTIERI	Eighty-Sixth Plaintiff
JUSTIN BRYANT	Eighty-Seventh Plaintiff
KERRY WHITTLE	Eighty-Eighth Plaintiff
LARRY PINEDA	Eighty-Ninth Plaintiff
MARINKO JEZABEK	Ninetieth Plaintiff
NICHOLAS LA POUPLE	Ninety-First Plaintiff
REECE PIPKA	Ninety-Second Plaintiff
ROBERT WILLIAMSON	Ninety-Third Plaintiff
ROCHELLE PINEDA	Ninety-Fourth Plaintiff
WENDY ROBINSON	Ninety-Fifth Plaintiff
KELLY SEIF	Ninety-Sixth Plaintiff
JAMIE ABDALLAH	Ninety-Seventh Plaintiff
HAYSEM ABDALLAH	Ninety Eighth Plaintiff
DANIEL INATI	Ninety-Ninth Plaintiff

BENJAMIN HAJJ	One Hundredth Plaintiff
ZDRAVKO KNEZIC	One Hundred and First Plaintiff
TENNILLE DE BOER	One Hundred and Second Plaintiff
ASC TRADING PTY LTD (ACN 165 727 837)	One Hundred and Third Plaintiff
3 APOSTLES PTY LTD (ACN 606 137 400) ATF 3 APOSTLES UNIT TRUST	One Hundred and Fourth Plaintiff
REHMAN HABIB	One Hundred and Fifth Plaintiff
NICHOLAS AMBRUS	One Hundred and Sixth Plaintiff
JASMIN ZECEVIC	One Hundred and Seventh Plaintiff
JOSEPH HADDAD	One Hundred and Eighth Plaintiff
SAMANTHA PARKIN	One Hundred and Ninth Plaintiff
AUDREY MOSIG	One Hundred and Tenth Plaintiff
AUSTRALASIAN POLY WELDING PTY LTD (ACN 600 152 403)	One Hundred and Eleventh Plaintiff
GEORGE CLANCEY	One Hundred and Twelfth Plaintiff
MICHAEL SMITH	One Hundred and Thirteenth Plaintiff
GEORGE LYRAS	One Hundred and Fourteenth Plaintiff
JACQUI PAPAS	One Hundred and Fifteenth Plaintiff
SEVEN ASTERIA PTY LTD (ACN 146 719 824)	One Hundred and Sixteenth Plaintiff
DAVID YOUNG	One Hundred and Seventeenth Plaintiff
PHILMA KAIREMBORA	One Hundred and Eighteenth Plaintiff
THEODORA BITSOLAS	One Hundred and Nineteenth Plaintiff
LEON DIAKOUMAKOS	One Hundred and Twentieth Plaintiff
DAVID POWELL	One Hundred and Twenty First Plaintiff
AIMEE CHURCHER	One Hundred and Twenty Second Plaintiff
ELIZABETH FOLEY	One Hundred and Twenty Third Plaintiff

KRISTY WATSON	One Hundred and Twenty Fourth Plaintiff
MELANIE OLIVER	One Hundred and Twenty Fifth Plaintiff
MICHELLE SAXON	One Hundred and Twenty Sixth Plaintiff
DANIEL WELLS	One Hundred and Twenty Seventh Plaintiff
DARREN BECKETT	One Hundred and Twenty Eighth Plaintiff
LANCE MCNAMARA	One Hundred and Twenty Ninth Plaintiff
TANYA MCEWAN	One Hundred and Thirtieth Plaintiff
KATIE BRADSHAW	One Hundred and Thirty First Plaintiff
SIMON BIRD	One Hundred and Thirty Second Plaintiff
REBECCA TAYLOR	One Hundred and Thirty Third Plaintiff
ANGELA VUKOVIC	One Hundred and Thirty Forth Plaintiff
SIMON OVERALL	One Hundred and Thirty Fifth Plaintiff
LIZA OVERALL	One Hundred and Thirty Sixth Plaintiff

- and -

BRETT SUTTON (in his capacity as Chief Health Officer as authorised to exercise emergency powers under the <i>Public Health and Wellbeing Act 2008</i> (Vic))	First Defendant
N DEBORAH FRIEDMAN (in her capacity as Acting Chief Health Officer as authorised to exercise emergency powers under the <i>Public Health and Wellbeing Act 2008</i> (Vic))	Second Defendant
BENJAMIN COWIE (in his capacity as Acting Chief Health Officer as authorised to exercise emergency powers under the <i>Public Health and Wellbeing Act 2008</i> (Vic))	Third Defendant

CERTIFICATE

I certify that this and the 78 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 11 November 2021.

DATED this eleventh day of November 2021.



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Associate