IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03402

5 BOROUGHS NY PTY LTD (ACN 632 508 304) Plaintiff

v

STATE OF VICTORIA & ORS Defendants

JUDGE:	KEOGH J
WHERE HELD:	Melbourne
DATE OF HEARING:	24 November 2023
DATE OF RULING:	23 February 2024
CASE MAY BE CITED AS:	5 Boroughs NY Pty Ltd v State of Victoria & Ors (No 6)
MEDIUM NEUTRAL CITATION:	[2024] VSC 60

PRACTICE AND PROCEDURE — Group proceeding — Plaintiff claims economic loss consequent to negligent conduct of the State of Victoria in operation of hotel quarantine program during COVID-19 pandemic — Application for orders maintaining confidentiality of the whole or part of the Amended Proposed Defence — Application for suppression orders under the *Open Courts Act 2013* (Vic) — Application to restrain plaintiff from proofing lay witnesses — Criminal proceedings for breach of the *Occupational Health and Safety Act 2004* (Vic) laid against relevant State Department of Health based in part on same alleged conduct of the defendants in civil proceeding — Substantial overlap in issues between civil and criminal proceedings — Whether prejudice to State in defence of the prosecution if orders not made — Whether prejudice to group members in group proceeding — Application of the companion principle — Orders sought by first defendant granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	A Hochroth with H Whitwell	Quinn Emanuel Urquhart & Sullivan
For the Defendants	D Neal SC with L Brown SC, R O'Neill & M McLay	MinterEllison, Herbert Smith Freehills

HIS HONOUR:

1 This proceeding concerns the hotel quarantine program put into operation by the first defendant in mid-2020 in response to the COVID-19 pandemic. The plaintiff, 5 Boroughs NY Pty Ltd ('5 Boroughs'), alleges that the negligent failure of the second to fifth defendants to implement effective infection prevention and control ('IPC') measures at two of the quarantine hotels (Rydges and Stamford Plaza) caused the transmission of SARS-CoV-2 ('COVID-19 virus') from returned travellers to workers at the hotels, who then transmitted the virus to members of the community. This failure allegedly resulted in the second wave of COVID-19 cases in Victoria and the making of directions under s 200 of the *Public Health and Wellbeing Act 2008* (Vic) ('*PHW Act*') ('*PHW Act* directions'). 5 Boroughs alleges that the first defendant is vicariously liable for the negligence of the second to fifth defendants. It claims damages against the first defendant for itself and on behalf of other retail businesses that suffered economic loss because, for some months in late 2020, they were prohibited or restricted by the *PHW Act* directions from supplying goods and services to members of the public.

2 After this proceeding commenced, the Victorian WorkCover Authority ('VWA') filed charges against the Crown in right of the State of Victoria (Department of Health) ('State') for alleged contraventions of ss 21(1) and 23(1) of the *Occupational Health and Safety Act 2004* (Vic) ('*OH&S Act*') arising out of the implementation of the hotel quarantine program between March and June 2020 ('*OH&S* charges'). The charges allege a failure to take the reasonably practicable measure of appointing a person with IPC expertise at each quarantine hotel to eliminate or reduce the risk of exposing employees and other persons to the COVID-19 virus. There are two charges relating to each of Rydges and Stamford Plaza.

3 In September 2022, the first defendant applied to stay this proceeding until the criminal charges had been finally determined, withdrawn or discontinued. While the application for a stay was refused,[1] orders were made to prevent prejudice to the State

[1] *5 Boroughs NY Pty Ltd v Victoria (No 3)* [2023] VSC 22 ('*Stay Application Ruling*') confirmed on appeal in *State of Victoria v 5 Boroughs NY Pty Ltd* [2023] VSCA 101 ('*Stay Application Appeal Ruling*').

in the criminal proceeding and it was contemplated that further orders may be required at a later stage in the proceeding to achieve the same purpose.

4 These reasons deal with the following applications by the first defendant:

(a) that the Amended Proposed Defence dated 1 September 2023 ('APD'):

(i) not be filed and remain subject to the confidentiality orders made by John Dixon J on 23 February 2023;

(ii) alternatively, that certain paragraphs of the APD be redacted from the document as filed and remain confidential; and

(b) that 5 Boroughs be restrained from proofing lay witnesses or potential lay witnesses in the criminal trial; and

(c) for closed court and suppression orders under the *Open Courts Act 2013* (Vic) ('*Open Courts Act*') prohibiting disclosure of information derived from and documents relevant to the hearing of the applications in (a) and (b) above.

5 5 Boroughs does not oppose certain paragraphs of the APD being redacted from the document as filed and remaining confidential, or the orders sought under the *Open Courts Act*. 5 Boroughs opposes the balance of the orders sought by the first defendant.

6 Before the hearing of these applications, 5 Boroughs served on the first defendant a notice to produce the hand-up brief served in the criminal proceeding and documents referred to in the summary of prosecution opening ('prosecution opening'). 5 Boroughs argued the hand-up brief documents were relevant to the applications made by the first defendant, but chose not to delay the hearing by first agitating the notice to produce. In the circumstances, the production of the hand-up brief became a discovery issue that the parties resolved after discussions between them.

Evidence

7 The first defendant relied on two affidavits of Caitlin Ible, the solicitor for the State in the criminal proceeding, affirmed 4 August 2023 and 12 October 2023.

8 5 Boroughs relied on an affidavit of its solicitor, Damian Scattini, affirmed 20 November 2023.

Background and procedural history

9 The COVID-19 hotel quarantine inquiry ('Board of Inquiry') was established on 2 July 2020 to examine matters related to the hotel quarantine program. The Board of Inquiry delivered its final report in December 2020 ('inquiry report').

10 5 Boroughs commenced this proceeding on 21 August 2020.

11 On 29 September 2021, the VWA filed the *OH&S* charges against the State.

12 On 2 December 2021 Dixon J delivered the ruling in *5 Boroughs NY Pty Ltd v State of Victoria & Ors*[2] refusing the defendants' application for summary dismissal of the proceeding ('*Summary Dismissal Ruling*').

13 On 26 August 2022 Dixon J ruled on the defendants' application to strike out parts of the statement of claim in *5 Boroughs NY Pty Ltd v State of Victoria (No 2)* ('*Strike Out Ruling*').[3]

14 5 Boroughs filed an amended statement of claim ('ASOC') on 21 September 2022 after the pleadings disputes had been heard and determined.

15 On 16 September 2022, the first defendant applied for the proceeding to be stayed until the *OH&S* charges were finally determined, withdrawn or discontinued.

16 On 3 February 2023, Dixon J ruled that the stay application should be dismissed.[4] Orders made on 23 February 2023 giving effect to the ruling required that the defendants serve and provide to the Court their proposed defence by 8 March 2023. The orders gave the first defendant the opportunity to identify, by a brief outline of its contentions, whether disclosure of any part of the proposed defence would risk real prejudice to the State in the criminal proceeding, and prohibited disclosure of the

2 [2021] VSC 785 ('*Summary Dismissal Ruling*').
3 *5 Boroughs NY Pty Ltd v State of Victoria (No 2)* [2022] VSC 494 ('*Strike Out Ruling*').
4 *Stay Application Ruling* (n 1).

proposed defence until the matters raised by the notice of contention were resolved. The orders also provided for some initial discovery to be made by the defendants.

17 On 16 March 2023, the State was committed to stand trial on the *OH&S* charges in the County Court of Victoria.

18 On 21 April 2023, Wraight J of the County Court made orders that, among other things, required the Director of Public Prosecutions to file and serve the indictment in the criminal proceeding by 30 June 2023.

19 On 2 May 2023, the Court of Appeal refused the first defendant's application for leave to appeal the orders of Dixon J dismissing the stay application.[5]

20 On 26 May 2023, the first defendant served a notice of contentions seeking that the proposed defence remain confidential and not be placed on the Court file until the conclusion of the criminal proceeding. In the alternative, the first defendant contended that highlighted paragraphs of the proposed defence be redacted from the document as filed and remain confidential.

21 On 10 July 2023, Wraight J extended the time for filing the indictment to 30 August 2023 and set the criminal proceeding down for trial beginning 6 May 2024 on an estimate of six to eight weeks.

22 On 4 August 2023, the first defendant filed a summons seeking orders under the *Open Courts Act* to the effect that the matters the subject of its notice of contentions be heard in closed court.

23 On 9 August 2023, the prosecution filed and served the indictment in the criminal proceeding. Charge 10 in the indictment reads:

> **CHARGE 10** The Director of Public Prosecutions charges that THE CROWN IN RIGHT OF THE STATE OF VICTORIA (**Department of Health**) (A.B.N. 74 410 330 756) at Rydges on Swanston in Victoria between about 12 April 2020 and 30 June 2020, pursuant to section 21(1) of the Occupational Health and Safety Act 2004 (**the Act**), as an employer failed, so far as was reasonably practicable, to provide and maintain for its employees a working environment

5 *Stay Application Appeal Ruling* (n 1).

that was safe and without risks to health.

Particulars

1. In 2020, the Department of Health was known as the Department of Health and Human Services (**DHHS**).

2. DHHS was an employer within the meaning of section 5 of the Act.

3. Operation Soteria was a program whereby persons returning to Victoria after travelling overseas undertook 14 days of mandatory quarantine in a hotel, on the basis that those persons may be infected with the virus known as severe acute respiratory syndrome coronavirus 2 (**SARS-CoV-2**).

4. DHHS had responsibility for the oversight and coordination of Operation Soteria.

5. On 12 April 2020, Rydges on Swanston (**Rydges**) commenced operation as a quarantine hotel.

6. DHHS employees worked as Team Leaders and Authorised Officers at Rydges.

7. There was a risk of illness (including serious illness and death) to persons working at Rydges as a result of contracting SARS-CoV-2 and developing COVID-19 (the disease caused by SARS- CoV-2) through:
   a. Transmission from an infected returned traveller; or
   b. Transmission from an infected person working at the hotel; or
   c. Fomite transmission.

8. It was reasonably practicable for DHHS to reduce that risk by appointing a person with expertise in infection prevention and control (**IPC**) to be stationed at Rydges and perform the following functions:
   a. Lead the daily operationalisation of IPC measures for persons working at Rydges;
   b. Ensure that persons working at Rydges received adequate information, instruction and training with respect to IPC; and
   c. Supervise and reinforce the implementation of IPC procedures.

9. DHHS failed to adopt the measure set out in particular 8.

10. The matters set out in particulars 7 and 8 were matters over which DHHS had control.

11. Employees placed at risk by DHHS' conduct included, but were not limited to, HEIDI BAXTER, NOEL CLEAVES and CHRIS POTTER.

Statement of Offence - Failing to provide and maintain a safe working environment contrary to section 21(1) of the *Occupational Health and Safety Act 2004*.

The indictment also contains a charge under s 23(1) of the *OH&S Act* supported by the same particulars alleging risk to non-employees from the conduct of the hotel

quarantine program at Rydges, and equivalent charges relating to the operation of the program at Stamford Plaza. The remaining 28 charges in the indictment relate to 14 other hotels at which the program operated in early to mid-2020.

24 On 10 August 2023, Dixon J ordered that the defendants serve an APD by 1 September 2023 and that by 8 September 2023 the first defendant produce to 5 Boroughs documents on the defendants' list pursuant to s 26 of the *Civil Procedure Act 2010* (Vic) ('*CPA*')('s 26 list'), subject to any claims of legal professional privilege or public interest immunity; and that the defendants make further discovery in tranches.

25 The APD was served by the defendants on 1 September 2023.

26 On 26 September 2023, Wraight J made orders in the criminal proceeding for the prosecution opening to be filed and served by 3 November 2023 and the defence response ('defence response') to be filed and served by 22 November 2023.

27 [redacted]

28 [redacted]

[redacted]

29 Following conferral between the parties, 5 Boroughs agreed and gave an undertaking to the court not to take any step to proof lay witnesses until the hearing and determination of the first defendant's applications regarding confidentiality of the APD and the restriction on proofing lay witnesses.

30 On 23 October 2023, I made orders setting the proceeding down for trial on 1 September 2025 on an estimate of 12 to 15 weeks. The orders also provided for further discovery by both parties and for the parties to exchange positions and confer about the opt out process, the discoverability of witness statements given to the Board of Inquiry, expert evidence, and any other case management orders to be sought by either party at a proposed further case management conference in February 2024.

31 The prosecution opening in the criminal proceeding was filed and served on about 2 November 2023. The following is a brief summary of relevant parts of the prosecution opening:

(a) It was known in 2020 that the COVID-19 virus was transmitted by respiratory droplets, aerosols in crowded and inadequately ventilated indoor settings and by deposited virus particles (fomite transmission).

(b) When the hotel quarantine program was established in early 2020, transmission was understood to occur primarily through droplet transmission and fomite

transmission.

(c) Essential elements of IPC in guarding against transmission of the virus consisted of:

(i) physical distancing;

(ii) practicing good hygiene (hand hygiene, respiratory hygiene and cough etiquette);

(iii) personal protective equipment (PPE); and

(iv) cleaning (including waste management).

(d) In a quarantine environment, there should have been a person with IPC expertise on site at all times to:

(i) lead the daily operationalisation of IPC measures for staff;

(ii) ensure that staff received information, instruction and training with respect to IPC in accordance with their roles; and

(iii) supervise and reinforce the implementation of IPC procedures.

(iv) At the quarantine hotels during the charge period, there was no such person fulfilling that role.

(e) Security guards at the quarantine hotels, who were likely to have physical interactions with returned travellers, did not receive adequate training in the use of PPE.

(f) There were interactions as described between a family with members who tested positive for the COVID-19 virus and nurses and security guards at Rydges.

(g) Two security guards and a Rydges employee subsequently tested positive for the COVID-19 virus.

(h) The Rydges and Stamford Plaza outbreaks were genomically linked to returned travellers accommodated at those hotels as part of the hotel quarantine program.

32 The defence response is a brief, four-page document dated 22 November 2023. It identifies that the primary issues in the criminal trial are:

(a) whether the measures proposed by the prosecution would have materially reduced the alleged risk of contracting the COVID-19 virus; and

(b) whether those measures were reasonably practicable in all the circumstances.

33 In the defence response, the State takes issue with the prosecution opening on matters including the following:

(a) knowledge as to the modes of COVID-19 transmission in early 2020;

(b) the essential elements of IPC in guarding against transmission of the COVID-19 virus at that time;

(c) that in a quarantine environment there should be a person with IPC expertise on site at all times;

(d) that there was no such person fulfilling that role at the quarantine hotels during the charge period;

(e) the roles and responsibilities of personnel engaged in the hotel quarantine program;

(f) that security guards engaged in the hotel quarantine program were the cohort who were likely to:

(i) have physical interactions with returned travellers; and

(ii) be untrained in IPC and the use of PPE;

(g) that the security guards engaged in the hotel quarantine program had not

received adequate training in IPC and the use of PPE.

34 On 5 December 2023, I ordered by consent that by 29 February 2024 the first defendant make discovery of documents in the hand-up brief in the criminal proceeding, to the extent those documents had not already been discovered in this proceeding. That order dealt with the notice to produce issue raised by 5 Boroughs at the hearing of this application.

35 Following a further case management conference ('CMC') held on 5 February 2024 and a mention on 16 February 2024, I made orders, to which the parties consented, for opt out and claim registration to occur by 8 July 2024 and for mediation to occur in November 2024. Orders requiring service of particulars, expert reports and mediation position papers were made to facilitate mediation. The proceeding is listed for a further CMC in April of this year. The matters to be discussed at the CMC include the finalisation of discovery, and orders for lay and expert evidence.

The stay application

36 At first instance, Dixon J noted the wide jurisdiction of the court to stay a proceeding 'in the interests of justice, which is an incident of its general power to control its own proceedings'.[6]

37 His Honour considered the immediate question of whether requiring the first defendant to disclose its defence 'on substantially the same issues as are in issue in the VWA prosecution'[7] may prejudice its defence in the criminal trial by directly or indirectly assisting the prosecution in proof of the State's guilt. His Honour described his task in answering that question as follows:

> In this case, I must balance the prejudice asserted by the plaintiff in the group proceeding, as a consequence of delay, against the prejudice to the State through compromise of the companion principle in the prosecution, a proposition to be further discussed in due course. Alternative protective measures that fall short of contravening the open justice principle are also relevant to this balancing exercise.[8]

6 *Stay Application Ruling* (n 1) [48].
7 Ibid [52].
8 Ibid [54].

His Honour recognised that the answer to that question:

> … must be understood in the context of the particular interlocutory steps that are about to occur in the civil proceeding. To do otherwise would necessarily undermine the plaintiff's right to a timely trial of the civil proceeding. Rejection of the application for a stay at this stage of the civil proceeding will not preclude another application in the changed circumstances of the continuing civil proceeding.[9]

38 Dixon J then considered a mechanism that would allow a fully pleaded defence to be provided without causing risk to the State in the criminal proceeding:

> While I accept that access by the prosecution to a full defence filed by the State in the group proceeding may well present some risk of prejudice to the State in its defence of the criminal proceedings, that is not the end of the matter. A critical issue is whether and how the State's disclosures in the group proceeding would come to the attention of the prosecution, not the fact of disclosure, per se, by the State. It does not automatically follow that disclosure of the civil defence to the prosecution will occur or that the State's forensic choices would not otherwise be narrowed by some other mechanism.
>
> The State could serve on the plaintiff a proposed defence identifying those parts of it that might be prejudicial to it if disclosed in the VWA prosecution. That contention could be tested and, if established, the court could order that a redacted defence be filed. The issue of access to and use of the unredacted defence could then be determined. The court might then be persuaded that the group proceeding must be stayed without filing any defence at all, or it might conclude that disclosure of the material on which this application proceeded be managed in a manner that does not reveal any prejudicial disclosures to the prosecutors, while permitting the group proceeding to progress towards a trial, including through alternative dispute resolution processes. The legal practitioners and litigants with access to unredacted material will be subject to the paramount duty to further the administration of justice, the relevant content of which would extend to a duty to the court to keep prejudicial material confidential for the express purpose of ensuring that the information did not come to the attention of the prosecution. So much is made plain by these reasons. It should not be assumed that such a duty would be readily breached. I do not accept that an unacceptable risk of 'leakage' to the prosecution should be factored into the balance.[10]

39 His Honour concluded that the proposed mechanism would allow 5 Boroughs to take significant steps in preparation of the proceeding, which he described as follows:

> Although the plaintiff could be in possession of information that it could not immediately use, I am satisfied that the plaintiff would still be able to take significant steps towards the trial and would be able to minimise the impact of delay on group members. The precise constraints on the plaintiff are not presently clear, but understanding the issues to be in contest would likely

9 Ibid [57].
10 Ibid [60], [61].

> permit it to apply for a group costs order, complete discovery, and mediate. It could mostly proof potential witnesses even if it might later need to return to that task to obtain further, particular information.[11]

40 His Honour concluded that maintaining the confidentiality of the whole or parts of the defence until completion of the criminal proceeding would not offend the open justice principle, and that the need to keep group members informed of the proceeding would best be managed when the time for opting out arrived.[12]

41 Dixon J also addressed an argument put by the State about prejudice from derivative use of information disclosed through interlocutory steps:

> The State submitted that prejudice can arise through the derivative use of information disclosed in a defence or through discovery when enquiries are made of key witnesses by an innocent communication by the plaintiff when seeking a statement from such witnesses about an issue raised by the defence that the State is otherwise entitled, by the application of the companion principle, not to disclose to the prosecution. This glib submission requires a more granular examination, such as might occur on an application to redact the State's defence in the group proceeding. It is not readily apparent how the plaintiff might unwittingly communicate such information when subject to an obligation to maintain the confidentiality of redacted parts of the defence.[13]

42 His Honour was not persuaded, for the following reasons, that the process of discovery should be stayed:

> First, the plaintiff already has substantial discovery by reason of documents that were produced by the State to the Coate Inquiry. Secondly, the State is willing to consent to produce documents obtained by the prosecution pursuant to OHSA processes. Thirdly, beyond that production it is unclear what further documents might be relevant, particularly in the absence of pleadings, and how their production might be prejudicial to the State in its defence of the prosecution. Again, rather than proceeding on the assumption that prejudice is obvious, I consider it desirable that remaining categories of undisclosed documents be assessed on this issue of prejudice to determine whether, when that stage of the proceeding is reached, a stay will be appropriate.[14]

43 His Honour concluded that in the context of the interlocutory steps he was considering this was:

> … an exceptional case where the specific matters of prejudice must be articulated, particularly because it appears to be open to the court to manage

11 Ibid [62].
12 Ibid [64].
13 Ibid [65].
14 Ibid [66].

> the preparation of the group proceeding for trial in a manner that would ameliorate any genuine prejudice to the State in the criminal proceeding.[15]

His Honour said:

> In the context of disclosure that has occurred in the Coate Inquiry and is occurring through the committal and otherwise, it is not clear what forensic choice may be constrained and how, in order to compare the incommensurable prejudice claimed by each party. However, through protective orders, a granular analysis of the possible prejudice to the State from future interlocutory steps in the group proceeding, assuming it is entitled to the protections of the companion principle, can be evaluated without causing the very consequences sought to be avoided.[16]

44 On appeal, the court concluded Dixon J's refusal to grant the first defendant's application for a stay was plainly correct, noting:

> As the first defendant conceded in oral argument, there are interlocutory steps which can be taken in the proceeding which do not require the first defendant to provide any material disclosing the course the State might take in the criminal trial. In those circumstances, it would not have been correct for his Honour to make an order staying the civil proceeding absolutely until the conclusion of the criminal proceedings.[17]

45 The court observed that there was scope for discovery orders that would not risk prejudicing the State's defence of the criminal proceeding, and stated:

> For example, it may be that the first defendant could be ordered to discover the prosecution brief in relation to the criminal charges. In the event that the plaintiff seeks discovery from the first defendant of documents which, if produced by it, would risk prejudicing the State's defence of the criminal proceedings, that matter can be the subject of argument before his Honour at the appropriate time; ...[18]

46 The court dealt with the derivative use argument made by the first defendant as follows:

> The first defendant submitted that there was an additional risk to the State by the potential derivative use of such information. In our view, this submission was misconceived. There is no relevant possibility of derivative use in this case. The confidentiality orders made by the judge prohibit the disclosure of the first defendant's proposed defence, save to certain specified individuals. Those individuals are not permitted to disclose or use, in any manner, the information the subject of the confidentiality regime presently in place. It would be wrong

15 Ibid [78].
16 Ibid [75].
17 *Stay Application Appeal Ruling* (n 1) [60] (Beach, T Forrest and Hargrave JJA).
18 Ibid [62] (citations omitted).

to assume that his Honour's orders will not be obeyed.

Further, to the extent that it was submitted that the prosecution in the criminal charges might be able to make derivative use of information provided by the first defendant in the civil proceeding, that submission must likewise be rejected. The orders of the judge prevent any material the subject of the first defendant's claim for confidentiality being provided to anyone other than the individuals specified in the judge's orders. No material will be provided to any person involved in the prosecution of the criminal charges. There will thus be no occasion for the prosecution to make any use (derivative or otherwise) of the information ordered to be kept confidential by the judge.[19]

Submissions

[redacted]

48 [redacted]

49 [redacted] of

[19] [redacted]

[redacted]

50 [redacted]

51 [redacted]

[redacted]

52 [redacted]

53 [redacted]

54 [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

55 [redacted]

56 [redacted]

57 [redacted]

58 [redacted]

59 [redacted]

60 [redacted]

[redacted]

61 [redacted]

62 [redacted]

63 [redacted]

64 [redacted]

65 [redacted]

Analysis

Board of Inquiry

66 5 Boroughs relied on the inquiry report and witness statements and submissions that are still available on the inquiry web page to establish that some of the matters that the State seeks to keep confidential are already in the public domain and would be known or available to the prosecution in the criminal proceeding. By way of example, paragraph [27A] of the APD pleads that 'The hotel quarantine program was established urgently, in order to implement the National Cabinet Quarantine Policy Decision made on 27 March 2020, to commence operation from midnight on 28 March 2020'. 5 Boroughs relied on extracts from the inquiry report to submit that the facts pleaded by the defendants were a matter of public record.

67 The defendants argued that 5 Boroughs' proposed use of the inquiry report was prohibited by s 77(5) of the *Inquiries Act 2014* (Vic) ('*Inquiries Act*'). That provision deals with the privilege that attaches to Board of Inquiry material, including reports, that has been brought before Parliament and reads:

> The publication of Board of Inquiry material in accordance with this section is absolutely privileged and the provisions of sections 73 and 74 of the **Constitution Act 1975** and of any other enactment or rule of law relating to the publication of the proceedings of Parliament apply to and in relation to the publication of the Board of Inquiry material as if it were a report to which those sections applied and had been published by the Government Printer under the authority of Parliament.

The defendants also relied on s 80(1) of the *Inquiries Act* in relation to the admissibility in this proceeding of witness statements and submissions produced by the first defendant to the Board of Inquiry. That provision reads:

> (1) Any answer, information, document or other thing given or produced to a Board of Inquiry by a person and the fact that an answer, information, document or other thing was given or produced, is not admissible in evidence, or otherwise able to be used, against the person in any other proceedings, except in proceedings for—
>
> (a) an offence against this Act; or
>
> (b) an offence against section 254 or 314 of the **Crimes Act 1958** in relation to the Board of Inquiry.

68 Dixon J addressed the privilege applying to the inquiry report in the *Summary Dismissal Ruling* in the context of 5 Boroughs seeking to place reliance on the report in its pleaded particulars:[24]

> 231. The second reason for striking out these references is the defendants' submission that the Final Report, being a publication of a Board of Inquiry, is privileged was not disputed. Its admission into evidence would breach parliamentary privilege where the intention or result of the tender would be to impeach or question the contents of the report. This would include examination of the report for the purpose of supporting a cause of action where the cause arose out of something done outside of the House. The report cannot be tendered as evidence for the facts and opinions contained in it, or used in such a way as to enable inferences to be drawn from it to establish facts and opinions, such that an examination would have to be made of its contents and conclusions. This would be particularly so should the defendants intend to lead evidence to found a submission critical of the reasoning, opinions, findings and conclusions of the report.

69 5 Boroughs does not rely on the content of the inquiry report to prove the truth of the facts contained in it. 5 Boroughs' only purpose is to establish that the words recorded in the report were written and are publicly available. This limited use of the inquiry report could not result in the content of the report being impeached or challenged in any way and therefore does not offend s 77(5) of the *Inquiries Act* in the manner described by Dixon J.[25] The use 5 Boroughs made of the inquiry report is permissible.

70 Dixon J also considered the operation of s 80 of the *Inquiries Act* in the *Summary Dismissal Ruling*. His Honour noted that the immunity conferred by that provision was not confined just to the admissibility of evidence, but extended more broadly to use against the person who made the statement in any other proceeding. His Honour said:

> 238. … The use immunity is not only to protect witnesses against self-incrimination but also against civil liability and even disciplinary measures.
>
> 239. The evident purpose of this provision is to ensure that witnesses at inquiries are at liberty to give full and complete evidence without any fear of self-incrimination or prejudice to their legal interests in any civil matter. Therefore the provision ought to be given a broad meaning.

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24 *Summary Dismissal Ruling* (n 2) [231] (citations omitted).

25 *Mundey v Askin* [1982] 2 NSWLR 369; *Mees v Roads Corporation* (2003) 128 FCR 418, [86] (Gray J); and *Victorian Taxi Families Inc v Taxi Services Commission* (2018) 61 VR 91, [93](e)-(f), [156] (Derham AsJ).

> Using this material in a statement of claim, as a source for a material fact that the witness (or his principal) has to answer, is using that evidence against the witness, in the broad sense. The use immunity cannot refer only to the use of the document or testimony in evidence, otherwise the additional words 'or otherwise able to be used' would be rendered meaningless.[26]

71 The brief argument at the hearing before me did not address the proper construction of s 80(1) of the *Inquiries Act*, which is expressed in broad terms. The provision prohibits admission or use of the material 'against a person in any other proceedings'.[27] 5 Boroughs does not rely on the content of the witness statements as proof of what was said, to challenge the evidence of any witness, or as relevant to any fact in issue in this proceeding. The use sought to be made of the witness statements does not expose the witness or the first defendant to the sort of prejudice or fear of self-incrimination described by Dixon J at [70] above. 5 Boroughs relies on the material to address the application made by the first defendant for orders in this proceeding preventing prejudice to the State in the criminal proceeding. 5 Boroughs does not seek to admit or use witness statements and submissions produced to the Board of Inquiry against the deponent or the first defendant in this proceeding. I conclude the use 5 Boroughs seeks to make of the witness statement and submission extracts does not contravene s 80(1) of the *Inquiries Act*.

Are the confidentiality orders sought by the first defendant suppression orders?

72 5 Boroughs argued that because the first defendant's application to maintain confidentiality of the APD is in substance an application for a suppression order, the first defendant must satisfy the heavy burden of persuading the court that the orders it seeks are necessary to prevent prejudice to the proper administration of justice. Further, 5 Boroughs argued that the confidentiality orders can only be made after taking into account open justice principles under ss 4, 17 and 18 of the *Open Courts Act* or in the exercise of the court's inherent jurisdiction.

73 The first defendant relied on s 7 of the *Open Courts Act* and the decision of Elliott J in

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26 *Summary Dismissal Ruling* (n 2) [238], [239] (citations omitted).

27 *Inquiries Act 2014* (Vic) s 80(1).

Cargill Australia Ltd v Viterra Malt Pty Ltd (No 23) ('Cargill'),[28] and submitted the orders it sought were not suppression orders and were not caught by the *Open Courts Act*.

74 In *5 Boroughs NY Pty Ltd v Victoria (No 3)* [2023] VSC 22 ('*Stay Application Ruling*') Dixon J, contemplating the orders now sought by the first defendant to maintain confidentiality of the APD, said:[29]

> Such a process would not offend the open justice principle. No determination of substantive rights in the claims would be occurring by these interlocutory processes. Material to be filed in preparation for the hearing or trial of a cause is not part of the ordinary course of the open determination of the proceeding until it is tendered, or relied on, in open court. As French CJ observed in *Hogan v Hinch*, the open court principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny and maintaining public confidence in the courts. The principle is not absolute. The character of the proceedings and the nature of the function conferred upon the court may qualify the application of the open-court principle. The exceptional exercise of any power to restrict the application of the open justice principle is conditioned by the need to secure the proper administration of justice.

75 In that discussion, his Honour referred to s 7(d)(iii) of the *Open Courts Act*, which deals with orders prohibiting or restricting access to a court file. The first defendant relies on other parts of s 7, which reads:

> **Admission of evidence and disclosure of information to a court or tribunal or party to a proceeding**
>
> This Act does not limit or otherwise affect—
>
> (a) the making of an order or decision by a court or tribunal that requires the disclosure of information in the course of, or in relation to, a proceeding;
>
> (b) any rule of law restricting the permitted use and disclosure of information referred to in paragraph (a);
>
> (c) the making of an order or decision by a court or tribunal regarding the admission into evidence of information;
>
> (d) the making of an order or decision by a court or tribunal that—
>
> (i) conceals the identity of a person by restricting the way the person is referred to in open court;
>
> (ii) restricts the way an event or thing may be referred to in open court;

[28] (2019) 58 VR 611 ('*Cargill*').

[29] *Stay Application Ruling* (n 1) [63] (citations omitted).

(iii) prohibits or restricts access to a court or tribunal file.

76 In *Cargill* Elliott J, in the context of an application for a confidentiality order in relation to commercially sensitive information conveyed in evidence in open court and recorded on transcript, observed in relation to s 7(d) of the *Open Courts Act*:[30]

> 43. … the orders referred to in s 7(d) share a common characteristic: they restrict the *availability* (or more accurately, preserve the *unavailability*) of information ordinarily derived from court processes. In contrast to "suppression orders", such orders or decisions are concerned with primary court processes by restricting the disclosure and availability of information ordinarily derived from those processes. Moreover, the orders or decisions identified do not directly interfere with processes by which intermediaries provide or disseminate to the public the information made available by court processes.
>
> …
>
> 46. … Put at its highest, the order indirectly *limits* the information which might by disclosed by concealing 1 discrete category of information: the Sale Figures. However, as the cases in relation to pseudonym orders establish, orders which conceal a discrete category of information in a proceeding, but which otherwise fully preserve the public nature of the proceeding, including the ability of the media to report on the proceeding, are not "suppression orders".

77 The principle of open justice requires that evidence that forms part of a court record will ordinarily be open and available to the public. There is a relevant distinction in terms of the application of the open justice principle between documents on a court file and material that has been admitted into evidence and is thus part of the court record.[31] In this case, the contrast is greater because the APD has not been filed. 5 Boroughs concedes that at least some paragraphs of the APD can be redacted from the defence as filed with the court in order to maintain the confidentiality of the information contained in those paragraphs.

78 I accept the first defendant's submission that ss 7(a) and (b) of the *Open Courts Act* apply to the application to maintain the confidentiality of the APD and that the power to make any order in relation to maintaining its confidentiality is not sourced in the *Open Courts Act*. The order for service of the APD required disclosure of the

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30 *Cargill* (n 28) (citations omitted).

31 *Smith v Harris* [1996] 2 VR 335, 341–2 (Byrne J); *HT v R* [2019] 269 CLR 403, [81] (Gordon J); *Bolitho v Banksia Securities Limited (No 9)* [2020] VSC 309, [8], [21], [25].

information it contains. The distinction between information that a party is compelled to disclose by orders in a proceeding requiring the service or filing of documents, and evidence given in open court, is consistent with the statutory position.

79 The inherent jurisdiction of the court to control its own procedures and processes includes the power to limit access to a document required to be served by a court order, and to preserve the confidentiality of information contained in that document or to limit the use that can be made of the document. Whether it is appropriate to impose such limits in a particular case will turn on where the interests of justice lie.[32] In this case, that assessment is to be made in the context of the application of the companion principle, that 'absent a clear statutory power to the contrary, a person charged with a crime cannot be compelled to assist in the discharge of the prosecution's onus of proof'.[33]

80 That assessment involves weighing the potential prejudice to the first defendant if the prosecution in the criminal proceeding was to become aware of the content of the unredacted APD against prejudice to the plaintiff and group members from delay in preparation of this proceeding for trial. This does not mean the public interest in open justice is irrelevant to the application.[34] In making a confidentiality order, the general principle of open justice is a starting point.[35] It is considered in the context of applications for confidentiality orders for pleadings and pleading-like documents already on a court file, particularly in jurisdictions like Victoria where there is a presumption the court file is open for inspection in the Rules.[36] In the *Stay Application Ruling*, Dixon J contemplated that an order maintaining the confidentiality of the proposed defence must still be a justified deviation from the

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32 *Heckler and Koch GmbH v Faxtech Pty Ltd* [2016] VSC 697, [90].

33 *Stay Application Ruling* (n 1) [19]; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *Lee v The Queen* (2014) 253 CLR 455.

34 *Secretary, Department of Justice and Regulation v Zhong (No 2)* [2017] VSCA 19, [3]–[4] (Santamaria, Ferguson and McLeish JJA); *Bolitho v Banksia Securities Limited (No 9)* [2020] VSC 309, [28], [31]; *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293, [27] (Rares J); *Cargill* (n 28) [65] (Elliot J).

35 *Cargill* (n 28) [58]-[59] (Elliot J); *Secretary, Department of Justice and Regulation v Zhong (No 2)* [2017] VSCA 19, [4] (Santamaria, Ferguson and McLeish JJA).

36 *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293, [27]-[28] (Rares J); *Bolitho v Banksia Securities Limited (No 9)* [2020] VSC 309, [27]-[28]; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05.

open justice principle.[37] This was not challenged on appeal. In the case of a group proceeding concerning important rights of many thousands of Victorians, there is an additional public interest of group members which is 'distinct from the general public interest in open justice'.[38] It does mean however that the first defendant is not applying for a suppression order under the *Open Courts Act* or in the inherent jurisdiction of the court, and that the principle of open justice is not the primary consideration which must prevail unless circumstances require displacement.

81 While the open justice principle is not irrelevant to the determination of the first defendant's notice of contention for the reasons stated by Dixon J set out in paragraph [74] above, maintaining the confidentiality of some paragraphs of the APD, which has not been filed, does not offend the open justice principle.

Amended proposed defence

82 I reject the first defendant's argument that any partial disclosure of the APD will reveal the architecture of the defence pleading and provide clues to or telegraph aspects of the defence strategy in the group proceeding in a way that may assist the prosecution in the criminal proceeding. There was very limited development of this argument in submissions by the first defendant. I accept 5 Boroughs' submission that there are many paragraphs of the APD that are not contentious and, if made publicly available, would give no hint to the basis of the State's defence to the criminal charges. Further, I accept 5 Boroughs' contention that the APD contains information that is already available to the prosecution in the criminal proceeding through the Board of Inquiry documents and inquiry report, the summary dismissal and strike out rulings, or in the prosecution opening or the defence response served in the criminal proceeding. The first defendant's submissions that the whole APD should be kept confidential was not developed at all in relation to what are otherwise innocuous paragraphs of the document. There is no cogent basis for concluding that the whole APD should remain confidential.

37 *Stay Application Ruling* (n 1) [61]-[63].
38 *Bolitho v Banksia Securities Limited (No 9)* [2020] VSC 309, [29].

83 [redacted]

84 [redacted]

85 [redacted]

[redacted]

86 I am satisfied that there is a real risk of prejudice to the State in the criminal proceeding if the confidentiality of paragraphs of the APD which contains relevant information and details of the defendants' forensic choices not otherwise available to the prosecution is not maintained.

87 By filing and serving the defence response, the State has disclosed its position in the criminal proceeding as required by s 183 of the *Criminal Procedure Act*. Disclosure in the defence response is very limited when compared to the APD served in this proceeding. That is confirmed by the relative size and content of the two documents. The defence response is four pages in length. The APD runs to almost 90 pages and appears to be a comprehensive pleading in response to the ASOC filed in this proceeding.

88 In oral submissions, 5 Boroughs made some muted criticism of the defence response on the basis that it did not satisfy the requirements of s 183 of the *Criminal Procedure Act*. There are two answers to 5 Boroughs' submissions. First, there is a material difference between the disclosure required of an accused in accordance with s 183, and a properly pleaded defence to a statement of claim. In *Alfarsi v R*,[39] the Court of Appeal said:

> Section 183(2) of the [*Criminal Procedure Act*] requires the defence response to identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken. As a matter of ordinary language, to 'identify' something is to point it out or to pinpoint it. Again, as a matter of ordinary language, 'issue is taken' with an act, fact, matter or circumstance if there is disagreement with it. And the 'basis' upon which issue is taken is the reason for disagreement. Thus, s 183(2) requires no more of an accused person than to point out those acts, facts, matters and circumstances in the prosecution opening with which he or she disagrees, and to provide a reason for such disagreement. But the provision does not — expressly or impliedly — require an accused person taking issue with an act, fact, matter or circumstance to make any positive statements of fact in relation to it.

In contrast to the defence response, the APD contains positive pleadings of material

[39] [2021] VSCA 283, [31] (Priest, Kaye JJA and Lasry AJA).

facts and particulars upon which the defendants rely to make out their defence to 5 Boroughs' claim. Second, there is nothing to indicate that there has been a challenge to the adequacy of the defence response in the criminal proceeding. Should the prosecution successfully challenge the adequacy of the defence response and require more extensive disclosure, the confidentiality of certain paragraphs of the APD may need to be revisited.

Paragraphs of the APD

89 5 Boroughs does not oppose orders maintaining the confidentiality of paragraphs [33], [34], [56]–[58], [63], [64], [66], [80], [81], [87] or [88] of the APD.

90 These reasons will consider in detail some selected paragraphs that the first defendant has applied to maintain as confidential. The remaining paragraphs that are in dispute will be resolved in a manner consistent with these reasons summarised in a schedule to these reasons.

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91 [redacted]

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92 [redacted]

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113 [redacted]

Proofing of lay witnesses

114 The first defendant's application to prohibit 5 Boroughs from proofing lay witnesses is made in the context of its original application to stay the proceeding, and the court's continued consideration of protective steps necessary to allow this proceeding to continue while managing the risk of prejudice to the State in the criminal proceeding.

115 The wide jurisdiction to stay a proceeding in the interests of justice is an incident of the court's general power to control its own proceedings.[42] The court has inherent power to make orders it determines are appropriate 'to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction'.[43] *Chairperson of the Royal Commission Into the Management of Police Informants v Director of Public Prosecutions Victoria and Ors*[44] concerned whether the inherent jurisdiction of the Supreme Court extended to making orders varying or revoking earlier suppression orders made by an inferior court. The court said:[45]

> 49. The High Court has said that 'inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Inherent jurisdiction, self-evidently, is not derived by implication from any statutory provisions. It extends to courts of 'unlimited jurisdiction', of which, the Supreme Court of this State is clearly one such body.
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> …
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> 53. The foundation for this Court's jurisdiction is to be found in s 85 of the *Constitution Act*. In terms, that section defines the Supreme Court's jurisdiction as being 'in all cases', 'in or in relation to Victoria' and as being 'unlimited'. As has been observed before, this is a very wide definition of jurisdiction. Moreover, it is well settled that laws conferring jurisdiction are to be construed broadly, while laws excluding jurisdiction are to be construed narrowly.

The court concluded that the Supreme Court clearly had the inherent jurisdiction to make the orders sought, which were 'an exercise of judicial power, and within s 85 of the *Constitution Act*'.[46]

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42 *Stay Application Ruling* (n 1) [48]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, [43] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

43 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 623 (Wilson and Dawson JJ); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, [43] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

44 (2021) 61 VR 490.

45 Ibid (Beach, McLeish and Weinberg JJA) (citations omitted).

46 Ibid [55].

116 *Obian v R*[47] concerned an appeal from conviction on drug trafficking charges. While the applicant, who gave evidence in his defence at trial, was under cross-examination, that trial judge permitted the prosecution to reopen its case and introduce rebuttal evidence before cross-examination was completed. In the process, the trial judge ordered that defence counsel not confer with the applicant while he was under cross-examination. The applicant appealed on grounds including that preventing his counsel from communicating to him in relation to the Crown's application to reopen amounted to a fundamental irregularity in the trial. Macaulay JA, with whom Niall JA agreed, rejected that ground, and said:[48]

> 362. First, I am not persuaded that it is beyond the power of the trial judge to control communications between counsel and witnesses, including a party, at critical moments in a trial. In my view the Court has such power as an incident of its inherent power to preserve the integrity of the trial process, to prevent unfairness, and to maintain public confidence in the administration of justice.
>
> 363. I do not accept that communications between counsel and a party must solely be the domain of ethical constraints. The relevant ethical rule is designed to protect the integrity of evidence. There is no reason to suppose that the existence of an ethical rule of conduct for that purpose should exclude a co-existing power of the Court to do the same thing. A barrister's primary duty is to the Court in which that barrister appears. In that context, recognising that the Court has a power to control its processes, including by regulating communications between counsel and a party to avoid a potential abuse of process or the appearance of one, does not conflict with the special role counsel occupies as the champion of the party.

117 In *Hartnett t/as Harnett Lawyers v Bell as Executor of Estate of the late Deakin-Bell*,[49] the New South Wales Court of Appeal considered the ambit of the New South Wales Supreme Court's inherent jurisdiction. Bell CJ, with whom the other members of the court agreed, identified statements of authority, including the following matters relevant to the present case:[50]

> (1) The Court's inherent jurisdiction "can be exercised in any circumstances where the requirements of justice demand it and thus cannot be restricted to closed and defined categories of cases": *McGuirk v University of New South Wales* [2010] NSWCA 104 at [178] (**McGuirk**); *Reid v Howard* (1995) 184 CLR 1 at 16; [1995] HCA 40 (**Reid**); *Tringali v Stewardson Stubbs & Collett Ltd* [1966] 1

47 (2023) 69 VR 553.
48 Ibid (citations omitted).
49 [2023] NSWCA 244.
50 Ibid [123].

NSWR 354; (1966) 66 SR (NSW) 335 at 344;

(2) "The juridical basis of [the inherent jurisdiction] is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner": IH Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 27-28, as cited in *McGuirk* at [185];

(3) "The inherent power of a court to control and supervise proceedings includes the power to take appropriate action to prevent injustice": *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 502; [1989] HCA 21;

…

(5) The Court can do whatever "may be necessary to prevent any injustice occurring with respect to matters which come within its cognizance": *Ex parte Farren; Re Austin* (1960) 77 WN (NSW) 743 at 744, cited in *Dwyer v National Companies & Securities Commission* (1988) 15 NSWLR 285 at 287[.]

118 The first defendant seeks the order to prevent injustice to the State in the criminal proceeding which could arise from the course of that proceeding being affected in a manner prejudicial to the State, if information the defendants have been required to disclose in this proceeding by pleading a defence and discovering documents does not remain confidential. The potential injustice to the State arises from the defendants being compelled to take steps in this proceeding. The purpose of the orders sought is to prevent interlocutory steps taken in this proceeding from risking injustice to a party in a factually related criminal proceeding. I conclude that it is within the inherent power of the court to control and supervise the proceeding to make the order sought.

119 The further question is whether an appropriate balance between the risk of prejudice to the State in the criminal proceeding and the prejudice to 5 Boroughs in its preparation of this proceeding is achieved by the first defendant's proposed order. A less restrictive alternative would be to prohibit disclosure of the confidential paragraphs of the APD and documents discovered by the defendants other than to selected persons.

120 When Dixon J refused the stay application, his Honour made orders prohibiting disclosure of the proposed defence save to selected persons. The effect of those orders was to prevent the plaintiff from proofing lay witnesses on information contained in the proposed defence. In extracts set out in paragraphs [41]-[43] above, Dixon J gave

reasons for rejecting the first defendant's submissions about the unacceptable risk of 'leakage' of information to the prosecution, and prejudice that might arise 'through the derivative use of information disclosed in a defence or through discovery when enquiries are made of key witnesses'.[51] His Honour contemplated that 5 Boroughs would be able to proof potential witnesses without disclosing confidential information from the proposed defence or from discovered documents that should remain confidential for the same reason. In the extract set out at paragraph [46] above, the Court of Appeal agreed with the approach by Dixon J to the orders prohibiting disclosure and to the risk of derivative use of confidential information.

121 Since the stay application was refused and the initial confidentiality orders were made by Dixon J on 23 February 2023, the circumstances of the criminal prosecution and this proceeding have changed in the following material ways. First, the criminal trial is listed to commence on 6 May this year. This has two consequences. When the orders were made by Dixon J, the State had not been committed to stand trial. Any delay in this proceeding pending completion of the criminal prosecution was for an indefinite, potentially lengthy period. Given the impending criminal trial, delay of steps in this proceeding resulting from the orders sought by the first defendant will be for a definite, relatively brief period. The second consequence is that the risk of prejudice to the State if witnesses or the prosecution become aware of information contained in those parts of the APD that will remain confidential and/or the s 26 list documents is likely to be more acute in the short period prior to trial.

122 [redacted]

51 *Stay Application Ruling* (n 1) [65].

[redacted]

123 [redacted]

124 Fourth, the significant progress that has been made in this proceeding since Dixon J's 23 February 2023 orders, and the further progress that will be made this year, reduces the prejudice to 5 Boroughs of delay caused by the orders the first defendant seeks. Discovery is now well advanced and should complete in coming months. A group costs application has been heard and determined. Opt out and soft class closure orders have been made in contemplation of a mediation that has been ordered to occur in November this year. An expert evidence regime is under discussion and will be the subject of a case management conference in April this year, when orders are likely to be made. The proceeding has been listed for trial to commence on 1 September 2025.

The progress being made with the proceeding significantly ameliorates any prejudice to 5 Boroughs from delay caused by the first defendant's proposed orders. I accept there is a further potential prejudice to 5 Boroughs from the elapse of time since the events which form the basis of its claim occurred, and the potential for witnesses' memories to fade before they are proofed. That risk is reduced at least in respect of the witnesses who gave evidence to the Board of Inquiry and the large number of lay witnesses who I understand are to give evidence in the criminal trial. In the circumstances, and given that only a few months' delay is envisaged before witnesses may be proofed, I conclude this aspect of prejudice is not significant.

125 I conclude for the above reasons that it is in the interests of justice that the court make the order sought by the first defendant preventing 5 Boroughs from conferring with liability lay witnesses.

Closed court and suppression orders

126 The first defendant applied for orders that the hearing of its notice of contention in relation to confidentiality of the APD and its application to restrain 5 Boroughs from proofing lay witnesses be in closed court, and that documents relating to the applications be subject to a suppression order. The orders were unopposed. I concluded that, after taking into account the primacy of the principle of open justice, the closed court and suppression orders were necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that could not be prevented by other reasonably available means. If the hearing had been conducted in open court, or the documents relating to the applications made publicly available, the risk of prejudice to the State in the criminal proceeding would have eventuated.

Conclusion

127 I will make orders in accordance with the above reasons. I will hear from the parties as to the form of orders.

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CERTIFICATE

I certify that this and the 59 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Keogh of the Supreme Court of Victoria delivered on 23 February 2024.

DATED this twenty-third day of February 2024.

.....
Associate

SUPREME COURT OF VICTORIA
Associate to Judge of the Court