

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) and others according to the Schedule

Defendants

and

VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Intervener

<u>JUDGE:</u>	Richards J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	27 October, 3, 5 and 12 November 2021, written submissions received from the defendants 18 November 2021
<u>DATE OF RULING:</u>	29 November 2021
<u>CASE MAY BE CITED AS:</u>	Harding v Sutton (No 2)
<u>MEDIUM NEUTRAL CITATION:</u>	[2021] VSC 789

PRACTICE AND PROCEDURE – Case management – Expert evidence – Directions made under s 65H, *Civil Procedure Act 2010* (Vic) as to assumptions on which expert evidence to be based, and questions to be addressed by expert evidence – Whether power in s 65H(1) to make directions permits Court to determine questions for expert witnesses – Limited scope for expert evidence in judicial review proceeding – Assumptions on which experts’ opinions are to be based – Questions for experts – *Civil Procedure Act 2010* (Vic), ss 7, 8, 9, 10, 16, 19, 20, 23, 25, 65F, 65G, 65H.

EVIDENCE – Opinion evidence – Ultimate issue rule – Whether experts should be asked general questions about proportionality of directions under review – Whether evidence of an opinion as to proportionality probative of a fact in issue in the proceeding – Role of expert witness – *Evidence Act 2008* (Vic), s 80(a).

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

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

NOH Legal

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

HER HONOUR:

1 In this proceeding, Simon Harding and 128 other plaintiffs seek judicial review remedies in relation to a number of directions given by the defendants in the exercise of their emergency powers under s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic). The directions all concern mandatory vaccination against the COVID-19 virus (**Vaccination Directions**), and were given by the defendants between 7 September and 5 November 2021. The effect of the Vaccination Directions is summarised at [16] to [22] of *Harding v Sutton (Harding No 1)*,¹ my reasons for refusing the interlocutory relief sought by the plaintiffs and the trial of a separate question sought by the defendants.

2 The proceeding is listed for trial commencing 15 March 2022. On 18 November 2021, following a directions hearing on 12 November 2021, I made timetabling orders for the steps to be taken by the parties before trial. The next step in that timetable is for the plaintiffs to file and serve any expert evidence and any further affidavits upon which they intend to rely, which is to occur by 1 December 2021. The defendants are to file and serve any lay witness affidavits and expert evidence on which they intend to rely on or before 15 December 2021.

3 From the outset, the plaintiffs have indicated their intention to call expert evidence in support of their contentions that the Vaccination Directions are legally unreasonable and an unjustifiable limitation of human rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The defendants have queried the utility of this proposed expert evidence, and have foreshadowed objections to its admissibility, while reserving their right to adduce expert evidence of their own.

4 On 23 November 2021, I made the following directions in relation to expert evidence, under s 65H of the *Civil Procedure Act 2010* (Vic):

1. The **expert evidence** to be filed and served by the parties, in accordance with orders 4 and 5 of the orders made in this proceeding on 18 November 2021, is to be based on the following facts and assumptions:

¹ [2021] VSC 741 (*Harding No 1*).

- A. The Mandatory Vaccination Directions are those directions identified in Attachment A.
- B. The following data is set out in Attachment A for the dates on which each of the Mandatory Vaccination Directions were made:
- a. Percentage of persons who have received first dose of a COVID-19 vaccine in Victoria;
 - b. Percentage of persons who have received second dose of a COVID-19 vaccine in Victoria;
 - c. Percentage of persons who have received first dose of a COVID-19 vaccine in Victoria (breakdown by age);
 - d. Percentage of persons who have received second dose of a COVID-19 vaccine in Victoria (breakdown by age);
 - e. Active cases;
 - f. Hospitalisation.
- C. The COVID-19 vaccines currently available for use in Australia are the AstraZeneca, Pfizer and Moderna vaccines (**available COVID-19 vaccines**).
- D. The key dates on which those vaccines became available are set out in **Attachment B**.
2. The expert evidence is to address the following questions:

General

- (1) What is SARS-COV-2 and COVID-19? In answering this question, please describe the nature, severity and duration of symptoms associated with COVID-19, and how the virus is transmitted.
- (2) What is the predominant variant of SARS-CoV-2 globally and in Victoria, Australia?

Vaccine efficacy

- (3) To what medical and scientific standard has the efficacy of the available COVID-19 vaccines been established?
- (4) To what extent are available COVID-19 vaccines effective against the Delta variant of SARS-CoV-2 in respect of:
 - (a) infection;
 - (b) transmission;
 - (c) attenuation of symptoms, both short and long-term;

- (d) death?
- (5) What is the incidence of:
 - (a) serious illness requiring hospitalisation;
 - (b) death;
 - (c) long-term symptoms,
among persons who contract COVID-19 who:
 - (i) are unvaccinated;
 - (ii) have received a single dose of an available COVID-19 vaccine;
 - (iii) have received two doses of an available COVID-19 vaccine?
- (6) How does the immunity derived from one or two doses of an available COVID-19 vaccine compare with the immunity derived from having contracted and recovered from COVID-19?

Vaccine safety

- (7) To what medical and scientific standard has the safety of the available COVID-19 vaccines been established?
- (8) What are the known side effects of the available COVID-19 vaccines?
- (9) What is the incidence of adverse effects associated with receiving a dose of an available COVID-19 vaccine that:
 - (a) endure longer than one month;
 - (b) require hospitalisation;
 - (c) cause death?
- (10) Are there persons or groups of persons for whom there is a higher risk of adverse effects associated with receiving a dose of an available COVID-19 vaccine? Please include in your answer persons who have contracted and recovered from COVID-19, and women who are pregnant, breastfeeding or trying to conceive.

Public health measures

- (11) What were the public health measures available in Victoria to reduce or eliminate the risks posed by SARS-COV-2 and COVID-19 to human health as at the dates on which the Mandatory Vaccine Directions were given? What are their

advantages and disadvantages?

- (12) Would public health measures other than the measures contained in the Mandatory Vaccination Directions have been as effective as the Mandatory Vaccination Directions in reducing or eliminating the risks to human health posed by SARS-COV-2 and COVID-19, having regard to the percentage of persons in Victoria who had received one and two doses of an available COVID-19 vaccine as at the dates on which each of the Mandatory Vaccine Directions were given (as set out in Assumption B)? In your answer to this question, please indicate:
- (a) whether your opinion differs as between the dates on which any of the Mandatory Vaccination Directions were given; and
 - (b) what (if any) risks, uncertainties or practical, implementation or compliance considerations affect the assessment of whether the other available public health measures would have been as effective as the Mandatory Vaccination Directions?

- 3. The parties are to instruct any expert witness engaged by them to answer only those questions that are within the expert's area of expertise.
- 4. Costs are reserved.
- 5. The parties have liberty to apply.

5 These are my reasons for making those directions.

Procedural history

6 The proceeding was commenced on 21 October 2021, and a first directions hearing took place on 27 October 2021. Expert evidence was one of a number of matters on which directions were sought. The plaintiffs simply sought directions for the filing and service of expert evidence, while the defendants sought a direction that the plaintiffs file and serve a document stating the identity and expertise of the experts, the questions that each expert would be asked to address, the facts, documents and assumptions with which each expert would be briefed, and the ground (or sub-ground) of review to which the evidence is said to be relevant.

7 At the directions hearing on 27 October 2021, I asked senior counsel for the plaintiffs if he could give me an idea of the experts' areas of expertise and the questions that

might be asked of them. At that early stage in the proceeding, he did not wish to preempt the questions to be asked. I reminded the parties that the Civil Procedure Act requires any party wishing to adduce expert evidence to approach the Court for directions as soon as practicable. I foreshadowed giving a direction about the questions that the experts are to address, so that they address relevant questions, do not trespass into areas that are not matters for expert opinion, and so that the parties' expert evidence does not pass 'like ships in the night'. Senior counsel for the plaintiffs appeared to accept that would be a reasonable course to take.²

8 At the end of the discussion about expert evidence, I made the following order:³

By 4.00 pm on Friday 29 October 2021, the plaintiffs are to file and serve on the defendants a document that states, with precision, the following matters:

- (a) the identity of any expert;
- (b) the area of expertise of each expert;
- (c) the questions that each expert will be asked to address; and
- (d) identification of the ground (or sub-ground) of the amended originating motion to which the expert evidence is said to be relevant,

together with a draft letter of instruction to each expert.

9 I also made orders for the defendants to file and serve any request for further and better particulars of certain grounds of review, including legal unreasonableness, by 29 October 2021. The plaintiffs were directed to file and serve particulars in response to the request by 5 November 2021.

10 On 29 October 2021, the plaintiffs filed draft letters of instruction to three expert witnesses: Professor Jayanta Bhattacharya, Dr Peter McCullough and Dr Michael Palmer. The plaintiffs also filed an expert evidence note, which provided the following details of their proposed experts' areas of expertise:

- (a) Professor Jayanta Bhattacharya is a Tenured Professor of Medicine at Stanford University. His qualifications from Stanford University include an MD and a Ph.D in economics. He specialises in health

² Transcript, 27 October 2021, 34:22-35:8.

³ Transcript, 27 October 2021, 32:20-37:21.

policy, infectious disease policy, health economics and infectious disease epidemiology.

- (b) Dr Peter McCullough is a medical doctor with board certifications in Internal Medicine and Cardiovascular disease. His qualifications include a Bachelor of Science, Master of Public Health and a Doctor of Medicine. He has 40 peer reviewed publications on COVID-19 infection cited in the National Library of Medicine in the United States of America. His specialised knowledge is based on direct clinical experience with acute and convalescent COVID-19 cases.
- (c) Dr Michael Palmer is a medical doctor trained and board certified in medical microbiology and infectious disease epidemiology. His specialised knowledge is derived from clinical and academic experience in infectious disease epidemiology, microbiology, biochemistry and biochemical pharmacology.

11 As to the relevance of their proposed expert evidence, the plaintiffs' note said:

On the basis that the experts will be commenting on:

- (a) The proportionality, safety, efficacy, risks and necessity of mandatory COVID-19 vaccinations and their effect on reducing transmission of SARS-CoV-2 and its variants;
- (b) Vaccine immunity and natural immunity;
- (c) Public health measures that reduce a serious risk to public health;
- (d) The public health utility [in] using vaccine passports and vaccine mandates as a public health measure;

The expert evidence will be relevant to the following Grounds:⁴

Ground 1 - Breach of Charter (paragraph [19]): The expert evidence is relevant to the issues of:

- (i) whether and to what extent COVID-19 vaccinations, and the Impugned Emergency Directions⁵ making such vaccinations mandatory, impinge upon the rights pleaded in 19(a)(i) to (ix) and whether the curtailment of those rights is reasonable and demonstrably justified;
- (ii) whether the Defendants gave proper consideration to one or more of the engaged Charter rights when they decided to give directions that imposed mandatory vaccination requirements, as pleaded in paragraph 19(b).

⁴ The paragraph numbers refer to the paragraphs in the plaintiffs' **further amended originating motion** filed 3 November 2021.

⁵ The further amended originating motion at [16] refers to the Vaccination Directions as 'Impugned Emergency Directions'.

Ground 3 - No Power (paragraph [21]): The expert evidence is relevant to the issues of:

- (iii) whether the Impugned Emergency Directions are found to be reasonably necessary to protect public health for the purposes of s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) and, therefore, whether each Defendant acted outside their power;
- (iv) whether and to what extent certain rights of the Plaintiffs and other Victorian residents have been infringed by the Impugned Emergency Directions, as pleaded in paragraph 21(e).

Ground 6 - Unreasonableness/Illogicality/Irrationality (paragraph [25]): The expert evidence is relevant to the issues of:

- (v) whether the Defendants acted illogically or irrationally in reaching a conclusion that the directions were reasonably necessary to protect public health, as pleaded in paragraph 25(a);
- (vi) whether the Defendants acted unreasonably in making the Impugned Emergency Directives, as pleaded in paragraph 25(b);
- (vii) whether the Defendants acted unreasonably by their failure to comply with section 8 of the *Public Health and Wellbeing Act 2008* (Vic), as pleaded in paragraph 25(c);
- (viii) whether the Defendants acted unreasonably by their failure to comply with section 9 of the *Public Health and Wellbeing Act 2008* (Vic), as pleaded in paragraph 25(d);
- (ix) whether the Defendants acted unreasonably by their failure to take into account material countervailing considerations relevant to the imposition of the Impugned Emergency Directives, as pleaded in paragraph 25(e);
- (x) whether the Defendants acted unreasonably by their failure to take into account material considerations, namely the human rights of the plaintiffs contained in the Charter, as pleaded in paragraph 25(f).

12 The questions proposed for each expert were set out in the draft letters of instruction. They were numerous and wide-ranging, and not easy to relate to the plaintiffs' grounds of review. The draft letters also set out the following assumptions:

- 4.1 SARS-CoV-2 and Covid-19 represents a 'serious risk to public health' in that the virus poses a material risk that substantial injury or prejudice to the health of human beings has or may occur having regard to:
 - (a) the number of persons likely to be affected;
 - (b) the location, immediacy and seriousness of the threat to the health of persons;

- (c) the nature, scale and effects of the harm, illness or injury that may develop;
- (d) the availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce the risk to the health of human beings.

4.2 At the time of this letter of engagement, 75% of the population in the State of Victoria aged 16 years and over has received two doses of a COVID-19 vaccine.

4.3 The COVID-19 vaccines currently available for use in Australia are the Astra Zeneca, Pfizer and Moderna vaccines.

13 The proposed questions were the subject of discussion at the end of the hearing on 3 November 2021.⁶ The discussion was inconclusive. I asked the parties to confer 'with a view to coming up with a much more focused set of questions that actually address the questions in the proceeding'. I indicated that I also would consider whether the questions could be refined, in light of the particulars to be provided of the plaintiffs' further amended originating motion.

14 On 5 November 2021, I made orders dismissing the plaintiffs' summons seeking interlocutory relief, and the defendants' summons seeking the trial of a separate question.⁷ I then made some observations about the future case management of the proceeding, and concerns I held about whether it would be possible to hear and determine it before the end of the year. In relation to the expert evidence that the plaintiffs proposed to call, I said:⁸

Third, the draft letters of instruction for the three expert witnesses the plaintiffs wish to call filled me with alarm. The proposed questions were numerous, broad-ranging and in many cases had no obvious connection to the grounds set out in the further amended originating motion. As I said near the conclusion of the hearing on Wednesday [3 November 2021], those letters of instruction, in particular the questions posed for the experts, need considerable refinement before I will be prepared to make directions in relation to expert evidence under s 65H of the Civil Procedure Act.

I reiterate that this proceeding is not a general inquiry into the benefits or otherwise of mass vaccination against COVID-19 as a public health measure, nor can it involve merits review of judgments made by the defendants in the exercise of their emergency powers. It is a judicial review proceeding about

⁶ Transcript, 3 November 2021, 114:27-130:17.

⁷ I published my reasons for making those orders the following week, in *Harding No 1*.

⁸ Transcript, 5 November 2021, 5:16-6:5.

whether the impugned directions were lawfully given. I hope that the parties have engaged with each other over the questions that are appropriate for expert evidence and I expect that discussions on that subject are ongoing.

15 I listed the proceeding for a further directions hearing on 12 November 2021. I told the parties that at that directions hearing I proposed to fix a trial date and make directions to bring the matter to trial.

16 On 5 November 2021, the plaintiffs filed and served particulars of their further amended originating motion. In relation to Ground 6 - Unreasonableness / Illogicality / Irrationality, the plaintiffs provided the following particulars:

Under to paragraph 25(a) (Ground 6) of the Amended Originating Motion, the acts, facts, matters, circumstances or things that existed that lead to the conclusion that each of the Defendants acted illogically or irrationally in concluding that each of the impugned emergency directions was reasonably necessary to protect public health are:

- a. The majority of persons who contract COVID-19 suffer mild illness and make a full recovery.
- b. The case fatality rate in relation to those persons in the general population who contract COVID-19 is low.
- c. COVID-19 tends to be dangerous only to those persons with comorbidities.
- d. It is not possible to determine the proportion of people in the general population who have been infected and recovered from COVID-19.
- e. The efficacy of COVID-19 vaccinations in relation to the predominant COVID-19 variant in Australia ('the 'Delta' variant') has not been established in accordance with conventional medical and scientific standards.
- f. The introduction of a biochemical artificial compound into the human body by injection into the bloodstream is an inherently dangerous act and, as such:
 - i. is first and foremost a matter on which an individual should be able to decide for themselves, freely and in the absence of any kind of coercion;
 - ii. should be supported by evidence, assessed in accordance with conventional medical and scientific standards, that demonstrates the compound is sufficiently safe for introduction into the human bloodstream;
 - iii. should be supported by evidence, assessed in accordance with

conventional medical and scientific standards, that demonstrates the compound is sufficiently efficacious with respect to its intended medical purpose;

- iv. should never, in the absence of a clear and compelling case justifying the contrary, be administered to healthy individuals by coercive means.
- g. The safety of COVID-19 vaccinations has not been established in accordance with conventional medical and scientific standards.
- h. There are known and unknown dangers, in the form of adverse medical effects, that may be suffered by individuals who are administered a COVID-19 vaccination.
- i. The impugned emergency directions make no provision for the exemption of persons from being obliged to have a COVID-19 vaccination, and who have contracted COVID-19, in circumstances where:
 - i. naturally-generated immunity derived from contracted COVID-19 is superior to vaccination-induced immunity; and
 - ii. a requirement to vaccinated serves no medically-established purpose and is potentially dangerous for such persons.
- j. The impugned emergency directions otherwise make no provision for the exemption of persons from being obliged to have a COVID-19 vaccinations having regard to their particular circumstances, which do not fall within the medical contraindication exemption provided for by the directions, but which may nevertheless inform a reasonable person in the position of an authorised officer exercising the section 200(1)(d) power that the general directions mandating vaccination is not reasonably necessary to protect public health in the circumstances of that person.
- k. Coercive measures of the nature contained in the impugned emergency directions that impact upon individual human rights can only be justified after anxious scrutiny.
- l. The impugned emergency directions engage and impinge upon the human rights as pleaded and particularised in this Amended Originating Motion.
- m. The uptake of COVID-19 vaccinations by the public on a voluntary basis, coupled with government-resourced measures promoting the voluntary uptake of COVID-19 vaccinations by the public, is capable of achieving the statutory objects and purposes of the PHWA.
- n. There are other measures, alternative to excluding unvaccinated persons from participating ordinarily in society, that are capable of achieving the same aim of protecting public health in relation to COVID-19, but which do not impinge upon or have less detrimental impact on the rights of the unvaccinated.

- o. The level of COVID-19 vaccination in the Victorian population is such as to not justify a coercive mandatory vaccination regime.
- p. It is not necessary and not possible to have every healthy individual society vaccinated in order to do what is reasonably necessary to protect public health.
- q. To exclude healthy individuals from participating in the workforce because they have chosen not to be vaccinated is prima facie oppressive.
- r. The overall benefits of mandatory vaccination directions gained by society are disproportionate to their aggregated detrimental effects.

17 At the directions hearing on 12 November 2021, the only directions that the plaintiffs sought in relation to expert evidence were orders that their expert evidence be filed and served by 17 November 2021, and the defendants' by 24 November 2021. The plaintiffs did not provide the Court with revised draft letters of instruction for their experts. However, the defendants provided a table indicating their position in relation to a more confined set of questions that, I understood, the plaintiffs proposed to ask their experts. The defendants also sought a direction that the plaintiffs file and serve a copy of the final letters of instruction for each of their experts by 17 November 2021.

18 The revised questions that I understood the plaintiffs proposed to ask their experts were:

(a) Professor Bhattacharya

- (1) What are the kinds of precautions, safeguards, treatments or other measures that public health professionals in Victoria can use to eliminate or reduce the risk that viruses represent to the health of human beings at a population level?
- (2) What is SARS-COV-2 and Covid-19?
- (3) At this time, are the currently available vaccines effective against the Delta variant of SARS-CoV-2 and if so, to any and what extent in respect of:
 - (a) transmission;
 - (b) contagion; and
 - (c) attenuation of symptoms.

- (4) Are the limitations imposed by the Mandatory Vaccination Directions a proportionate response to the risk to public health posed by SARS-CoV-2 and COVID-19 as at the date of signing of each of the Mandatory Vaccination Directions set out at paragraphs 2.5 to 2.24 inclusive above?
- (5) Assuming that the currently available vaccines are not safe for use, does that have any impact on your opinion as to proportionality and if so, to what extent?
- (6) At this time, are there less restrictive means reasonably available to achieve the purpose that the limitations imposed by the Mandatory Vaccination Directions seek to achieve?
- (7) Does natural immunity both provide durable protection against reinfection and if reinfected with the Delta variant (and other variants) of SARS-CoV-2?

(b) Dr McCullough

- (1) Is protective immunity from the Delta variant greater in individuals who have had natural infections from SARS-CoV-2 and COVID-19 as compared to those who have been vaccinated against SARS-CoV-2 and COVID-19 without infection? If so, why?
- (2) Is there any benefit or risk of COVID-19 vaccination for individuals who have already experienced and survived COVID-19 natural infection?

(c) Dr Palmer⁹

- (1) Since July 2021, what is the predominant variant of SARS-CoV-2 in Victoria (Australia) and the world?
- (2) Will the Covid vaccinations as described in the Mandatory Covid Directions referred to in paragraphs # to # hereof, safely address the serious risk to public health that the current predominant variant of SAR-CoV-2 virus and Covid-19 represents for the Victorian population? If not, why not?
- (5) At this time, are the currently available vaccines effective against the Delta variant of SARS-CoV-2 and if so, to any and what extent

⁹ Neither the plaintiffs nor the defendants informed me of any revised questions 3 and 4 for Dr Palmer. I have proceeded on the basis that the revised questions for the plaintiffs' expert witnesses were those set out at [18] in these reasons.

in respect of:

- (a) transmission;
- (b) contagion; and
- (c) attenuation of symptoms.

- (6) Are the limitations imposed by the Mandatory Vaccination Directions a proportionate response to the risk to public health posed by SARS-CoV-2 and COVID-19 as at the date of signing of each of the Mandatory Vaccination Directions set out at paragraphs # to # inclusive above?

19 The defendants queried the relevance of revised questions 4, 5 and 6 for Professor Bhattacharya, and revised question 6 for Dr Palmer, on the basis that they were questions about the ultimate issue of proportionality. I held the same concern. Counsel for the plaintiffs made submissions as to why opinions given in answer to those questions would be relevant and admissible, which I set out below.¹⁰

20 I also expressed concern that the revised questions bore very little relationship to the particulars of Ground 6 provided by the plaintiffs the previous week.¹¹

21 After some discussion, I suggested that I would consider the questions proposed by the plaintiffs, together with their particulars, provide the parties with a draft list of questions for all experts, and invite submissions about the draft list. Counsel for the plaintiffs acceded to that suggestion, while reserving the plaintiffs' position to press the questions that they had articulated. The defendants were also content with the course I had proposed.

22 That afternoon, my associate provided the parties with a draft list of questions that I had prepared, having regard to the plaintiffs' proposed questions, the defendants' comments on those questions, and the particulars provided in respect of the plaintiffs' Ground 6. The covering email communicated my view that there would be benefit in having a standard set of questions for expert evidence, with each expert asked to answer only those questions within his or her expertise. The parties were asked to

¹⁰ See [55] below.

¹¹ Set out at [16] above.

consider the document, and provide any comments or suggested amendments by email to chambers by close of business on 17 November 2021.

23 In preparing the draft questions, I also considered the facts and assumptions set out in the plaintiffs' draft letters of instruction provided on 29 October 2021. As set out at [12] above, these were minimal and, in one case, of questionable accuracy. The draft letters asked the experts to assume that, at the time of the letter of engagement, 75% of the population in the State of Victoria aged 16 years and over had received two doses of a COVID-19 vaccine. Based on widely reported data about vaccination rates in Victoria over recent months, I considered that assumption might not be accurate. It was also an incomplete basis on which to seek expert opinion directed to the reasonableness and proportionality of Vaccination Directions given at various times between 7 September and 5 November 2021.

24 I considered that the prospect of the expert witnesses being able to give relevant and useful evidence would be improved if they were instructed to base their opinions on assumptions that reflected the situation in Victoria at the time each of the Vaccination Directions was given. I therefore included the following in the draft questions, under the heading 'Assumptions'.

- A. The COVID-19 vaccines currently available for use in Australia are the AstraZeneca, Pfizer and Moderna vaccines.
- B. The percentage of the Victorian population aged 12 and over who had received two doses of a COVID-19 vaccine was:
 - a. 50% on or about 5 October 2021;
 - b. 60% on or about 14 October 2021;
 - c. 70% on or about 23 October 2021;
 - d. 80% on or about 2 November 2021;
 - e. 85% on or about 12 November 2021;
 - f. projected to be 90% on or about 23 November 2021.
- C. As at *** November 2021, the percentage of the Victorian population known to have contracted and recovered from COVID-19 is [*insert figure*].

25 The percentage figures in draft assumption B were drawn from the website covidlive.com.au, which aggregates COVID-19 related data published by state and federal health departments. These figures were included in the draft to prompt the parties to update and refine the assumption set out at 4.2 of the initial draft letters of instruction provided by the plaintiffs, as to the proportion of the Victorian population that had received a COVID-19 vaccination at relevant times.

26 Neither side was able to respond to my draft questions by 17 November 2021.

27 On 18 November 2021, the defendants provided detailed comments, and suggested amendments. The suggested amendments included providing more data for each of the dates on which the Vaccination Directions were given, in place of the figures set out in the 'Assumptions' section of my draft. The data to be provided would be the percentages of persons who had received one dose and two doses of a COVID-19 vaccine in Victoria, generally and broken down by age, as well as the number of cases active and in hospital. The defendants indicated that they could provide that data in table form, 'in short order' if their suggestion were accepted.

28 My associate emailed the parties' solicitors communicating a request that, if the plaintiffs had any response to the email of 12 November 2021 regarding the draft questions for expert witnesses, they provide their response by 4.00 pm that day.

29 The plaintiffs' solicitor sent the following email at around 5.00 pm:

The plaintiffs' counsel is presently finalising their review of the proposed questions with a view of providing the Court with the plaintiffs' views as to the appropriateness of each of the draft questions and the process of limiting expert evidence that the plaintiffs propose to adduce at the final hearing and determination of this matter.

The plaintiffs seek clarification on the following arising from the draft questions:

1. The source of the assumptions at [B].
2. The proposed source of the assumption at [C].
3. The use of the word "voluntary" at [14] noting the plaintiffs view this to be a fact in issue in the proceeding.

30 After consulting with me, my associate replied, shortly before 6.00 pm:

Please find attached timetabling orders made by her Honour this afternoon. The questions to be addressed by the expert evidence will be the subject of a further order.

In relation to the queries raised by Mr El-Hissi about the source of paragraphs B and C of the assumptions set out in the draft questions, her Honour has noted that the defendants propose providing the experts with more detailed data as to vaccination rates, active cases and hospitalisations at the date each of the Vaccination Directions was given. The parties should confer directly about the source of this data.

As to the third query, the word 'voluntary' was taken from paragraph 3.m of the plaintiffs' further and better particulars filed 5 November 2021. Her Honour notes that the defendants have proposed an alternative wording for the final question, which omits the word 'voluntary'.

The plaintiffs should provide their comments or suggested amendments to the draft questions without further delay.

31 On 19 November 2021, my associate emailed the parties' solicitors, with a request that the solicitors for the defendants provide a completed version of the table that the defendants proposed be provided to the experts, identifying the source of the data. The completed table was provided the following Monday, 22 November 2021. The source of the data was identified as the Victorian Department of Health, with the data about vaccination rates sourced from the Australian Immunisation Register and ABS Estimated Resident Population as of June 2020.

32 By the morning of 23 November 2021, the plaintiffs had still provided no response to the draft questions circulated for consideration on 12 November 2021. I had by then made orders requiring the expert evidence to be relied on by the plaintiffs to be filed by 1 December 2021, and requiring the defendants to file their expert evidence by 15 December 2021. Mindful that both sides had very limited time in which to instruct their experts, I made the directions in relation to expert evidence set out at [4] above on 23 November 2021.

33 Shortly after my associate had emailed my order setting out the directions to the parties' solicitors, the solicitor for the plaintiffs, Omar El-Hissi of NOH Legal, sent a letter to my chambers for my consideration. The letter conveyed, for the first time, the

plaintiffs' position that the Court should not make directions as to the questions to be put in a letter of engagement to a party's expert witness. It put a submission that directions under s 65H of the Civil Procedure Act should be limited to the *issues* that may be the subject of expert opinion. The letter provided no comments or suggested amendments to the draft questions for expert witnesses. It communicated the plaintiffs' concern about the source of draft assumption B in the draft questions, and sought clarification about that. The letter concluded:

The plaintiffs ought to be permitted to engage their experts on the terms they have reasonably seen fit, particularly in circumstances where the *issues* the plaintiffs propose the experts address are the same as the issues set out in Her Honour's Draft Questions.

We submit that it would be a denial of procedural fairness to prevent the plaintiffs from asking the questions they see fit in the letters of engagement (which is a separate issue as to whether the expert opinion is ultimately admissible at trial) or allow the defendants any input into the drafting of the questions the plaintiffs propose to ask their experts in support of their case.

Expert evidence in judicial review proceedings

34 The enactment of the Civil Procedure Act 'changed the litigation landscape'.¹² Among other things, it provides for the management and control of expert evidence in civil proceedings.¹³ The overarching purpose of the Civil Procedure Act is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.¹⁴ The Court is obliged to seek to give effect to the overarching purpose in the exercise of its powers.¹⁵

35 In making any order or giving any direction in a civil proceeding, the Court is to further the overarching purpose by having regard to the objects set out in s 9(1), namely:

- (a) the just determination of the civil proceeding;
- (b) the public interest in the early settlement of disputes by agreement between parties;

¹² *Mandie v Memart Nominees Pty Ltd* [2016] VSCA 4, [42].

¹³ *Civil Procedure Act 2010* (Vic), s 1(2)(g).

¹⁴ *Civil Procedure Act*, s 7(1).

¹⁵ *Civil Procedure Act*, s 8(1).

- (c) the efficient conduct of the business of the court;
- (d) the efficient use of judicial and administrative resources;
- (e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for –
 - (i) the fair and just determination of the real issues in dispute; and
 - (ii) the preparation of the case for trial;
- (f) the timely determination of the civil proceeding;
- (g) dealing with a civil proceeding in a manner proportionate to –
 - (i) the complexity or importance of the issues in dispute; and
 - (ii) the amount in dispute.

Matters to which the Court may have regard for the purposes of s 9(1) are set out in s 9(2).

36 The Civil Procedure Act also requires participants in civil litigation, including parties' legal representatives and expert witnesses, to comply with the overarching obligations set out in Pt 2.3.¹⁶ The overarching obligations include:

- (a) a paramount duty to the Court to further the administration of justice in relation to any civil proceeding;¹⁷
- (b) an obligation not to take any step in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding;¹⁸
- (c) a duty to co-operate with the parties and the Court in connection with the conduct of the civil proceeding;¹⁹
- (d) an obligation to use reasonable endeavours to narrow the issues in

¹⁶ Civil Procedure Act, s 10.

¹⁷ Civil Procedure Act, s 16.

¹⁸ Civil Procedure Act, s 19.

¹⁹ Civil Procedure Act, s 20.

dispute;²⁰ and

- (e) an obligation to use reasonable endeavours to act promptly and minimise delay.²¹

37 Part 4.6 of the Civil Procedure Act is concerned with expert witnesses and expert evidence. The main object of the Part is to further the overarching purpose by:²²

- (a) enhancing the case management powers of a court in relation to expert evidence in civil proceedings;
- (b) restricting expert evidence to that evidence which is reasonably required to resolve a civil proceeding;
- (c) emphasising the primary duty of an expert witness to the court.

38 Section 65G obliges a party that intends to adduce expert evidence at trial to seek direction from the Court as soon as practicable. Section 65H enables the Court to give directions in relation to expert evidence. It provides:

- (1) A court may give any directions it considers appropriate in relation to expert evidence in a proceeding.
- (2) A direction under subsection (1) may include, but is not limited to—
 - (a) the preparation of an expert's report;
 - (b) the time for service of an expert's report;
 - (c) limiting expert evidence to specified issues;
 - (d) providing that expert evidence may not be adduced on specified issues;
 - (e) limiting the number of expert witnesses who may be called to give evidence on a specified issue;
 - (f) providing for the appointment of—
 - (i) single joint experts; or
 - (ii) court appointed experts;
 - (g) any other direction that may assist an expert witness in the

²⁰ Civil Procedure Act, s 23.

²¹ Civil Procedure Act, s 25.

²² Civil Procedure Act, s 65F.

exercise of his or her functions as an expert witness in the proceeding.

- (3) A direction under subsection (1) may be given at any time in a proceeding

39 The powers conferred on the Court in Pt 4.6, including in s 65H, are in addition to the Court's other powers of case management and in relation to expert witnesses.

40 Management of expert evidence assumes particular importance in a judicial review proceeding like this one, where the general rule is that evidence that was not before the decision-maker is inadmissible. There are some limited exceptions to that rule, which include 'evidence that is capable of showing that there was no intelligible foundation for the decision'.²³ A further exception is evidence that is capable of demonstrating that the decision was incompatible with a human right protected by the Charter. In that case, evidence may be directed to whether a right is limited, and whether the limitation is justified under s 7(2).²⁴

41 Because expert evidence may be admitted in a judicial review proceeding in only limited circumstances, it should where possible be carefully managed, in order to give effect to the overarching purpose of the Civil Procedure Act. It is particularly important that expert evidence, if it is to be adduced in a judicial review proceeding, is relevant to the real issues in dispute. The case of *Mackenzie v Head, Transport for Victoria*²⁵ is an example of an attempt to adduce expert evidence in a judicial review proceeding, which wasted a great deal of time, effort and expense, and contributed nothing to the resolution of the real issues in dispute.

42 In addition, it is always necessary in a judicial review proceeding to observe the boundary between judicial review and merits review.²⁶ Even in a case where the decision is claimed to be incompatible with a human right, contrary to s 38(1) of the

²³ *Mackenzie v Head, Transport for Victoria* [2021] VSCA 100 (*Mackenzie (CA)*), [153].

²⁴ See, eg, *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, [293]-[416], in particular the evidence of Dr Adam Deacon, psychiatrist, at [399]-[416].

²⁵ [2020] VSC 328, [57]-[72]; see also *Mackenzie (CA)*, [152]-[176].

²⁶ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37-8 (Brennan J).

Charter, the Court's jurisdiction is supervisory, not substitutionary, and does not involve reconsidering the merits of the decision.²⁷ This means that parties do not have 'open slather, in cases of judicial review, to lead any evidence that may be thought to impugn, or support, the merits of the decision at issue'.²⁸

43 The Court's power in s 65H(1) to give directions in relation to expert evidence plainly extends, in an appropriate case, to a power to give directions about the questions to be addressed by expert evidence and the assumptions on which the experts are to base their opinions. The list of matters that may be the subject of directions in s 65H(2) is inclusive, not exhaustive, and does not limit the scope of the power in s 65H(1).

44 None of the authorities referred to by the plaintiffs in Mr El-Hissi's letter supports the proposition that the Court cannot or should not make directions about the questions to be answered by expert witnesses, or that the power in s 65H(1) is confined to limiting the issues that may be the subject of expert evidence. To the contrary, McDonald J's ruling in *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 5)*²⁹ explains why a party wishing to adduce expert evidence must first obtain directions from the Court, in order to enhance the probative value of the evidence and reduce the scope for disputation as to its admissibility and weight.

45 The directions I made on 23 November 2021 apply to the expert evidence that the plaintiffs intend to adduce at the trial of the proceeding. In relation to that evidence, the plaintiffs are not entitled to instruct their experts 'as they reasonably see fit'. As participants in a civil proceeding in this Court, the plaintiffs and their lawyers are obliged to give effect to the overarching purpose of the Civil Procedure Act, to cooperate with the Court and the defendants, and to make reasonable endeavours to

²⁷ *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373, [314]-[317]; *Certain Children*, [211]-[219]; *Minogue v Thompson* [2021] VSC 56, [81].

²⁸ *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446, [637].

²⁹ [2020] VSC 72, [40]-[43]. The other authorities to which the plaintiffs referred in their solicitor's letter of 23 November 2021 were *Matthews v SPI Electricity (Ruling No 39)* [2014] VSC 109, *Wilson v Bauer Media (Ruling No 1)* [2017] VSC 302, and *Gorman & Kelly Commercial Real Estate v Peluso* [2017] VSC 387. *Matthews* and *Wilson* were rulings on the admissibility of expert evidence. *Gorman & Kelly* upheld a refusal to authorise an expert witness to produce a supplementary report, in a case where detailed orders had been made governing the preparation of the expert's initial report.

narrow the issues in dispute. They are expected to act promptly in the conduct of the proceeding, and to avail themselves of opportunities to be heard in relation to case management issues. They are also obliged to seek directions from the Court in relation to expert evidence that they wish to adduce, and to abide by those directions once made. The plaintiffs and their lawyers are not relieved of these obligations by the undoubted public importance of the issues in dispute. I reject the suggestion that it is a denial of procedural fairness to exercise the Court's power under s 65H of the Civil Procedure Act so as to maximise the possibility that the expert evidence to be adduced by both sides is relevant, admissible, and directed to the resolution of the real issues in dispute.

Assumptions

46 As mentioned, the facts and assumptions set out in the plaintiffs' draft letters of instruction to their expert witnesses were minimal and incomplete. I was particularly concerned that they did not provide a firm basis for any expert to provide an opinion relevant to the reasonableness or proportionality of the Vaccination Directions given at various times between 7 September and 5 November 2021. I wished to avoid the possibility of an expert's opinion being undermined because it was given on the basis of an assumption that was not shared with other expert witnesses and turned out to be incorrect. It appeared to me that could be avoided by specifying some assumptions on which all experts were to base their opinions.

47 The figures included in assumption B in the draft questions were intended to prompt the parties to consider the relevance of vaccination rates in the Victorian population when each of the Vaccination Directions was made. I was conscious that the difficulty of justifying mandatory vaccination requirements might vary with the proportion of the eligible population that had been vaccinated, and that it was notorious that this proportion had increased rapidly between September and November 2021. The rate of 75% stated in the plaintiffs' draft letters of instruction clearly needed attention.

48 The data provided by the defendants appeared to me to meet the concern that all

experts – both the plaintiffs’ and the defendants’ – should base their opinions on the same assumed facts. Of course at this stage those facts are to be assumed – they have not been proved. However, I anticipate that the defendants will adduce evidence of the material that was before them when they gave the Vaccination Directions. I would be most surprised if that did not include relevant data collected and published by the Victorian Department of Health. In other words, it appears to me likely that the assumptions on which the experts are to base their opinions will approximate data that informed the defendants in giving the Vaccination Directions.

49 To the extent that the plaintiffs are concerned about the source of the percentages in assumption B in the draft questions, I note that those figures do not appear in the assumptions set out in the directions, and form no part of my order made on 23 November 2021. There is no basis for the implication, made in Mr El-Hissi’s letter, that the Court had received any ‘document or information regarding the percentages in Assumption [B] from the defendants prior to the draft of the document being circulated on 12 November’. As I have explained, the figures were drawn from a website that aggregates COVID-19 related data published by Australian health departments, including the Victorian Department of Health.

Questions for expert evidence

50 I considered the 12 questions posed for expert evidence to be an appropriate synthesis of:

- (a) the revised questions that I understood the plaintiffs wished to ask their experts;
- (b) the initial concerns identified by the defendants and their subsequent comments on the draft questions; and
- (c) the issues raised by the plaintiffs’ grounds of review and the particulars they provided of Ground 6.

51 The questions are expressed neutrally, in a way that directs attention to relevant

matters without suggesting an answer or assuming a state of affairs that is in dispute. The parties may ask an expert witness to answer any or all of the questions, so long as the question is within the expert's area of expertise. I decided against directing which witness should answer which questions, contrary to the defendants' submission.

52 With one exception, the questions set out in my order of 23 November 2021 cover the same ground as the plaintiffs' revised questions, with two additional questions directed to issues raised in the plaintiffs' particulars of Ground 6. The exception is those questions that sought an opinion in relation to the ultimate issue of proportionality. I explain shortly why I did not adopt the way the plaintiffs had phrased those questions, and preferred the defendants' revised wording of Question 12.

53 Taking each question in turn:

- (a) Question 1 is in similar terms to the second revised question the plaintiffs wished to ask Professor Bhattacharya. The only difference is that Question 1 seeks specific information about the nature, severity and duration of symptoms associated with COVID-19, and how the virus is transmitted.
- (b) Question 2 is in similar terms to the first revised question the plaintiffs proposed to ask Dr Palmer.
- (c) Question 3 relates to paragraph 3.e of the plaintiffs' further and better particulars, in relation to the standard to which the efficacy of the available COVID-19 vaccines has been established. This was not a matter that was covered in the plaintiffs' revised questions for their experts.
- (d) Question 4 is in similar terms to the third revised question the plaintiffs wished to ask Professor Bhattacharya, and their fifth revised question for Dr Palmer. It also seeks an opinion as to the effectiveness of the

available COVID-19 vaccines in respect of death.

- (e) Question 5 seeks additional opinion in relation to the efficacy of the available COVID-19 vaccines, which is relevant to paragraphs 3.f.iii and 3.r of the plaintiffs' particulars.
- (f) Question 6 is in similar terms to the plaintiffs' first revised question for Dr McCullough.
- (g) Question 7 relates to paragraph 3.g of the plaintiffs' particulars, in relation to the standard to which the safety of the available COVID-19 vaccines has been established. Again, this was not a matter covered by the plaintiffs' revised questions.
- (h) Question 8 concerns the side effects of the available COVID-19 vaccines, and is a component of the second revised question the plaintiffs proposed to ask Dr Palmer. It also relates to paragraphs 3.h and 3.r of the plaintiffs' particulars.
- (i) Question 9 concerns the incidence of adverse effects associated with receiving a dose of a COVID-19 vaccine, which is another component of the plaintiffs' second revised question for Dr Palmer. It also relates to paragraphs 3.h and 3.r of the plaintiffs' particulars.
- (j) Question 10 seeks opinion about those groups who are at a higher risk of adverse effects associated with receiving a dose of a COVID-19 vaccine. It relates to paragraphs 3.h, 3.i and 3.j of the plaintiffs' particulars. It includes the plaintiffs' second revised question for Dr McCullough.
- (k) Question 11 is in similar terms to the plaintiffs' first revised question for Professor Bhattacharya, in relation to available public health measures, although it is framed to relate to the risks to human health posed by

SARS-COV-2 and COVID-19, rather than viruses generally.

- (l) Question 12 seeks opinion as to whether public health measures other than those contained in the Vaccination Directions would have been as effective as the Vaccination Directions, at the time each of them was given. It is posed in place of the revised questions that the plaintiffs sought to ask Professor Bhattacharya and Dr Palmer about whether the Vaccination Directions were a proportionate response to the risk to public health posed by COVID-19.

54 As mentioned, the defendants contested the relevance of the plaintiffs' revised questions 4, 5 and 6 for Professor Bhattacharya and revised question 6 for Dr Palmer, all of which concerned the proportionality of the Vaccination Directions. They objected to the experts being asked for their opinions about the ultimate question for the Court.

55 Counsel for the plaintiffs correctly pointed out that s 80(a) of the *Evidence Act 2008* (Vic) provides that evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue. She referred me to Sackville J's ruling in *Australian Rugby Union Ltd v Hospitality Group Pty Ltd*,³⁰ which ruled admissible opinion evidence concerning 'the likely effect in the Hospitality Market of the imposition by the ARU of the Condition on all ticket sales'. She accepted that an opinion that the Vaccination Directions were not proportionate would not be of assistance to the Court unless the expert also set out the basis and rationale for that opinion, but said that questions of relevance and admissibility could be determined at a later time.

56 The 'ultimate issue rule' is a common law rule of evidence that is often stated to be that 'a witness may not express an opinion on the ultimate issues in a case'.³¹ It may be better stated as a rule that 'an expert must not express an opinion if to do so would

³⁰ [1999] FCA 1098, [8].

³¹ Law Reform Commission, *Evidence* (Report No 26, 1985) vol 1, [359].

involve unstated assumptions as to either disputed facts or propositions of law'.³²

57 I do not accept that the effect of s 80(a) of the Evidence Act is that opinion evidence given in answer to the plaintiffs' proposed questions about proportionality would be admissible. Nor do I accept that questions framed in that way are likely to produce opinions that are of value in determining the real issues in dispute in this case. There are several reasons for those conclusions.

58 First, evidence of any kind is only admissible if it is relevant – that is, it is evidence that, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding.³³ The proportionality of the Vaccination Directions is not a fact in issue in the proceeding. It is one of the ultimate issues in the proceeding.³⁴ Determining it will involve the application of the complex legal test under s 38(1) and s 7(2) of the Charter, to the facts as I find them on the evidence at trial. Opinion evidence as to the overall question of proportionality would not be relevant to any fact that I have to determine, and would be inadmissible for that reason alone.

59 Second, I doubt that s 80(a) of the Evidence Act displaces the 'fundamental common law principle which excludes expert legal opinion evidence as intruding upon the essential judicial function and duty' to determine the ultimate issue for decision.³⁵ In the context of this case, an opinion about the proportionality of the Vaccination Directions would be an opinion about a question of mixed fact and law. It would inevitably involve an element of legal opinion that is not properly a matter for expert evidence.

60 Third, it is axiomatic that an expert witness is not an advocate for a party.³⁶ They may

³² *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313, 350, citing Sir Richard Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983), 147-8.

³³ *Evidence Act 2008* (Vic), ss 55, 56.

³⁴ Subject to the defendants' argument that s 38(1) of the Charter did not apply to the making of the Vaccination Directions: *Harding No 1*, [158(a)], [207]-[208].

³⁵ *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79, 84.

³⁶ *Civil Procedure Act*, s 65F(c); *Supreme Court (General Civil Procedure) Rules 2015* (Vic), Form 44A – Expert

give evidence of opinion that is probative of a fact in issue, where the opinion is based on the witness's specialised knowledge.³⁷ Their role is not to argue the case of the party who has retained them to give evidence in the proceeding. Phrasing questions for expert witnesses in a way that seeks an opinion on the ultimate legal issue for decision may invite tendentious opinion that is both unhelpful and irrelevant.³⁸

61 For those reasons, I determined that no expert witness should be asked for an opinion in response to a general question about the proportionality of or justification for the Vaccination Directions. I considered Question 12 to be framed in a way that was most likely to elicit expert opinion evidence probative of facts in issue on which that ultimate legal issue may turn, namely the relative efficacy of the various public health measures available to reduce or minimise the risk to human health posed by COVID-19.

Witness Code of Conduct, [2]; *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666, [2125]-[2126].

³⁷ Evidence Act, ss 55, 56, 76, 79.

³⁸ *Allstate*, 83; see also *Faucett v St George Bank Ltd* [2003] NSWCA 43, [48].

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 34 preceding pages are a true copy of the reasons for ruling of Justice Richards of the Supreme Court of Victoria delivered on 29 November 2021.

DATED this twenty-ninth day of November 2021.


.....
Associate