Summary

Supreme Court
New South Wales

Medium Neutral Citation:	**Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320**
Hearing dates:	30 September 2021, 1 October 2021, 5 and 6 October 2021
Date of orders:	15 October 2021
Decision date:	15 October 2021
Jurisdiction:	Common Law
Before:	Beech-Jones CJ at CL
Decision:	**Proceedings 2021/249601**

(1) The proceedings be dismissed;
(2) On or before 22 October 2021, the parties confer in relation to the appropriate orders as to costs;
(3) In the event that agreement is reached on the appropriate orders as to costs, the parties file the proposed orders on or before 5.00pm on 25 October 2021;
(4) In the event that no agreement is reached on the appropriate orders as to costs, each party file and serve:
    (i) their proposed orders as to costs and any submissions in support of the proposed orders that are not to exceed four pages on or before 5.00pm on 29 October 2021;
    (ii) any submissions in reply that do not exceed four pages on or before 5.00pm on 5 November 2021.

Proceedings 2021/252587

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(ii) any submissions in reply that do not exceed four pages on or before 5pm on 5 November 2021.

Catchwords:

PUBLIC HEALTH ACT – COVID-19 – public health orders made under s 7(2) of the *Public Health Act* – orders designate certain areas of concern and restrict movement out of the home and out of the area –authorised workers able to leave area of concern but only if vaccinated – orders allow residents of area of concern to enter and remain on construction sites but only if vaccinated – orders allow persons to enter and remain upon premises that operate aged care facilities but only if vaccinated – orders preclude persons from working at school and early education facilities unless vaccinated – scope of power to make orders giving such broad directions – whether power limited by reference to other powers conferred by the *Public Health Act* as a whole – whether principle of legality engaged by impugned orders – effect on personal freedoms – orders affect freedom of movement and capacity to work – orders do not violate right to body integrity – rule restricting freedom of movement for unvaccinated persons does not vitiate consent to vaccination – requirement for persons who leave areas of concern, enter building sites or work at schools or aged care centre to produce vaccination requirement on request – requirement does not infringe privilege against self-incrimination – privilege protects against production of incriminating not exonerating material.

ADMINISTRATIVE LAW – proof of basis upon which Minister for Health acted – Minister did not give evidence – part of documents relied on subject of public interest immunity claim as documents produced to sub-committee

of cabinet - whether *Jones v Dunkel* inference or *Blatch v Archer* reasoning available against Minister and State – position of Ministers with competing responsibilities – no adverse inference available – *Blatch v Archer* reasoning not available

ADMINISTRATIVE LAW – grounds of challenge – relevant considerations – how derived and how framed – procedural fairness – no obligation to afford procedural fairness in making public health orders affecting a vast number of persons – not proven that making of orders was not a genuine exercise of the Minister's power – unreasonableness – adducing of evidence to undermine factual basis for making of orders – decision to make orders informed by policy considerations – whether differential treatment of unvaccinated persons consistent with objects of *Public Health Act* – all grounds of review rejected.

CONSITUTIONAL LAW – whether orders and section 7 of the *Public Health Act* rendered invalid by s 51(xxiiiA) of the Constitution – orders do not create any form of civil conscription in the provision of medical and dental services – s 51(xxiiiA) does not limit legislative power of the States – no joint scheme with Commonwealth to effect civil conscription – neither orders or *Public Health Act* dependent for its operation on any joint scheme with Commonwealth – argument untenable – no inconsistency between orders, *Public Health Act* and *Australian Immunisation Register Act 2015*

Legislation Cited:

Australian Immunisation Register Act 2015 (Cth)
Constitution
Constitution Alteration (Social Services) Act 1946
Disability Discrimination Act 1992 (Cth)
Education Act 1990 (NSW)
Education Standards Authority Act 2013
Evidence Act 1995 (Cth)
Fair Work Act 2009
Health Insurance Act 1973 (Cth)
Health Records and Information Privacy Act 2002 (NSW)
Interpretation Act 1987
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Personal Information Protection Act 1998 (NSW)

Privacy Act 1988 (Cth)
Public Health Act 1991
Public Health Act 2010 (NSW)
State Emergency and Rescue Management Act 1989 (NSW)
Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW)
Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW)
Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW)
Public Health (COVID-19 General) Order 2021

Cases Cited:

ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199; [2001] HCA 63
Abebe v Commonwealth (1999) 197 CLR 510; [1999] HCA 14
Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth (1987) 162 CLR 271; [1987] HCA 6
Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1; [1932] HCA 9
ASIC v Hellicar (2012) 247 CLR 345; [2012] HCA 17
Associated Province Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Athavle v State of New South Wales [2021] FCA 1075
Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1; [2013] HCA 3
Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493; [1980] HCA 53
Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321; [2000] HCA 7
Baldwin v State of New South Wales [2020] NSWCA 112
Blatch v Archer (1774) 1 Cowp 63; 98 ER 969
Botany Bay City Council and Others v Minister of State for Transport and Regional Development (1996) 66 FCR 537
Bread Manufacturers of New South Wales v Evans (1981) 180 CLR 404; [1981] HCA 69
British Medical Authority v The Commonwealth (1949) 79 CLR 201; [1949] HCA 44
Buckley v Tutty (1971) 125 CLR 353; [1971] HCA 71
Castle v Director General, State Emergency Service [2008] NSWCA 231
Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15
Commonwealth of Australia v Northern Land Council and

Another (1993) 176 CLR 604; [1993] HCA 24
Commonwealth v Progress Advertising & Press Agency Co Pty Ltd (1910) 10 CLR 457; [1910] HCA 28
Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5
Electrolux Home Products Pty Ltd v Australian Workers Union (2004) 221 CLR 309; [2004] HCA 40
Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477; [1993] HCA 74
Fairfax Media Publications Pty Ltd v Kermode (2011) 81 NSWLR 157; [2011] NSWCA 174
Forbes v NSW Trotting Club Ltd (1979) 143 CLR 242
G v H (1994) 181 CLR 387; [1994] HCA 48
General Practitioner's Case (1980) 145 CLR 532; [1980] HCA 30
Gorman v McKnight [2020] NSWCA 20
Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1; [2017] HCA 33
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7
Henry & Ors v Hazzard (No 2) [2021] NSWSC 1235
Hepples v Federal Commissioner of Taxation (1992) 173 CLR 492
Hunter and New England Area Health Service v A (2009) 74 NSWLR 88; [2009] NSWSC 761
ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWCB 6015
Kioa v West (1985) 159 CLR 550; [1985] HCA 81
Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs (1986) 11 FCR 543; [1986] FCA 290
Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39
McWilliam v Civil Aviation Safety Authority (2004) 142 FCR 474; [2004] FCA 1701
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40
Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11
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(2001) 206 CLR 323; [2001] HCA 30
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566; [2006] HCA 50
Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; [1995] HCA 20
Mulholland v Australian Electoral Commission (2004) 220 CLR 181; [2004] HCA 41
Norberg v Wynrib [1992] 2 SCR 226
P J Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382; [1949] HCA 66
Pye v Renshaw (1951) 84 CLR 58; [1951[HCA 8
R v Melin (Ozan) [2019] EWCA 557
R v Richardson (Diane) [1999] QB 444
Reid v Sinderberry (1944) 68 CLR 504; [1944] HCA 15
RG Capital Radio Ltd v Australian Broadcasting Authority (2001) FCR 185; [2001] FCA 855
Rogers v Whitaker (1992) 175 CLR 479; [1992] HCA 58
Secretary, Department of Family and Community Services v Hayward (a pseudonym) (2018) 98 NSWLR 599; [2018] NSWCA 209
Secretary, Department of Health & Community Services (NT) v JWB and SMB (1992) 175 CLR 218; [1992] HCA 15
Sidaway v Bethlehem Royal Hospital Governors [1984] QB 493
Spencer v Commonwealth (2018) 262 FCR 344; [2018] FCAFC 17
State of New South Wales v Public Transport Ticketing Corporation [2011] NSWCA 60
Transport Action Group Against Motorways Inc v Roads and Traffic Authority (1996) 44 NSWLR 598; [1996] HCA 196
Tunnock v Victoria (1951) 84 CLR 42; [1951] HCA 55
Wong v The Commonwealth (2009) 236 CLR 573
Work Health Authority v Outback Ballooning Pty Ltd (2019) 266 CLR 428; [2019] HCA 2
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29
Dunsmiur v *New Brunswick* [2008] 1 SCR 190
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18

Texts Cited:

Convention on the Rights of Persons with Disabilities
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights

	Universal Declaration of Bioethics and Human Rights Augusto Zimmerman and Gabriel Moens, “Emergency Measures and the Rule of Law”,(2021) 64(10) Quadrant Magazine Hansard, Legislative Assembly, 24 November 2010, p 28128
Category:	Principal judgment
Parties:	Proceedings 2021/249601 Al-Munir Kassam (First Plaintiff) George Nohra (Second Plaintiff) Alexandrea Goundoulas (Third Plaintiff) Jelena Zmiric (Fourth Plaintiff) Bradley Hazzard (First Defendant) Kerry Chant (Second Defendant) State of NSW (Third Defendant) Commonwealth of Australia (Fourth Defendant) Proceedings 2021/252587 Natasha Henry (First Plaintiff) Selina Crowe (Second Plaintiff) Julie Ramos (Third Plaintiff) Hohepa Waapu (Fourth Plaintiff) Kamran Khan (Fifth Plaintiff) Sandi Greiner (Sixth Plaintiff) Bradley Hazzard (Defendant)
Representation:	Counsel: Mr P King; Ms E Rusiti (Kassam Plaintiffs) Mr M Clarke QC; Dr J Harkess; Ms V Plain (Henry Plaintiffs) Mr J Kirk SC; Mr T Prince; Mr D Reynolds (State Defendants) Ms J Davidson (Commonwealth) Solicitors: Ashley, Francina, Leonard & Associates (Kassam Plaintiffs) G&B Lawyers (Henry Plaintiffs) Crown Solicitor’s Office (State Defendants) Australian Government Solicitor (Commonwealth)
File Number(s):	2021/249601; 2021/252587

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JUDGMENT

1 The highly contagious variant of COVID-19 known as the Delta variant was first detected in the community in New South Wales in June 2021. Since that time, it has spread rapidly. In response to the threat to public health it poses, the Minister for Health and Medical Research, the Honourable Bradley Hazzard, (the "Minister"), made various orders under s 7(2) of the *Public Health Act 2010* (the "PHA") which on any view significantly affect the freedoms of the citizens of this State and impose greater burdens on those who are not vaccinated. The main focus of the two proceedings the subject of this judgment is those aspects of those orders which prevented so called "authorised workers" from leaving an affected "area of concern" that they resided in, and prevent some people from working in the construction, aged care and education sectors, unless they have been vaccinated with one of the approved COVID-19 vaccines.

2 One of the proceedings is brought by Mr Al-Munir Kassam and three other persons (the "Kassam plaintiffs"). Their circumstances are described further below but it suffices to note that they all state that they have made an informed choice to refuse to be vaccinated. They sue the Minister, the Chief Medical Officer, Dr Kerry Chant, the State of NSW (the "State parties") and the Commonwealth of Australia. They contend that the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) ("Order (No 2)"), and s 7 of the *PHA*, are invalid.

3 The Kassam plaintiffs rely on various bases to establish the invalidity of Order (No 2)

namely that: the Minister did not undertake any real exercise of power in making the order (Ground A); that Order (No 2) is either outside of the power conferred by s 7 or represents an unreasonable exercise of the power because of its effect on fundamental rights and freedoms (Ground B); and the manner in which Order (No 2) was made was unreasonable (Ground C). The Kassam plaintiffs also contend that Order (No 2) confers powers on police officers that are inconsistent with the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* ("LEPRA") (Ground D).

4 In addition, the Kassam plaintiffs also argued that Order (No 2) and s 7 of the PHA are rendered invalid by s 51(xxiiiA) of the *Constitution* (Ground E). They further contended that they are otherwise inconsistent with the *Australian Immunisation Register Act 2015* (*Constitution*, s 109) (Ground F).

5 The other proceedings are brought by Ms Natasha Henry and five other persons (the "Henry plaintiffs"). Like the Kassam plaintiffs, they also refuse to be vaccinated. They sue the Minister only. They seek declarations that Order (No 2) is invalid along with the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) (the "Aged Care Order") and the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW) (the "Education Order"; and collectively the "impugned orders"). They contend that because of their effect on rights and freedoms, the impugned orders are beyond the scope of s 7(2) of the PHA (Ground 1); that they were made for an improper purpose (Ground 2), that in making them the Minister failed to have regard to various relevant considerations (Ground 3); asked the wrong question or took into account irrelevant considerations (Ground 4); was obliged to but failed to afford them natural justice (Ground 5) and acted unreasonably (Ground 6).

6 On the evening of 3 October 2021, when hearing of the proceedings was still to be completed, the Minister made *Public Health (COVID-19 General) Order 2021* which repealed Order (No 2) with effect from the beginning of 11 October 2021. Despite this, it was not contended by any party that the challenges to Order (No 2) were rendered futile. Both sets of plaintiffs confirmed that they sought declaratory relief concerning its invalidity (or least parts of it). Further, the Aged Care Order and the Education Order continue to have effect.

7 Leaving aside the constitutional challenge raised by the Kassam plaintiffs, in considering the grounds of challenge raised in both proceedings it is important to note that it is not the Court's function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risks to the public health posed by the Delta variant. It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines especially their capacity to inhibit the spread of the disease. These are all matters of merits, policy and fact for the decision maker and not the Court (see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [28], [66] and

[108]; "Li"). Instead, the Court's only function is to determine the legal validity of the impugned orders which includes considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences.

8 As explained below, one of the main grounds of challenge in both cases concerns the effect of the impugned orders on the rights and freedoms of those persons who chose not be vaccinated especially their "freedom" or "right" to their own bodily integrity. The plaintiffs contend that, as a matter of construction, the broad words of s 7(2) of the PHA do not authorise orders and directions that interfere with those rights or that they are otherwise unreasonable because of their effect on those rights. They seek to deploy the "principle of legality" which is a rule of statutory construction to the effect that, in the absence of a clear indication to the contrary, it is presumed that statutes are not intended to modify or abrogate fundamental rights (*Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15 at 437; "Coco"). However, this country does not have a bill of rights, and thus, important as the principle of legality is, it is only a rule of construction. As such "the assistance to be gained from [the] presumption will vary with the context in which it is applied" (*Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309; [2004] HCA 40 at [19] per Gleeson CJ; *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* [2018] NSWCA 209 at [39]). At least so far as the abrogation of particular rights are concerned, the presumption is of little assistance in construing a statutory scheme when abrogation is the "very thing which the legislation sets out to achieve" (*Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321; [2000] HCA 7 at [43]).

9 Although it was contended that the impugned orders interfere with a person's right to bodily integrity and a host of other freedoms, when all is said and done the proper analysis is that the impugned orders curtail freedom of movement which in turn affects a person's ability to work (and socialise). So far as the right to bodily integrity is concerned, it is not violated as the impugned orders do not authorise the involuntary vaccination of anyone. So far as the impairment of freedom of movement is concerned, the degree of impairment differs depending on whether a person is vaccinated or unvaccinated. Curtailing the free movement of persons including their movement to and at work are the very type of restrictions that the PHA clearly authorises. Hence, the principle of legality does not justify the reading down of s 7(2) of the PHA to preclude limitations on that freedom.

10 Further, any consideration of the unreasonableness of an order made under s 7(2) is to be undertaken by reference to the objects of the PHA which are exclusively directed to public safety. Orders and directions under the PHA that interfere with freedom of movement but differentiate between individuals on arbitrary grounds unrelated to the relevant risk to public health, such as on the basis of race, gender or the mere holding

of a political opinion, would be at severe risk of being held to be invalid as unreasonable (see *Li* at [70] per Hayne, Kiefel and Bell JJ). However, the differential treatment of people according to their vaccination status is not arbitrary. Instead, it applies a discrimen, namely vaccination status, that on the evidence and the approach taken by the Minister is very much consistent with the objects of the PHA. Accordingly, for this reason and the reasons set out below this aspect of both challenges fails.

11 As for the balance of the grounds of challenge, in summary and for the reasons set out below:

(i) It was not demonstrated that the making of Order (No 2) was not a genuine exercise of power by the Minister, that the making of the impugned orders by the Minister involved any failure to ask the right question or any failure to take into account relevant considerations much less that it was undertaken for an improper purpose. The Minister was not obliged to afford the plaintiffs or anyone else procedural fairness in making the impugned orders;

(ii) It was otherwise not demonstrated that either the manner in which the impugned orders were made was unreasonable or that the operation and effect of the orders could not reasonably be considered to be necessary to deal with the identified risk to public health and its possible consequences;

(iii) No aspect of Order (No 2) was shown to be inconsistent with LEPRA;

(iv) Order (No 2) does not effect any form of civil conscription as referred to in s 51(xxiiiA) of the Constitution and, even if it did, the prohibition on civil conscription does not apply to laws made by the State of NSW; and

(v) There is no inconsistency between Order (No 2) and the *Australian Immunisation Register Act 2015* (Cth);

12 It follows that all grounds of challenge fail, and both proceedings must be dismissed. The balance of these reasons explain these conclusions.

The Public Health Act – ss 3, 7, 10 and 10A

13 Subsection 3(1) of the PHA enunciates the objects of the Act. They include "promot[ing], protect[ing] and improv[ing] public health", "control[ling] the risks to public health" and "prevent[ing] the spread of infectious diseases". As noted by Senior Counsel for the State parties, Mr Kirk SC, those objects involve active measures. Subsection 3(2) provides that the "protection of the health and safety of the public is to be the paramount consideration in the exercise of functions" under the Act. The making of orders under s 7 by the Minister is one of those functions.

14 Section 7 is found within Part 2 of the PHA which is entitled "General Public Health". It provides:

> "(1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.

> (2) In those circumstances, the Minister--
>
> (a) may take such action, and
>
> (b) may by order give such directions,
>
> as the Minister considers necessary to deal with the risk and its possible consequences.
>
> (3) Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary--
>
> (a) to reduce or remove any risk to public health in the area, and
>
> (b) to segregate or isolate inhabitants of the area, and
>
> (c) to prevent, or conditionally permit, access to the area.
>
> (4) An order must be published in the Gazette as soon as practicable after it is made, but failure to do so does not invalidate the order.
>
> (5) Unless it is earlier revoked, an order expires at the end of 90 days after it was made or on such earlier date as may be specified in the order.
>
> (6) Action may not be taken, and an order has no effect, in relation to any part of the State for which a state of emergency exists under the *State Emergency and Rescue Management Act 1989* .
>
> (7) An application may be made to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of any of the following decisions--
>
> (a) any action taken by the Minister under this section other than the giving of a direction by an order under this section,
>
> (b) any direction given by any such order."

15 Section 10 of the PHA provides that a person who is subject to a "direction" under ss 7, 8 or 9 and who has notice of the direction "must not, without reasonable excuse, fail to comply with the direction". Non-compliance with s 10 is an offence, with the maximum penalty for an individual being 100 penalty units or imprisonment for 6 months or both and, in the case of a continuing offence, a further 50 penalty units for each day the offence continues. For a corporation, the maximum penalty is 500 penalty units and, in the case of a continuing offence, a further 250 penalty units for each day the offence continues.

16 Section 10A provides that a direction made by the Minister under ss 7, 8 or 9 "may adopt, and require compliance with, a publication as in force for the time being". The State parties submitted that the serious penalties imposed by s 10 and the power to adopt a publication conferred by s 10A provides some support for the contention that the power conferred by s 7 includes a power to make rules of general application.

17 Seven matters should be noted about the power conferred by s 7 at this point.

18 First, for the power conferred by the section to be enlivened, the Minister must "consider" on "reasonable grounds" that a situation has arisen that is or is likely to be, a risk to public health. As explained below, each of the impugned orders contains a statement of the grounds for concluding that there is a risk to public health. I infer from the Minister's making of the impugned orders with that statement that those grounds reflected his consideration. There was no contention by either set of plaintiffs that s 7(1) was not satisfied.

19 Second, one indication of the potential width of the power conferred by s 7(2) is that it is activated by a determination that there is a "risk" to public health and the power is exercised to "deal with the risk *and its possible consequences*". By definition "risks" and "possible consequences" are contingencies that may never eventuate and may even have a very low chance of materialising. Given the object of "prevent[ing]" the spread of any disease, the scope of any power which is conferred to address "risk" and its "possible consequences" would appear to be very wide.

20 Third, the power conferred on the Minister by s 7(2) is to take "action" and "by order give direction". The concept of "action" appears to refer to some specific step. Given that s 10 does not engage with "action" it seems unlikely that "action" includes any form of prohibition. An order that gives direction(s) appears to have a potentially wide scope. In that regard, both parties referred to s 7(3) for different purposes. Subsection 7(3) clearly contemplates the imposition of severe restrictions on movement in any part of the State declared to be a public health risk area and for the imposition of conditions on movement.

21 Junior Counsel for the Henry Plaintiffs, Dr Harkess, sought to distinguish between ss 7(2) and 7(3). He submitted that s 7(3) was directed to dealing with public health emergencies in particular areas and contended, or conceded, that it enabled those areas to be effectively partitioned by an order to avoid a contagion spreading. This contention was embraced by the State parties. Dr Harkess then sought to contrast ss 7(3) with s 7(2). This contention was not embraced by the State parties. It overlooks that s 7(3) is expressed as not limiting s 7(2).

22 Counsel for the Kassam plaintiffs, Mr King with whom Ms Rusiti of counsel appeared, submitted that s 7(3) is indicative of the narrowness of s 7(2) because the "power in sub 2 is independent of the special powers in subs 3".[1] I disagree. His submission does not truly address the words "without limiting" and more importantly does not address that subsection 7(3) does not confer any power to make an order. Instead, subsection 7(3) is only declaratory of what an order under s 7(2) can address. There is only one source of power in s 7 to make an order and that is conferred by s 7(2).

23 Given the objects and subject matter of the PHA, the terms of ss 7(2) and 7(3) and the criminal sanctions imposed for breaching a direction under s 10, it is evident that the PHA specifically contemplates the making of orders that give direction to a wide group of persons, including persons residing in particular areas, that severely curtail freedom of movement. The segregation much less the isolation of the inhabitants of an area of the State is clearly a draconian step, yet it is clearly contemplated as what may be considered necessary (by the Minister) to fulfill the objects of the PHA. Otherwise, as the authorities referred to below explain, whether and, if so, the extent to which the broad words of s 7(2) affect fundamental rights and freedoms requires a focus on the particular right or freedom in question (and the degree of affectation).

24 In his written submissions, Mr Kirk SC, with whom Mr Prince and Mr Reynolds

appeared, contended that, as a matter of substance, Order (No 2) either effectively declared areas of the State to be high risk areas or the whole State to be a high risk area.[2] He pointed to Ground (c) of Order (No 2) and the delineation in that order between the general area, stay at home areas and "areas of concern". The terms of Order (No 2) are set out below but it does not include any express "declaration" to that effect. Given that the words "without limiting subsection 7(2)" indicate that s 7(3) is only be treated as an instance or an example of the exercise of the power conferred by s 7(2) it is unnecessary to consider this further.

25 Fourth, one matter the Minister must conclude before exercising the power conferred by s 7(2) is that the relevant action or order is "necessary". The Henry plaintiffs submitted that this effectively means it had to be '[i]ndispensable, vital, essential; requisite'.[3]. I reject that contention. In the context of the exercise of a power that deals with a "risk" and "its possible consequences", "necessary" does not mean "absolutely or essentially necessary" but instead means "appropriate and adapted" (*Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 469 per Higgins J; [1910] HCA 28; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; [2004] HCA 41 at [39] per Gleeson CJ).

26 Fifth, an exercise of power under s 7(2) is premised on the Minister "consider[ing]" it "necessary to deal with the risk and its possible consequences". The reference to "considers" reflects a subjective state of mind on the part of the relevant Minister. That said, where the exercise of a statutory power is conditioned on the existence of a subjective state of mind of a public official the provision conferring the power is usually construed as though that state of mind was formed reasonably (*Li* at [64] per Hayne, Kiefel and Bell JJ; at [88] to [92] per Gageler J; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [34] per Gleeson CJ, Gummow, Kirby and Hayne JJ).

27 In that regard, one issue that was the subject of significant debate between the parties was whether the exercise of the power to make an order expressed in wide terms should be classified as a quasi-legislative act, as contended for by the State parties, or as an administrative act, as contended for by the plaintiffs. The State parties contended that orders made under s 7(2) could, depending on their content, be either an administrative act or have a legislative quality (citing *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74; [2004] FCA 1701 at [43]). They pointed to the fact that s 7 contemplates that the making of rules that may be expressed in wide terms and which attract a criminal sanction under s 10 such that in that case they would have a legislative character *(RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) FCR 185; [2001] FCA 855 at [43]; "RG Capital"). They also pointed to the necessity to publish them in the gazette as supporting that characterisation.[4] Generally laws containing rules, and not administrative decisions, are published to the world at large.

28 Dr Harkess, and counsel for the Kassam plaintiffs, Mr King, contended that the making

of an order was an administrative act.[5] Dr Harkess contended that a power such as s 7 could not have a dual characterisation such that it might authorise the making of quasi-legislation in the form of widely drafted directions given by orders and administrative decisions in the form of specific directions addressed to particular people, entities or narrow locations. Most significantly, he pointed to s 7(7)(b) which on its face appears to allow merits review by the Civil and Administrative Tribunal ("NCAT") of directions given by an order made under s 7(2) (*RG Capital* at [72ff]). Mr Kirk SC submitted that did not extend to review of the directions given by the orders in this case, a construction that appears to be contestable.

29 In the end result it is not necessary to determine this debate, especially as to do so may require a conclusive determination of the scope of merits review available in NCAT. The debate's significance was said to be that, if the impugned orders were found to have a legislative character, then the threshold for demonstrating that they were unreasonable is especially high (*Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3 at [48] per French CJ), that no obligation to afford natural justice would arise and it could not be said that the impugned orders were invalid by reason of a failure by the Minister to take into account relevant considerations when he made them. As explained below, some of those contentions are debatable. In any event, I will address all three grounds on the basis favourable to the plaintiffs namely that the impugned orders are administrative decisions. I will address the unreasonableness ground on the basis that the plaintiffs must demonstrate that no Minister could have reasonably formed the conclusion that the impugned orders were necessary, that is appropriate and adapted, to "deal with" the relevant "risk and its possible consequences" (*Li* at [28], [76] and [105] to [106]; see [233] below).

30 Sixth, in considering the extent to which s 7(2) may authorise any interference with fundamental rights and freedoms, Mr Kirk SC pointed to the temporary nature of any order in that it can only operate for at most 90 days (s 7(5)) and noted that the power is only exercisable by a Minister who is accountable to the Parliament and to the public. He also relied on the second reading speech in the Legislative Assembly for the PHA when the relevant Minister stated (Hansard, Legislative Assembly, 24 November 2010, p 28128):[6]

> "The review of the Public Health Act recognised that a number of the current administrative requirements associated with making emergency orders do not deliver greater clarity or accountability to any subsequent emergency action, whilst having the potential to slow the response and therefore the effectiveness of that response. *Amendment of the relevant provisions therefore is warranted to improve flexibility while ensuring that the appropriate balance is struck with protecting ordinary liberties and freedoms, including freedom of movement and assembly*. For example, the requirement that an order be published in the *Government Gazette* before it takes effect may result in unnecessary delays in responding to public health emergencies, such as the outbreak of a pandemic. In addition, the limitation of orders to 28 days may be inappropriately short, particularly when dealing with a serious infectious disease outbreak."

31 Mr Kirk SC submitted that this passage contemplates that orders made under s 7 will interfere with "ordinary liberties and freedoms" but, even so, the amendments were

offering improved flexibility. Those amendments were the extension of the operative period of an order from 28 days to 90 days and the removal of the requirement that an order could only be effective upon publication in the Gazette.

32 The above passage also refers to the "review of the Public Health Act". This was a departmental review of the *Public Health Act 1991* which, in relation to orders made under the predecessor to s 7, referred to the "potentially intrusive nature of orders on the rights of individuals".[7] Mr Kirk SC contended that the use of this material was supported by s 34(1) and s 34(2)(b) of the *Interpretation Act 1987* presumably on the basis that it confirms that the meaning of s 7(2) is "the ordinary meaning conveyed by the text of the provision" (s 34(1)(a)). This may be the case for the second reading speech (s 34(2)(f)) but I consider it highly doubtful that an internal Department report not shown to have been laid before a House of Parliament can be relied upon (s 34(2)(c); cf *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157; [2011] NSWCA 174 at [31] to [34]). Given the view I take of the width of the power conferred by s 7(2), nothing turns on this.

The PHA – Other Provisions

33 The plaintiffs relied on four other parts of the PHA as suggesting that s 7 does not support the impugned orders.

34 First, s 8 confers power on the Minister to take action and by orders give directions in circumstances where a state of emergency exists under the *State Emergency and Rescue Management Act 1989*. It provides:

> (1) This section applies in relation to any part of the State for which a state of emergency exists under the *State Emergency and Rescue Management Act 1989* ("the 1989 Act") if, after consultation with the Minister administering that Act, the Minister considers on reasonable grounds that the emergency is, or is likely to be, a risk to public health.
>
> (2) In these circumstances, the Minister, with the agreement of the Minister administering the 1989 Act--
>
> (a) may take such action, and
>
> (b) may by order give such directions,
>
> as the Minister considers necessary to deal with the risk and its possible consequences.
>
> (3) Without limiting subsection (2), an order may direct--
>
> (a) all persons in a specified group, or
>
> (b) all persons residing in a specified area,
>
> to submit themselves for medical examination in accordance with the order.
>
> (4) An order must be published in the Gazette as soon as practicable after it is made, but failure to do so does not invalidate the order.
>
> (5) Unless it is earlier revoked, an order expires when the relevant state of emergency ceases to exist.
>
> (6) Action taken (including any order made) under this section has effect as if it had been taken in the execution of Division 4 of Part 2 of the 1989 Act.
>
> **Note:** Consequently, it is an offence under that Act to obstruct or hinder the Minister

> administering that Act in the exercise of any such function (section 40), and no proceedings may be brought against any person (including the Crown) as a consequence of any damage, loss, death or injury arising from the exercise of any such function (section 41)."

35 Thus s 8 confers a similar power to that conferred by s 7, however it is the only source of power to take action or by order give directions in circumstances where a state of emergency exists. The effect of exercising the power is set out in subsection 8(6) and is explained by the note to the section. In this case, it was accepted that no state of emergency has been declared to exist under s 33 of the *State Emergency and Rescue Management Act 1989*. It was not contended by the State parties that any part of the impugned orders was made under s 8.

36 One matter raised by the Henry plaintiffs is that, unlike s 7, s 8(3) confers an express power to require all persons in a specified group or residing in a specified area to submit themselves for a medical examination which might otherwise constitute a battery. The effect of the submission was that the inclusion of that specific power is an indication that no such power is conferred by s 7 and thus s 7(2) did not authorise so much of the impugned orders as concerns vaccinations which were also said to legalise what would otherwise be a battery. Given the subject matter, objects and text of the PHA I consider it unlikely that s 7 could be read down by this means. However, it is not necessary to determine this because, for the reasons I will outline, none of the impugned orders direct any person to submit to a medical examination or a medical procedure. I am otherwise not addressing the larger question of whether s 7(2) could authorise an order that gives directions requiring persons to submit to vaccination by allowing an injection into their arm.

37 Second, Part 4 of the Act deals with so called "Scheduled medical conditions". Those conditions are listed in Schedule 1 to the PHA. COVID-19 is listed as a category 2, 3 and 4 condition. Section 62 confers on an authorised medical practitioner the power to make a "public health order" "in respect of a person" that the Secretary is satisfied on reasonable grounds "has a category 4 or 5 condition and because of the way the person behaves may … be a risk to public health". It can also be exercised in relation to a person who has been exposed to a "contact order condition", is at risk of developing the contact order condition and because of the way they behave may be a risk to public health (s 62(1)). A "contact order condition" is a medical condition listed in schedule 1A to the PHA and includes COVID-19 (s 51). A public health order under s 62 may require a person to refrain from specific conduct or undergo "specified treatment" (s 62(3)) as well as authorise their detention (s 62(4)).

38 Dr Harkess relied on s 62 as indicating that Parliament had made specific provision for a power that mandates a form of medical treatment, which might include vaccination, and contrasted its specific words with the generality of s 7. While I do not accept that the impugned orders mandate any vaccination at least in the manner contended for by Dr Harkess, it does not matter. As noted by Mr Kirk SC, in substance this submission seeks to invoke the principle of construction stated in *Anthony Hordern & Sons Ltd v*

Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1 at 7; [1932] HCA 9 ("Anthony Hordern"), namely, that "[w]*hen the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power".*

39 However, the principle in *Anthony Hordern* is not engaged where the two powers do not deal with the same subject matter (*Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; [2006] HCA 50 at [59], [61] and [70] per Gummow and Hayne JJ). Section 62 is a power directed to treating and preventing the spread of a particular disease that a particular person either has or to which they have been directly exposed. Section 7 is directed to giving directions by order that deal with public health risks generally, ie addressing the overall risk and its possible consequences. Directions given by an order under s 7 may address the risk posed to people before they acquire a disease or are directly exposed to it.

40 Third, Dr Harkess pointed to Division 4 of Part 5 of the PHA as indicative of the PHA making specific provision for restrictions on persons based on their vaccination status. This division makes specific provision for the responsibilities of principals of schools and childcare centres with respect to "vaccine preventable diseases" which includes measles, mumps and rubella (schedule 3). In effect, they implement a regime that requires the vaccination of children as a condition of enrolment at schools and childcare centres. He also referred to the enforcement provisions of Part 8, especially s 108(1) which enables an authorised officer to enter and inspect property, as well as inspect documents on the premises and take copies etc. Dr Harkess again contrasted these specific grants of power with the impugned orders which it is said conferred "powers" to compel production of evidence concerning a person's vaccination status. So far as these contentions are concerned, I repeat [39]; the subject matter of these powers is entirely different to s 7(2).

41 Fourth, Dr Harkess referred to the regulation making power conferred on the Governor by s 134 of the PHA as indicative of the supposed inability of s 7(2) to make the impugned orders. It is unnecessary to describe that power in any detail other than to note that the power to make regulations is only exercisable by the Governor with the advice of the Executive Council (*Interpretation Act 1987*, s 14). The Second Reading speech noted above emphasised the significance of responding flexibly and urgently to unfolding pandemics by making orders under s 7(2) that do not require publication in the gazette to have force. That aspect of the PHA would be undermined by reading down s 7 by reference to the regulation making power in s 134 when the former can be exercised by the Minister but the latter requires the Executive Council to be convened.

42 Thus, the other matters pointed to by the plaintiffs in relation to the PHA do not warrant a reading down of s 7(2).

Public Health (COVID – 19 Additional Restrictions for Delta Outbreak) Order (No 2)

43 Although I suspect that Order (No 2) was the mostly widely read legal instrument in the history of NSW, it passed into history at midnight on 10 October 2021. Until then it governed the daily lives of millions of people.

44 Order (No 2) has had a number of iterations. It is the final iteration that is of most significance, although it is necessary to briefly trace its evolution (as well as how it was made). The first iteration of Order (No 2) was made on 20 August 2021. Clause 1.8 provided:

> "1.8 Grounds for concluding that there is a risk to public health
>
> The basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—
>
> (a) public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, which is a condition caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),
>
> (b) COVID-19 is a potentially fatal condition and is highly contagious,
>
> (c) a number of cases of individuals with COVID-19 have recently been confirmed in New South Wales and other Australian jurisdictions, including by means of community transmission, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales."

45 Parts 2 to 6 of the Order (No 2) then set out the "directions" made by the Minister under the Order. Each of Parts 2, 3 and 4 of Order (No 2) had their own regime of directions depending on whether a particular location was in the "general area" (Part 2), a "stay at home area" (Part 3) or an "area of concern" (Part 4). The "areas of concern" were eleven local government areas and some parts of the city of Penrith named in Schedule 1. The stay at home areas were those parts of greater Sydney and regional NSW that were not areas of concern (Schedule 1).

46 Part 4 contained numerous restrictions on persons living in "areas of concern". Clause 4.2(1) prohibited a person who resided in an area of concern from "be[ing] away from" their place of residence without a reasonable excuse. Clause 4.2(2) provided that a reasonable excuse "includes an activity specified for an area of concern in Schedule 2". Presumably an inclusive definition of reasonable excuse was adopted so as not to purport to limit the operation of s 10.

47 The various reasonable excuses in Schedule 2 included obtaining certain goods or services (cl 18) or engaging in exercise or outdoor education (cl 19). They also include leaving a place of residence for work if it was not reasonably practicable for a person to work at their place of residence (cl 2).

48 The permission to leave a person's place of residence in some circumstances was subject to clause 4.3. Subclause 4.3(1) precluded all persons who lived in an area of concern from leaving their relevant area of concern unless they were an "authorised worker". An "authorised worker" was a person who was the subject of an exemption granted by the Minister under Part 7 which included education and construction workers. None of the conditions attaching to the circumstances in which authorised

workers could leave an area of concern at the time Order (No 2) first commenced related to vaccination. However, clause 5.8 in the original version of Order (No 2) precluded persons whose place of residence was in "area of concern" from entering or remaining on a construction site in Greater Sydney unless they satisfied a vaccination requirement. This provision was similar to the final version of clause 5.8 set out below, although its original form made provision for a "medical contraindication" certificate in the sub-clause which was moved to the Dictionary in the next iteration.

49 The next iteration of Order (No 2) was amended with effect from the beginning of 23 August 2021. It now included a form of vaccination condition which had to be complied with before an "authorised worker" could leave an "area of concern" (clause 4.3(3)) except if the person was tested as part of an approved "rapid antigen testing program" (clause 4.3(3B)). Further iterations of Order (No 2) were made on 25 and 27 August 2021. Another iteration made on 28 August 2021 deleted the clause concerning rapid antigen testing for authorised workers in former clause 4.3(3B). Amendments continued to be made throughout September 2021 and the most recent iteration of Order (No 2) relevant to these proceedings was issued on 25 September 2021.

50 The end result is that from late August 2021 to midnight on 10 October 2021 all persons who resided within an LGA area of concern could not leave their relevant area except "authorised workers" in accordance with clause 4.3 which provided as follows:

> "4.3 Leaving area of concern for work
>
> (1) A person who lives in an area of concern must not leave the area of concern for the purposes of work unless the person is an authorised worker.
>
> (2) An authorised worker must not leave the area of concern for work without a permit issued by Service.
>
> (2A) An authorised worker does not require a permit for the provision of an emergency service.
>
> (3) *An authorised worker who is at least 16 years of age must not leave the area of concern for work unless the worker—*
>
> (a) has had at least 1 dose of a COVID-19 vaccine, or
>
> (b) has been issued with a medical contraindication certificate.
>
> (3A) *The authorised worker, when leaving the area of concern for work must—*
>
> (a) carry the required evidence, and
>
> (b) produce the required evidence for inspection if requested by—
>
> (i) the worker's employer, or
>
> (ii) the occupier of the worker's place of work, or
>
> (iii) a police officer, or
>
> (iv) an authorised officer.
>
> (3B), (3C) (Repealed)
>
> (3D) This clause does not apply to a person if the person has not been in the area of concern during the previous 14 days.
>
> (4) In this clause—
>
> authorised worker means a person who is authorised to work outside the area of concern because of an exemption under Part 7.

required evidence means:

(a) evidence showing the worker's name and place of residence, and

(b) the worker's vaccination evidence, and

(c) a permit issued by Service NSW, if required.

Note 1— A list of authorised workers is published on the NSW government website www.nsw.gov.au. Note 2— See clause 5.8 for additional restrictions for workers who reside in an area of concern and who work on a construction site in Greater Sydney. required evidence means— (a) evidence showing the worker's name and place of residence, and (b) the worker's vaccination evidence, and (c) a permit issued by Service NSW, if required. (emphasis added)

51 In addition, during that time clause 5.8 of Order (No 2) provided as follows:

5.8 Vaccination required to work on construction sites in Greater Sydney

(1) A person whose place of residence is in an area of concern *must not enter or remain on a construction site in Greater Sydney* unless the person—

(a) has had 2 doses of a COVID-19 vaccine, or

(b) has had 1 dose of a COVID-19 vaccine at least 21 days ago, or

(c) has had 1 dose of a COVID-19 vaccine within the previous 21 days and has been tested for COVID-19 within the previous 72 hours, or

(d) has a medical contraindication certificate issued to the person and has been tested for COVID-19 within the previous 72 hours.

(2) The occupier of the construction site must not allow the person to enter or remain on the construction site unless satisfied that the person has complied with this clause.

(3) The *person must, when entering or on the construction site*—

(a) carry the required evidence, and

(b) produce the required evidence for inspection if requested by—

(i) the person's employer, or

(ii) the occupier of the construction site, or

(iii) a police officer, or

(iv) an authorised officer.

(4) (Repealed)

(5) This clause does not apply to the following persons—

(a) a person who enters or remains on a construction site because of an emergency,

(b) a police officer,

(c) an authorised officer.

(6) In this clause— required evidence means—

(a) evidence showing the person's name and place of residence, and

(a1) a permit issued by Service NSW, if the person is required to have the permit to enter or leave an area of concern for work, and

(b) all of the following that apply to the person—

(i) evidence from the Australian Immunisation Register that the person has had 1 or 2 doses of a COVID-19 vaccine, Example— An online immunisation history statement or COVID-19 digital certificate from the Australian Immunisation Register.

(ii) evidence that the person has been tested for COVID-19, Example— An SMS text message or email from the testing organisation.

(iii) a medical contraindication certificate issued to the person. test for

> COVID-19 includes test for COVID-19 using a rapid antigen test in the way approved by the Chief Health Officer."

52 The Dictionary to the Order defines a "medical contraindication certificate" as meaning:

> "….. a certificate issued by a medical practitioner—
>
> (a) in a form approved by the Chief Health Officer, and
>
> (b) certifying that because of a specified medical contraindication, the person to whom the certificate has been issued cannot have a COVID-19 vaccine."

53 Although Order (No 2) contains the various "lockdown" provisions and the relief sought in both cases appeared to be directed to the entirety of Order (No 2), their sole focus was on these provisions and their so called "vaccine mandate". (Clause 4.23 of Order (No 2) contained a similar provision to clause 5.8 for persons who lived in areas of concern and who worked in an early education and care facility).

54 The parties were in dispute about what rights of citizens were being interfered with by provisions such as clauses 4.3 and 5.8 of Order (No 2). It is appropriate to deal with two of their principal contentions at this point as they are fundamental to both challenges.

Right to Bodily Integrity

55 The Kassam plaintiffs and the Henry plaintiffs contended that clauses 4.3(3) and 5.8(1) of Order (No 2) violated a person's right to bodily integrity.[8] In *Secretary, Department of Health & Community Services (NT) v JWB and SMB* (1992) 175 CLR 218; [1992] HCA 15 ("*Marion's Case*") at [10], Mason CJ, Dawson, Toohey and Gaudron JJ identified a "a right in each person to bodily integrity [t]hat is to say, the right in an individual to choose what occurs with respect to his or her own person". *Marion's Case* concerned the power of the Family Court to authorise the sterilisation by hysterectomy of an intellectually disabled young woman who was incapable of giving consent. The issue of court authorisation was addressed in the context that a medical procedure undertaken without consent is a violation of this right and is prima facie an assault (*Marion's Case* at [12]). The Henry plaintiff's also invoked various provisions of the *International Covenant on Civil and Political Rights* ("ICPR") to similar effect. They went as far to equate these provisions with Article 7 of the ICPR which proscribes "torture, cruel, inhuman or degrading treatment or punishment" as well as being subjected to "medical or scientific experimentation" without free consent.[9] Similar reliance was placed on Article 6 of the Universal Declaration of Bioethics and Human Rights.[10]

56 Leaving aside that the evidence did not establish COVID-19 vaccinations are "experimental", as the State parties submitted, provisions such as clause 4.3 and 5.8 do not violate any person's right of bodily integrity. Unlike, say, the court orders in *Marion's Case*, they do not purport to confer authority on any person including a medical practitioner to perform a medical procedure on anyone. After the making of Order (No 2), any attempt to force an injection into the arm of anyone who lived in an area of concern or worked in the construction industry was still a battery.

57 Clause 4.3 operated in conjunction with clause 4.2 which precluded all persons residing in an area of concern from leaving their homes without a reasonable excuse, one of which was that it was not reasonably practical for a person to work at their residence. Clause 4.3(1) qualified the ability to leave home for any of the reasonable excuse reasons so that a resident of an area of concern could only leave the area if they were an "authorised worker". In turn, subclause 4.3(3) qualified that limited permission to authorised workers to leave the area of concern so that in effect it was only applicable to the vaccinated. The end result was that persons who lived in the areas of concern, who were authorised workers, and who had not fulfilled the vaccination requirements were in no different position to people who lived in the areas of concern and who were not authorised workers. They all had their freedom of movement severely restricted.

58 Clause 5.8 of Order (No 2) operated differently but it still imposed a sanction on entering and remaining on a construction site which was relaxed for the vaccinated. Neither clause 4.3 nor clause 5.8 authorised the vaccination of persons without their consent. Neither provision imposed a sanction for being unvaccinated per se. On its face these provisions impaired freedom of movement and not a person's autonomy over their own body.

59 Both the written submissions in reply and the oral submissions of the plaintiffs contended that this analysis ignored the "practical effect" of these parts of the order which it was said effectively forced persons to undertake vaccination under threat of losing their capacity to work such that they will have not exercised a free choice to consent.[11] While none of the plaintiffs have been so overborne, the submissions hypothesised that there are persons who have been vaccinated in response to Order (No 2) (and the Aged Care Order and the Education Order). I will proceed on that hypothesis and otherwise accept that the orders have either an encouraging effect or even a coercive effect so far as vaccination is concerned.

60 These submissions in turn lead to a debate about what external factors may vitiate a person's consent to a battery in the form of medical treatment. Taken from a different context, Mr King referred to the observation of Latham CJ in *British Medical Authority v The Commonwealth* (1949) 79 CLR 201; [1949] HCA 44; "the *BMA* Case" that one of the "most successful means of compulsion of services is to be found in the deprivation of means of subsistence" (at 253). He also referred to a statement by McDougall J in *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88; [2009] NSWSC 761 in relation to whether the Court would declare that a hospital would be justified in refusing lifesaving treatment because an unconscious patient had previously executed a signed consent refusing lifesaving treatment. His Honour noted that "[w]hat appears to be a valid consent given by a capable adult may be ineffective if it does not represent the independent exercise of persons volition: if, by some means, the person's will has been overborne or the decision is the result of undue influence, or of some other vitiating circumstance" (at [40]).[12]

61 Dr Harkess referred to the judgment of La Forest, Gonthier and Cory JJ of the Supreme Court of Canada in *Norberg v Wynrib* [1992] 2 SCR 226 ("Norberg") in which their Honours held that not only could consent to an assault be vitiated by force, threats of force, fraud or deceit as to the nature of the defendant's conduct (at 246) but, based on principles of "unconscionability", found it is also vitiated where there exists proven inequality between the parties and proven "exploitation" (at 256). In *Norberg*, a patient sued her doctor for assault and battery after they had sexual contact in circumstances where the doctor exploited her drug addiction by writing scripts. La Forest, Gonthier and Cory JJ rejected the doctor's defence of consent (at 261). Sopinka J held the consent was not vitiated (at 307). L'Heureux-Dube and McLachlin JJ upheld the patient's claim on the basis that there was a breach of a fiduciary duty sounding in damages.

62 Generally, so far as batteries occasioned by medical treatment are concerned, "the consent necessary to negative the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed" (*Rogers v Whitaker* (1992) 175 CLR 479; [1992] HCA 58 at 490). No doubt such consent can be vitiated by such matters as fraud or misrepresentation although that has been limited to the nature of what has proposed to be done (*Sidaway v Bethlehem Royal Hospital Governors* [1984] QB 493 at 511) and perhaps as to the identity or registration status of the doctor who performed the procedure (*R v Richardson (Diane*) [1999] QB 444; *R v Melin (Ozan*) [2019] EWCA 557). The High Court has not considered the judgment of La Forest, Gonthier and Cory JJ in *Norberg* and nor has the Court of Appeal (other than on the issue of whether consent is a defence or an element of the offence: *Gorman v McKnight* [2020] NSWCA 20). However, even if *Norberg* did represent the law, it has no relevance here. Dr Harkess sought to draw an analogy between the exploitative doctor and the Minister in this case, however that analogy was stretched beyond breaking point. Unlike the doctor in *Norberg*, the Minister does not owe a fiduciary duty to anyone, he is not administering any treatment to anyone and he is not exploiting anyone.

63 It can be accepted that there is room for debate at the boundaries of what external factors might vitiate a consent to medical treatment so as to render the treatment a battery and a violation of a person's right to bodily integrity. The judgment of La Forest, Gonthier and Cory JJ in *Norberg* was influenced by provisions of the criminal law reforming the definition of consent for assaults including sexual assault (*Norberg* at 251). However, in the end result, the plaintiffs' contentions are well beyond those boundaries. People may choose to be vaccinated or undertake some other form of medical procedure in response to various forms of societal pressure including a law or a rule, an employment condition or to avoid familial or social resentment, even scorn. However, if they do so, that does not mean their consent is vitiated or make the doctor who performed the vaccination liable for assault. So far as this case is concerned, a

consent to a vaccination is not vitiated and a person's right to bodily integrity is not violated just because a person agrees to be vaccinated to avoid a general prohibition on movement or to obtain entry onto a construction site. Clauses 4.3 and 5.8 of Order (No 2) do not violate any person's right to bodily integrity any more than a provision requiring a person undergo a medical examination before commencing employment does.

64 Finally on this topic, I note that the Henry plaintiffs relied on the dissenting judgment of Deputy President Dean of the Fair Work Commission in an unfair dismissal case that addressed whether an employee who objected to being vaccinated could be reinstated to work at an aged care centre (*Kimber v Sapphire Coast Community Aged Care Ltd,* [2021] FWCB 6015). In particular, they relied on various passages in the Deputy President's judgment to the effect that "vaccine mandates" embodied in the various public health responses to COVID-19 amount to a form of coercion that violates a person's right to bodily integrity (at [115] to [129]).

65 Given the very different jurisdictions being exercised by the Fair Work Commission and this Court, I would not ordinarily address the reasoning in their decisions (and I doubt they would address the reasoning in mine). However, as the Henry plaintiffs sought to rely on the reasoning it is necessary to record why that judgment is of no assistance.

66 First, the relevant parts of the decision relied on by the Henry plaintiffs do not address the case law concerning consent to a medical treatment.

67 Second, the passages relied on and passages to similar effect throughout the judgment appear to contain assertions about the efficacy and safety of COVID-19 vaccines and other aspects of the public health response to COVID-19 that were not reflected in the evidence that I found persuasive in this case and as far as I can ascertain were not the subject of evidence in that case.

68 Third, elsewhere in her reasons, the Deputy President considered it necessary to opine on matters affecting either the validity or the appropriateness of making the Aged Care Order under the PHA (at [147] to [173]). The function of determining its validity is for this Court to discharge and the function of determining whether it should have been made is for the political process. The Fair Work Commission has neither function.

69 Fourth, the Deputy President's judgment concludes with a number of clarion calls imploring "all Australians" to do things such as "vigorously oppose the introduction of a system or medical apartheid and segregation" (at [182]) and "vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID" (at [183]). Political pamphlets have their place but I doubt that the Fair Work Commission is one of them. They are not authorities for legal propositions.

70 In the end result, provisions such as clause 4.3 and 5.8 do not amount to a violation of anyone's right to bodily integrity but instead impede their freedom of movement which has consequential effects on their ability to work. Freedom of movement is undoubtedly

important, although it is not necessarily some form of positive right. Regardless, the PHA is clearly directed to limiting that freedom, sometimes severely.

Privilege Against Self-incrimination

71 The other central contention made by both sets of plaintiffs is that clauses 4.3(3A)(b) and 5.8(3)(b) of Order (No 2) which in some circumstances require a person to produce evidence of their identity, residence and vaccination status, violate their privilege against self-incrimination. The short answer to this contention is that it is a privilege against incrimination and not a privilege against exoneration; ie as its name implies the privilege protects a person against the compulsory production by them of evidence that may incriminate them (*Baldwin v State of New South Wales* [2020] NSWCA 112 at [30]). The privilege does not protect against production of evidence by a person that may exonerate them from a breach of the law.

72 In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74 at 502, Mason CJ and Toohey J described the scope of the privilege as follows:

> "In conformity with that principle, the privilege against self-incrimination protects an accused person *who is required by process of law to produce documents which tend to implicate that person in the commission of the offence charged*. The privilege likewise protects a person from producing in other proceedings, including civil proceedings, documents which might tend to incriminate that person. In its application to the production of documents, the operation of the privilege is more far reaching in the protection which it gives than in its application to oral evidence. It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of real evidence. Indeed, the protection afforded by the privilege is now so far reaching that it has been described as protection against being compelled to say anything which "may tend to bring him into the peril and possibility of being convicted as a criminal" Lamb v Munster (1882) 10 QBD 110, per Field J at p.111.) or as protection "against exposure to conviction for a crime" Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR, per Mason ACJ, Wilson and Dawson JJ at p 336). That is because the privilege protects a person from *discovering or revealing information which may lead to the discovery of admissible evidence of guilt not in his or her possession or power* (…)." (emphasis added)

73 As the plaintiffs argument on this issue was directed to the invalidity of sub-clauses 4.3(3A)(b) and 5.8(3)(b) of Order (No 2) on the basis that they *necessarily* violated some fundamental right or freedom, it meant that they were forced to pitch their argument about provisions such as subclause 4.3(3A) or 5.8(3) of Order (No 2) at a high level of generality. Hence, the Kassam plaintiffs postulated a scenario whereby an unvaccinated person who was an authorised worker was, either on leaving an area of concern or entering a building site, requested to produce the "required evidence". It was submitted that their privilege against self-incrimination would then be imperilled by the requirement to comply with subclauses 4.3(3A)(b) or 5.8(3)(b) and produce evidence of their name and address, their vaccination status and a permit issued by Service NSW.[13] However, on this argument they could not produce that evidence, specifically the vaccination evidence, and so no question of the production of anything arises. It is true that in those circumstances they may implicate themselves in the sense

that they will then be in breach of either clause 4.3(3A) or 5.8(3)(b) and their failure to produce the vaccination evidence *might* be used against them to prove a breach of sub-clause 4.3(3) or 5.8(1). However, both of those consequences are beyond the reach of the privilege against self-incrimination as they are not consequences of *producing incriminating material* or potentially incriminating material.

74 As the above passage from *EPA v Caltex* makes clear, the privilege is concerned with the potential for the material that is produced in compliance with the obligation imposed by law to implicate a person in the commission of an offence. Nothing in the example relied on by the plaintiffs involves the potential for the use of any material that may be produced in compliance with clause 4.3(3) to incriminate anyone. To the contrary, the production of the material would exonerate them of any suspicion that they had breached the direction.

75 It may be that, in a particular case, a person could show that the production of the required evidence might incriminate them in some other offence unrelated to Order (No 2) or the PHA. It is not worthwhile to speculate about such possible scenarios occurring amongst the millions of people who were affected by Order (No 2). It suffices to state that such a person would have to demonstrate the real tendency for the material to incriminate them and, if the claim is found to be bona fide, a question would then arise as to whether the invocation of the privilege is accommodated by the provision in s 10 for a "reasonable excuse" as a basis for not complying with a direction given by an order. All this is for another day and another forum. However, it only serves to demonstrate that clauses 4.3(3A)(b) and 5.8(3)(b) of Order (No 2) do not on their face require the production by a person of potentially incriminating material.

76 It has not been established that subclause 4.3(3A)(b) and 5.8(3)(b) of Order (No 2) violate any fundamental right or privilege against self-incrimination which might not be authorised by an order made under s 7(2).

The Aged Care Order

77 The Aged Care Order was made by the Minister on 26 August 2021. Clause 2 specifies that it commenced at 9.00am on 17 September 2021. It is still in force and is the subject of challenge by the Henry plaintiffs.

78 Clause 4 of the Aged Care Order recites four grounds for concluding that there is a risk to public health. The first three are not relevantly different to those recited in Order (No 2). The fourth is that "the risk of transmission, including by means of community transmission, of COVID-19 in New South Wales will remain significant and ongoing unless more COVID-19 vaccines are administered."

79 Clause 5 of the Aged Care Order provides:

> "5 Direction—unvaccinated workers not to enter residential aged care facilities
>
> (1) The Minister directs that the following persons *must not enter or remain on the premises of a residential aged care facility* unless the person has received at least 1 dose of a COVID-19 vaccine—

> (a) an employee of the operator of the facility,
>
> (b) a person who provides services for the facility or for 1 or more residents of the facility under a contract or arrangement with any person, but not including the following—
>
> (i) a maintenance contractor,
>
> (ii) a person who provides services to a resident of the facility under a contract or arrangement with the resident,
>
> (iii) a student.
>
> Note— This direction has effect from the commencement of the Order at 9am on 17 September 2021.
>
> (2) Subclause (1) does not apply to a person who enters a residential aged care facility to respond to—
>
> (a) a medical emergency, or
>
> (b) a non-medical emergency, for example, a fire, flooding or a gas leak." (emphasis added)

80 Clause 6(1) contains a direction from the Minister that on or after 9.00am on 31 October 2021 health practitioners or students "must not enter or remain on the premises of a residential aged care facility unless the person has received 1 dose of a COVID-19 vaccine". Subclause 6(2) provides that subclause 6(1) does not apply to a health practitioner who enters a residential aged care facility to respond to a medical emergency.

81 Subclause 7(1) obliges the operator of a residential aged care facility to take all reasonable steps to ensure that a person subject to a direction under clause 5 or 6 comply with the direction. Subclause 7(2) provides:

> "The Minister directs that a person subject to a direction under clause 5 or clause 6 must, if required to do so by the operator of a residential aged care facility, provide the operator with vaccination evidence."

82 Clause 8 makes provision for exemptions including persons with a medical contraindication.

83 As with clauses 4.3 and 5.8 of Order (No 2), this direction amounts to a "mandate" to certain persons not to enter or remain on the premises of a residential aged facility unless they have received at least one dose of a COVID-19 vaccine. For the reasons given in relation to those provisions it operates to limit freedom of movement and has (significant) consequential effects on an unvaccinated person's ability to work. It does not, however violate their right to bodily integrity or involve a per se violation of their privilege against self-incrimination.

The Education Order

84 The Education Order was made by the Minister on 23 September 2021 and commenced immediately. It is still in force and is challenged by the Henry plaintiffs.

85 Clause 3 of the Education Order recites five grounds for concluding that there is a risk to public health, the first four of which are identical to the Aged Care Order (No 2). The fifth is that "there is a risk of transmission of COVID-19 among children *at* government schools, non-government schools and early education and care facilities because the

COVID-19 vaccine is currently not available for children of certain ages" (emphasis added).

86 Clause 4 provides:

> Education and care workers must be vaccinated
>
> (1) The Minister directs that an *education and care worker* must not carry out relevant work on or after 8 November 2021 unless the worker has—
>
> (a) had 2 doses of a COVID-19 vaccine, or
>
> (b) been issued with a medical contraindication certificate.
>
> (2) The Minister directs that an education and care worker must provide the worker's vaccination evidence if requested by—
>
> (a) a responsible person, or
>
> (b) a person authorised by a responsible person.
>
> (3) The Minister directs that each responsible person for an education and care worker must take all reasonable steps to ensure that the education and care worker complies with the directions of this clause.
>
> (4) This clause does not apply to an education and care worker who carries out relevant work in an emergency.
>
> (5) In this clause—
>
> *vaccination evidence* for an education and care worker includes, until the beginning of 8 November 2021—
>
> (a) evidence from the Australian Immunisation Register that the worker has had 1 dose of a COVID-19 vaccine, and
>
> (b) evidence of an appointment to receive a COVID-19 vaccine." (emphasis added)

87 The "responsible person for an education and care worker" is defined in clause 2. It includes the person who employs or engages the worker to carry out relevant work, a person who exercises employer functions for the person who employs the worker to carry out relevant work, a supervisor of a student on a student placement carrying out relevant work and the occupier of the school premises.

88 On its face, this order appears to operate differently to clause 5.8 of Order (No 2) and the Aged Care Order which are directed to precluding people from entering or remaining on certain work sites unless they are vaccinated. Subclause 4(1) is directed to education and care workers who carry out relevant work on or after 8 November 2021. Clause 3 defines an "*education and care worker"* to mean "a person who carries out relevant work". It is drafted in the present tense. It also defines "relevant work" as follows:

> "relevant work means the following work—
>
> (a) work *at* a government school or non-government school,
>
> (b) work *at* an early education and care facility, other than providing a service listed in—
>
> (i) the Education and Care Services National Regulations, clause 5, other than clause 5(2)(c) or (h), or
>
> (ii) the Children (Education and Care Services) Supplementary Provisions Act 2011, section 4(3), other than section 4(3)(a),
>
> (c) providing a disability support service in person to a child with a disability *at* a

> government school, non-government school or early education and care facility, if the work requires a working with children check clearance under the Child Protection (Working with Children) Act 2012, including a service funded or provided under—
>
> (i) the National Disability Insurance Scheme of the Commonwealth, or
>
> (ii) the Assisted School Travel Program of the Department of Education,
>
> (d) work as an authorised person under the Education Act 1990, Part 7, Division 2, Subdivision 5 in relation to the registration of children for home schooling,
>
> (e) work *at* a public examination for the Higher School Certificate referred to in the Education Act 1990, section 95(2),
>
> (f) work specified by the Chief Health Officer, by notice published on the website of NSW Health, as relevant work for the purposes of this Order" (emphasis added)

89 Clause 3 also defines "work" as including work as a volunteer for a charitable organisation, a student on a student placement and work done on a temporary basis, "including while acting in or filling an office or other role because of a vacancy or absence".

90 As noted, sub-clause 4(1) is directed to persons who are actually carrying out relevant work after 8 November 2021. It does not apply to a person who is employed as a teacher but not carrying out work because, for example, they are on leave. One matter that is unclear is whether subclause 4(1) precludes education and care workers who are not vaccinated from carrying out teaching work remotely. If it did have that effect there would be a serious question as to whether the clause as drafted was untethered from the risk that the Minister identifies in the grounds set out in clause 3.

91 When this issue was drawn to the attention of Mr Kirk SC he responded by accepting (and contending) that, on its proper construction, the Education Order only applies in respect of persons physically attending "at" the places listed in subparagraphs (a), (b), (c) and (e) of the definition of relevant work. I agree. It follows in part from the fact that the "risk" identified in the Education Order concerns physical transmission of the disease and the use of the word "at" as opposed to say "for" in sub-paragraphs (a), (b), (c) and (e). This is not inconsistent with subclause (d) which refers to "work as an authorised person under the *Education Act 1990*, Part 7, Division 2, Subdivision 5 in relation to the registration of children for home schooling". Such persons carry out assessments of application for registration for home schooling and include "inspectors" appointed under the *Education Standards Authority Act 2013* (*Education Act 1990*, s 70, 71 and s 72). It can be expected that such persons will physically inspect the residence at which home schooling will take place.

92 In relation to subclause 4(2), it follows that it only applies to a person who is carrying out relevant work in the sense just noted at the time the relevant request is made.

93 Clause 5 concerns family day care residences. None of the plaintiffs are affected by this order and it is not necessary or appropriate to construe it or address its validity in these proceedings.

94 The observations made in [83] concerning the Aged Care Order apply with equal force to the Education Order.

The Kassam Plaintiffs

95 The first plaintiff in the Kassam proceedings, Al-Munir Kassam, is employed as an Occupation Health and Safety officer for a supplier to construction sites within Greater Sydney. He lives in Sydney Olympic Park which is within the Parramatta Local Government Area ("LGA"). Paramatta LGA was classified as an "Area of Concern" by Order (No 2). He states that he does not consent to receiving a vaccine. He says he believes in a person's right to choose their own medicines and medical procedures. Based on his own research, he recounts his belief that COVID-19 vaccines do not provide immunity or lessen transmission rates and carry risks of adverse reactions. He states that the operation of the public health orders prevents him from working and he expresses concern about losing his job.

96 The second plaintiff in the Kassam proceedings, George Nohra, is the sole Director of the company that employs Mr Kassam. He lives in Merrylands which is within the Cumberland LGA. Cumberland LGA was classified as an "Area of Concern" by Order (No 2). Mr Nohra states that he does not wish to have a COVID-19 vaccine for a number of reasons including that he considers himself healthy and not at risk from the disease, that he believes that COVID-19 vaccines do not provide immunity or lessen transmission rates, that he would prefer to acquire natural immunity and believes that taking the vaccine carries risks to his health. He states that the effect of Order (No 2) was to prevent him from properly managing his business.

97 The third plaintiff in the Kassam proceedings, Alexandrea Goundoulas, is a health care worker employed by a pathology agency. As part of her job, she collects blood and other samples from across Greater Sydney. She lives in Wentworthville which is also within the Cumberland LGA. She states that the main reason she does not want to have a COVID-19 injection is because she is pregnant. Her employer has advised her she must have one to return to work. She consulted a doctor who advised her that it was safe for her to receive the Pfizer vaccine. Nevertheless, based on what she has heard in the media she states that she believes that vaccines are not effective and is concerned about adverse reactions.

98 The fourth plaintiff in the Kassam proceedings, Jelena Zmiric, is employed in Bankstown hospital as a "private patient officer". She lives in the Campbelltown LGA which was an area of concern. On or about 26 August 2021, she was advised by her employer that she was required to be vaccinated as a condition of her employment. The email notifying her of this referred to the fact that she was an authorised worker leaving her area of concern. She states that it her firm belief that she holds the "right to make [her] own medical decisions alongside medical professionals".

The Henry Plaintiffs

99 The first plaintiff in the Henry proceedings, Natasha Henry, is an experienced aged care worker who is employed at a retirement village in Byron Bay. Ms Henry states that she

chooses not to be vaccinated because she believes that she has "basic human right in Australia" to bodily integrity. She says she is concerned about the general side effects of the COVID-19 vaccines "and the general health risks associated with the vaccines". She identifies a number of health issues affecting her and says she is concerned about the effect of the combination of those conditions and any vaccine. On or about 13 August 2021, Ms Henry received an email from her employer advising her that the Federal Government had advised that vaccination will be mandatory for all residential care workers from 17 September 2021. Ms Henry is concerned that she will lose her job and that will affect her health and her family. Ms Henry's understanding is that the effect of Aged Care Order is that she will not be able to return to work unless she received at least one dose of a COVID-19 vaccine by 17 September 2021. She states that she was not consulted prior to the Aged Care Order being made.

100 The second plaintiff in the Henry proceedings, Selina Crowe, is also an experienced aged care worker. She works at an aged care facility in Nambucca Heads in NSW. Like Ms Henry, she was advised by her employer that she was required to obtain at least her first dose of a COVID-19 vaccine by mid-September 2021. She states that she should not be forced to be vaccinated "as it is my body and my right to choose what is best for me". She says that she "would choose to wait until the trials are completed and we have some real information and data on the immediate side effects and the long-term effects" of the COVID-19 vaccines. Her position is that she will not be vaccinated "[u]ntil such time as there is sufficient clinical data and years of testing". She states that she has obtained alternative casual employment at reduced wages but cannot survive financially with the reduced income. She has the same understanding of the Aged Care Order as Ms Henry. Like Ms Henry, she states that she was not consulted before it was made.

101 The third plaintiff in the Henry proceedings, Julie Ramos, is employed as a teacher by the NSW Department of Education. She states that she has made an "informed choice" not to submit to a COVID-19 vaccination. She says she believes an "individual has the right to bodily integrity" and should not be coerced into being subjected to a medical treatment. She states that she is concerned about possible side effects from a COVID-19 vaccine. Ms Ramos states that on 27 August 2021 she learnt of an announcement by the Premier and the Minister for Education that teaching staff will be included in the proposed mandatory vaccination orders, a proposal she was not consulted about. She recounts her understanding that, if she has not received two doses of a COVID-19 vaccine by 8 November 2021, she will not be allowed to enter or remain on school grounds. She expresses her concern about the consequence for her employment. Ms Ramos' affidavit was sworn prior to but in anticipation of the making of the Education Order.

102 The fourth plaintiff in the Henry proceedings, Hohepa Hemopo Manahi Waapu, is employed as a cleaner by the City of Sydney Council. He resides in Glen Alpine within

the Campbelltown LGA which was classified as an "area of concern" by Order (No 2). Mr Waapu states that "I have made an informed choice not to submit to a COVID-19 vaccination and I choose not to be vaccinated". In late August 2021 he received emails from his employer advising him that the effect of Order (No 2) was that, as he resided in an area of concern, if he wished to attend work, he must have had his first vaccination dose by 6 September 2021. He recounts his understanding that Order (No 2) had that effect and states that he was not consulted before it was made. He expresses concern that if he cannot attend work he will have to use and exhaust his leave entitlements to survive.

103 The fifth plaintiff in the Henry proceedings, Kamran Khan, is employed as an apprentice mechanic in a business located in Parramatta. He resides in Wetherill Park within the LGA Area of Fairfield. Fairfield was classified as an "Area of Concern" by Order (No 2). He states that he made an "informed choice not to submit to a COVID-19 vaccination and says he is concerned about "the possible side effects of the COVID-19 vaccine for [his] health, both short term and long term and the risks associated with its use". On or about 30 August 2021, he received an email from his employer advising him that, as he will not have had his first dose of the vaccine by 30 August 2021, he was stood down while Order (No 2) remained in effect "as per section 524 of the *Fair Work Act 2009*". He recounts a similar understanding of Order (No 2) to Mr Waapu and states he was also not consulted prior to it being made.

104 The sixth plaintiff in the Henry proceedings, Sandi Greiner, is employed as an aged care worker in Redfern. He states that he has decided not to be vaccinated against COVID-19 because he is "extremely worried about the risks" to his health "both in the short-term and in the long term". He says he cannot "provide informed consent to taking the vaccine when there is no long-term clinical data as to the long-term side effects of the vaccine". Mr Greiner states that he was stood down from his work as of 31 August 2021 for refusing to receive a vaccine. He recounts the same understanding of the Aged Care Order as Ms Henry and Ms Crowe. Like them, he states that he was not consulted before it was made.

Findings about the Plaintiffs

105 None of the above evidence given by the various plaintiffs was contested, although the evidence that each gave about COVID-19 vaccines, and their reasons for rejecting them, was only allowed to be used to establish their beliefs and opinions (*Evidence Act 1995*, s 136).

106 I note four matters about their evidence. First, I accept their evidence represents their genuine opinion and each of them is honest in stating they (strongly) opposed being vaccinated.

107 Second, each of Mr Kassam, Mr Nohra, Ms Goundoulas, Mr Waapu, Mr Khan and Ms Zmiric were relevantly affected by clause 4.3 of Order (No 2). Mr Kassam and Mr Nohra

were also affected clause 5.8 of Order (No 2). The limitation on their freedom of movement imposed by those provisions was sufficient to give them a "special interest" in their validity and thus standing to challenge them (*Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530 to 531; [1980] HCA 53). As noted, the State parties and the Commonwealth took no point about the repeal of Order (No 2).

108 Third, each of Ms Henry, Ms Crowe and Mr Greiner are relevantly affected by clause 5 of the Aged Care order and have standing to challenge it.

109 Fourth, Ms Ramos is relevantly affected by clause 4 of the Education Order and has standing to challenge it.

The Making of the Public Health Orders

110 The Minister did not give evidence in the proceedings. Each party sought to draw inferences about the manner in which the impugned orders were made. To address those submissions it is necessary to describe the evidence that was adduced on that topic.

Kassam Plaintiffs' Notice to Produce

111 On or around 17 September 2021, the Kassam plaintiffs issued various notices to produce which, amongst other material, sought production of the documents including "health advices" provided to the Minister in respect of the "formulation" of Order (No 2). After some correspondence their solicitor wrote to the solicitors for the State parties seeking confirmation that their evidence "will include all of the material which [the Minister] had before him when making Order No 2".[14] The solicitors for the State parties responded as follows:[15]

> "Your letter of 21 September 2021 states that the plaintiffs do not press category 3 of the Amended Notice and categories 4 and 5 of the Supplementary Notice, if the first to third defendants can "confirm that [the first to third defendants'] evidence will include all of the material which the First Defendant had before him when making Order No 2", being the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* made on 20 August 2021 ("Order No 2").
>
> I can confirm the following matters concerning the first to third defendants' evidence:
>
> • The evidence will include the material immediately before the first defendant when he made the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* on 20 August 2021.
>
> • The evidence will, further, address the general process by which the first defendant has been apprised of, or briefed with, information concerning COVID-19 and public health orders
>
> • The evidence will not address or include every piece of information or document concerning COVID-19 or public health orders that has been provided to the first defendant.
>
> • The evidence will refer to documents which are relevant to decision-making concerning the making of public health orders, in particular, the process by which the Crisis Policy Committee of NSW Cabinet makes such decisions. Those documents cannot be put into evidence because they are subject to public interest immunity. The evidence will address the basis upon which public interest immunity attaches to such documents." (underlined emphasis added)

112 As explained below, the evidence adduced on behalf of the State parties was consistent with this description. The significance of this response is that the issue was not pressed by the Kassam plaintiffs beyond this. Thus, the response to the notice cannot be utilised to draw inferences about everything that was notionally "before", as opposed to "immediately before", the Minister when Order (No 2) was made.

The Henry Plaintiffs' Notice to Produce and Public Interest Immunity

113 On 27 September 2021, the Henry plaintiffs issued a notice to produce to the Minister seeking "any documents ... [he] ... took into account in making … Clauses 5 and 7 of [the Aged Care Order] and clauses 4.3(3) and 4.3(3A) of [Order (No 2)].[16] In response, the State provided a schedule of 14 documents, 11 of which were produced.[17] For the other three, two of the documents were the subject of a claim for public interest immunity, being a presentation to the "Crisis Policy Committee" on 19 August 2021 and the decision of that committee on the same day. On 29 September 2021, Cavanagh J upheld a claim that they should be withheld from production under ss 130 and 131A of the *Evidence Act* (*Henry & Ors v Hazzard (No 2)* [2021] NSWSC 1235). The other document which was not produced was parts of an email chain dated 12 and 13 August 2021 which were the subject of a claim for legal professional privilege. On 28 September 2021 I upheld that claim.

The Crisis Policy Committee Meeting on 19 August 2021

114 In light of the response of the State parties to the notices to produce, it is necessary to describe the basis for the claim for public interest immunity over documents related to the making of Order (No 2) further. The State parties read an affidavit from the Deputy Secretary and General Counsel to the NSW Department of Premier and Cabinet, Ms Kathryn Boyd. Ms Boyd explained that, since the time of the 2019 to 2020 bushfires, the "Crisis Policy Committee" has met as required by the Premier to consider the response to that crisis and the COVID-19 pandemic. Ms Boyd states that the frequency of their meetings has varied from once a fortnight to daily and there have been over 150 meetings held since January 2020. This committee has been chaired by the Premier and its current membership includes ten other Ministers including the Deputy Premier, the Treasurer, the Attorney-General and the Minister for Health. Senior officials are requested to attend by the Premier. Ms Boyd has attended those meetings.

115 Ms Boyd states that the role and functions of the Crisis Policy Committee are set out in the NSW Human Influenza Pandemic Plan[18] which specifies that the committee is "to provide overarching strategic policy leadership and make decisions to address the implications and manage the risks of a pandemic".[19] Decisions of the Crisis Policy Committee are reported to the Cabinet and noted.

116 In relation to the making of Order (No 2), Ms Boyd states as follows:

> "17. In responding to the COVID-19 pandemic, the Crisis Policy Committee has [received],[20] and continues to [receive],[21] advice from senior officials, including

> advice from the Chief Health Officer and the Secretary of the Ministry of Health and Independent experts on the public health risks posed by COVID-19, and measures to mitigate those risks, such as directions under the *Public Health Act 2010.* Advice concerning such risks and measures, including options and recommendations, may be provided to the Crisis Policy Committee in documentary form. Where that occurs, such documents form part of the records of the Crisis Policy Committee.
>
> 18. The Minister for Health and Medical Research [attends][22] in the deliberations of the Crisis Policy Committee and has access to its submissions and decisions prior to making orders under s 7 of the *Public Health Act 2010*.
>
> 19. I attended the meeting of the Crisis Policy Committee that was held on 19 August 2021 prior to the making of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 20 2021.* The Minister for health and Medical Research also attended that meeting. I also attended meetings of the Crisis Policy Committee on 23 and 25 August 2021 and 1 September 2021 prior to the making of amendments to that Order. The Minister for Health and Medical Research attended those meetings. Documents prepared for and considered by the Crisis Policy Committee of Cabinet at the meetings on 12, 23 and 25 August 2021 and 1 September 2021 and that record the decisions of the Crisis Police Committee at those meetings form part of the records of the Crisis Policy Committee. [~~I believe that those documents would attract a claim of public Interest Immunity, for the reasons identified below~~]."

117 As can be seen from the rejected part of paragraph 19 of this affidavit, Ms Boyd sought to make claim for public interest immunity in relation to the deliberations of the Crisis Policy Committee that preceded the making of Order (No 2). The balance of her affidavit sets out various opinions she holds concerning the necessity to maintain the confidential nature of communications between Ministers in and about Cabinet decisions. Those opinions are consistent with the discussion of public interest immunity as it applies to cabinet documents in *Commonwealth of Australia v Northern Land Council and Another* (1993) 176 CLR 604; [1993] HCA 24. The premise of Ms Boyd's affidavit is that the Crisis Policy Committee is to be treated as a Cabinet committee (*State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at [64]). The last sentence of paragraph 19 was rejected because the Kassam plaintiffs did not challenge the claim for public interest immunity and, as noted, Cavanagh J upheld it when documents were sought by the Henry plaintiffs.

The Making of Order (No 2)

118 In the passage from Ms Boyd's affidavit set out above, she explains that a Crisis Policy Committee was held on 19 August 2021. On Friday 20 August 2021 at 3.57pm, Ms Boyd sent the Minister an email attaching an unexecuted version of Order (No 2) in its original form.[23] The draft included clause 5.8, being the vaccine requirement for construction workers who resided in areas of concern. The Minister was advised that the "measures agreed by the Crisis Policy Committee of Cabinet last night … will be included on a separate amendment order, which will commence at the beginning of Monday 23 August".

119 On Saturday 21 August 2021 at 6.44pm, Ms Boyd sent the Minister a further email attaching two amendment orders, one of which amended Order (No 2) from the beginning of Monday 23 August 2021.[24] This amendment introduced clause 4.3 which imposed the original vaccination condition on authorised workers who sought to leave their areas of concern noted at [49] above. Emails containing further amendments to

Order (No 2) sent on 25 August, 27 August and 1 September 2021 were tendered.[25] The email sent on 27 August 2021 attached the amendments to clause 4.3(3B) in relation to antigen testing, extended the date to be vaccinated to 6 September 2021 and clarified that vaccination condition only applied to those over the age of 16 years.

The Making of the Aged Care Order

120 Some of the material produced in response to the notice to produce issued by the Henry plaintiffs concerned the Aged Care Order.[26] It included correspondence between the Minister and his federal counterpart in mid-August about the implementation of "the National Cabinet decision to establish mandatory … vaccination requirement for aged care workers".[27]

121 At 4.55pm on 25 August 2021, the Minister was sent an email enclosing, inter alia, the Aged Care Order for signing and approval and a brief for the Minister.[28] The accompanying brief described the scope and operation of the proposed order in terms similar to that set out above. As noted, the grounds for concluding that there was a risk to public health set out in the order included a statement that the risk of transmission would remain significant and ongoing unless vaccines are administered ([78]). In addition, the brief to the Minister stated:

> "Residents of [Residential and Aged Care Facilities] are at increased risk of death from COVID-19, but not all residents will be able to be vaccinated or generate a sufficient immune response following vaccination to protect them from serious COVID-19. *Vaccination of all RACF staff will help to protect the vulnerable RACF residents from infection*." (emphasis added)

122 The Minister signed the order at 9.54am on 26 August 2021.

The Making of the Education Order

123 The State parties tendered a report prepared by the National Centre for Immunisation Research and Surveillance ("NCIRS") dated 8 September 2021 which provided an overview of surveillance of COVID-19 transmission in schools and early childhood and education care services between 16 June 2021 and 31 July 2021 with contact tracing and testing follow up data until 19 August 2021.[29] The report noted that, although children infected with COVID-19 are rarely hospitalised, infections nevertheless have long-term consequences for lack of access to education. It concluded that "[h]igher population-level rates of COVID-19 vaccination, including vaccination of school/ECEC staff are critical to reduce the risk of transmission … in the community and in educational settings".[30]

124 On 23 September 2021, the Minister signed a brief that he had received concerning the making of the Education Order.[31] The brief explained the operation of the proposed order in terms consistent with the above. The note also stated:[32]

> "There is an available vaccine, but the vaccination program roll-out is subject to a staged approach and there is limited immunity in the NSW community. Vaccination of workers in higher risk areas such as aged care, health care and those working in education settings is an essential part of reducing the risk that COVID-19 will spread

into the community."

125 The Minister signed the Education Order at 3.02pm on 23 September 2021.[33]

Other Evidence

126 The Kassam plaintiffs placed some reliance on a lengthy letter written by their solicitor, Mr Nikolic, in an independent capacity to the Minister on 7 July 2012.[34] The letter contained various assertions about COVID-19, the validity of the approval of vaccines and their effectiveness, the prevalence of side effects from the vaccines, the effectiveness of mask mandates and testing for COVID-19 using "PCR" methods (polymer chain reaction). He described the current health response as a "socially constructed emergency" in that there is said to be "a growing level of research that suggests establishment apparatuses use fear to oppress the citizenry".[35] One part of his letter asserted that there are "alternative treatments and preventative medications available" but added that "it will take the courage of political representatives to ensure patients can choose their treatment". The only preventative treatment that was specifically identified in the letter was the consumption of 12mg of Ivermectin taken every 7 days.[36]

127 On 10 August 2021, the then Premier of NSW held a press conference at which the Minister for Health was present.[37] During that conference the Premier referred to recent data suggesting that "[v]accination reduces the spread" and the data "strongly supports what was in the Doherty Report". At a press conference held the following day by the then Premier in the presence of the Minister, reference was again made to the "Doherty Report".[38]

128 On 31 August 2021, the Minister conducted a press conference during which he urged people to receive vaccinations. He stated "if we fail to get vaccinated, then we're putting ourselves our families at risk, we're putting our community at risk, we're putting front line health staff at risk...". He added that "[n]ot getting vaccinated is actually self-entitled and indulgent in the extreme in the middle of a pandemic".[39]

Findings

129 The absence of direct evidence from the Minister, the limitations on the answer to the notice to produce so far as Order (No 2) is concerned, and the successful claims to withhold production of some material on the basis of legal professional privilege and public interest immunity have left the Court with an incomplete set of materials to establish what was and was not considered by the Minister in making the impugned orders especially Order (No 2). This is not an unusual outcome in judicial review proceedings especially where claims for public interest immunity are upheld (*Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33 at [33] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

130 However, the Kassam plaintiffs and the Henry plaintiffs sought to overcome this

evidentiary lacuna by seeking a *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inference or relying on *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969. The former entitles a court to, inter alia, draw an inference unfavourable to a party from their failure to call a witness whom that party would have expected to call (*ASIC v Hellicar* (2012) 247 CLR 345; [2012] HCA 17 at [232] per Heydon J). *Jones v Dunkel* is but an example of the maxim enunciated in *Blatch v Archer* that all evidence is to be weighed according to the proof which it was in the power of one side to have produced (*G v H* (1994) 181 CLR 387 at 391 to 392; [1994] HCA 48).

131 These principles do not assist the plaintiffs. So far as the State parties did not adduce evidence of all the documents relied on by the Minister, a *Jones v Dunkel* inference cannot be drawn in respect of the failure to produce documents that are the subject of a proper privilege claim because the failure to produce them is explained and justified. The same applies in relation to any reliance on *Blatch v Archer*.

132 Insofar as the Minister did not give evidence, Senior Counsel for the Henry plaintiffs, Mr Clarke QC, contended that there is no rule that inferences can never be drawn from the failure of a Minister to give evidence, a proposition I accept. However, their position is different to many other classes of witness. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 ("Jia") at [317] Callinan J observed:

> "It is unnecessary to decide in this case whether the rule [in Jones v Dunkel] should have application to a Minister in modern times. But on any view it cannot be applied in any unqualified way to a modern Minister of State, and not just for the reasons that Pincus J described as cogent. Considerations of public interest immunity may loom large in some cases. A Minister is a policymaker and policy advocate as well as a decision-maker. Furthermore, the statement of principle in *Jones v Dunkel* is no more than a particular instance of the old rule stated by Lord Mansfield in *Blatch v Archer* … . that evidence has to be weighed according to the circumstances of, as well as the capacity of a party to adduce it*."*

133 The reference to the "reasons that Pincus J described" is to the various burdens on the time of Ministers which would be imposed by giving evidence in Court proceedings that were described by Pincus J in *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 11 FCR 543 at 548; [1986] FCA 290). This consideration is particularly apposite to a health minister in the time of a pandemic. The reference to public interest immunity and the capacity, or perhaps incapacity, of a party to adduce evidence is also of particular significance. It follows from the above that a significant amount of any evidence the Minister might be expected to give about his deliberations in making Order (No 2) and the other impugned orders would be likely to reveal aspects of the advice received by and deliberations of the Crisis Policy Committee for which a public interest immunity claim has been upheld and cannot be waived.

134 Accordingly, I do not draw any inference from the failure of the Minister to give evidence in circumstances where it has been shown that aspects of his decision making necessarily resulted from consultations in a cabinet sub-committee and given his very serious competing responsibilities in responding to a pandemic. Otherwise, it is to be

remembered that the onus of proof is on the plaintiffs and before questions arise about what inferences might follow about the decision-making process that led to the making of the impugned orders from the failure of the State parties to adduce more evidence or call the Minister, there has to be some evidence in favour of the relevant fact that each plaintiff asserts.

135 Mr Clarke QC contended that, based on the Minister's comments in the press conference on 31 August 2021 ([128]), it should be inferred that the Minister did not give any consideration to the effect of the impugned orders on the right to bodily integrity and the right to earn a living.[40] It follows from the above analysis that I do not accept that the orders infringe any right to bodily integrity. So far as the "right" to earn a living, as explained below, I do not accept that it is a right protected by the principle of legality. Further, I am not satisfied that the Minister did not appreciate or "consider" the impact of the impugned orders on freedom of movement including the capacity to earn a living (as opposed to the "right") including the differential impact on those who are not vaccinated. No one who read the impugned orders could fail to appreciate that. The Minister's description of people who refuse to be vaccinated as "indulgent" is not synonymous with being ignorant of the effect of the orders on them or indifferent to that effect. It is consistent with the role of Ministers described by Callinan J in *Jia* namely as a "policy advocate", in this case an advocate for vaccination.

136 Mr Clarke QC also sought the drawing of an inference from the failure of the Minister to swear an affidavit stating what factors he took into account. It follows from the above that I decline to draw any inference from that failure. He also sought the drawing of inferences from the failure of any adviser of the Minister to swear an affidavit stating "what matters were before the Minister and what matters were taken in account by the Minister".[41] One difficulty with that submission is that an adviser, namely a Deputy Chief Health Officer, Dr Marianne Gale, attempted to say something to the effect that the modelling of the Doherty Institute on transmission rates for various vaccination rates in the community informed decisions of the Minister.[42] Following an objection by the Kassam plaintiffs I rejected this part of her evidence because she was attempting to give evidence of the mental processes of another. In any event, the submission only begs the question as to what factor it is said that the Minister did not take into account, a matter I address below in relation to ground 3 of the Henry plaintiffs' challenge. As explained there, none of the matters they raise are relevant considerations within the proper understanding of that ground of review.

137 However, equally in the absence of direct evidence from the Minister and given that the decision-making process for Order (No 2) is partly shrouded in cabinet secrecy I adopt a cautious approach to drawing inferences in favour of the State parties. Even so, some findings can be drawn about the decision-making process. For example, I infer that, where the Minister has been sent a briefing and a public order, he read it before signing off on the order. Further, based on the email noted at [118], it is clear that the

decision to include a vaccination condition for authorised workers who wished to leave their relevant area of concern as reflected in the amendment made to Order (No 2) was addressed at the Crisis Policy Committee meeting on 19 August 2021.

138 The State parties sought a finding that, when he made the impugned orders, the Minister was familiar with the Doherty Institute modelling concerning the spread of the Delta variant amongst populations with different vaccination rates. They point to the reference to the "Doherty modelling" in the then Premier's press conference on 10 August 2021 which the Minister attended. Given the approach taken by the State to adducing evidence, I am only prepared to draw the inference that he understood that such modelling had been undertaken and that it addressed the differences in likely transmission rates depending on vaccination levels but not that the Minister had a detailed understanding of what those rates were. I otherwise draw the inference that throughout August 2021 and thereafter the Minister was acting on the basis that vaccination materially reduced the risk of transmission from one person to another. That was expressly stated by the then Premier in the press conferences on 10 and 11 August 2021 that he attended; it was the entire rationale for the making of clause 4.3 on 23 August 2021; the Minister was specifically told that in the briefing note on 25 August 2021 concerning the making of the Aged Care Order; it is recorded in the grounds for that order signed off by the Minister the next day; it was reiterated in the brief sent to him in relation to the Education Order on 23 September 2021 and also recorded in the grounds for that order when he signed it.

The Expert Evidence

139 At the hearing of these proceedings the parties adduced evidence from various experts that addressed a wide range of issues relevant to the public health response to COVID-19. The two experts called by the State, Dr Marianne Gale and Professor Kristine Macartney, were cross examined. None of the experts called by the plaintiffs were cross-examined.

140 The basis for the tender of this material was that it was said to be relevant to so much of each parties' case that contends that the impugned orders were unreasonable. For my part I was, and still am, doubtful that much of it could be deployed in that way. In any event, at this point it is appropriate to describe the evidence bearing in mind that the particular focus of the Kassam plaintiffs in alleging unreasonableness was the alleged failure of the Minister to either investigate or act upon potential treatments for COVID-19 rather than adopting so-called vaccine mandates. The focus of the Henry plaintiffs' case on unreasonableness was on the adoption of vaccine mandates when it is said that there is uncertainty surrounding the safety and efficacy of vaccines especially so far as the Delta variant is concerned.

The Expert Evidence adduced by the State Parties

141 As noted, Dr Gale is a Deputy Chief Health Officer. She is a public health physician and a Fellow of the Australian Faculty of Public Health Medicine. Prior to taking up her current position in August 2021, she was the Director of Population and Community Health in the South Eastern Sydney Local Health District from December 2019. She has a degree in medicine as well as Master's Degree in Public Health and Tropical Medicine, and a Doctorate of Public Health.[43] Her affidavit outlines the rationale and justification for a number of aspects of the public health response embodied in the impugned orders and their predecessors. She also summarises the effect of the Doherty Institute modelling referred to earlier. She contends that it indicates that, without high vaccination rates, a combination of public health and social measures ("PHSM") such as social distancing and mask requirements together with testing, tracing, isolation and quarantine ("TTIQ") measures are not sufficient to control the current outbreak.[44]

142 Professor Macartney is a vaccinologist, infectious diseases physician and paediatrician. She is a Professor in the Faculty of Medicine and Health at the University of Sydney and the Director of the National Centre for Immunisation Research and Surveillance. Professor Macarney is also an infectious diseases consultant to the Children's Hospital at Westmead and an expert advisor to the World Health Organisation, governments and other peak bodies.

143 In her report, Professor Macartney was asked 25 questions which in effect invited her to respond to various assertions made by a number of the experts whose reports were tendered by the plaintiffs. Rather than outline all of those answers and her response, I will outline her evidence as I summarise the material relied on by the plaintiffs.

144 Consistent with the statement in the opening part of this judgment ([7]), in determining the validity of the impugned orders, it would not ordinarily be the Court's function to conclusively resolve legitimate debates concerning the appropriate treatment(s) for COVID-19 or the effectiveness of the vaccines. This is so because, in determining whether the plaintiffs have discharged their onus of demonstrating that the impugned orders were unreasonable, the fact that there is genuine scope for debate about the appropriateness of a response to an identified risk or some fact highly relevant to that response is virtually determinative of the fact that they had not done so. Equally it would ordinarily not be necessary in these circumstances to resolve competing views about such topics expressed by leading experts in a particular field. For example, Professor Bhattacharya whose report was tendered by the Kassam plaintiffs is well qualified and opines against the imposition of lockdowns as a response to the pandemic. Professor Macartney disagrees with him as does Dr Gale. This only serves to demonstrate the potentially wide range of views concerning the response to COVID-19. The fact that well qualified experts in the area disagree provides no support for the suggestion that deciding to impose lockdowns is an unreasonable method of "dealing" with the identified "risk and its possible consequences" as referred to in s 7(2)

of the PHA.

145 Nevertheless, the Kassam plaintiffs submitted that lesser weight should be given to Professor Macartney's evidence because she was not directly involved in the treatment of patients with COVID-19 and she had the temerity to accept public funding for research.[45] The Henry plaintiffs also urged me to give her evidence and that of Dr Gale "very little weight".[46] In the case of Professor Macartney, this was said to be warranted because it was contended that, in her oral evidence, she exhibited the characteristic of being an "advocate" for the cause of the State parties.[47] I reject all of these contentions. Professor Macartney was an extremely impressive witness. With the possible exception of Professor Bhattacharya, she had vastly superior qualifications to opine on the various topics that she did compared with the experts relied on by the plaintiffs, especially Dr Parks. Just because the plaintiffs' experts were not cross-examined, does not make their evidence more persuasive or their qualifications superior to what they are. In relation to the suggestion that Professor Macartney has not been actively treating patients with COVID-19, she explained that is so because, at the hospital in which she practises, they "have been divided into teams of COVID and non-COVID infectious disease clinicians" presumably to minimise the risk of transmission.[48] To the extent that it is necessary to decide, and with the exception of Professor Bhattacharya's evidence on lockdowns, where the various witnesses disagreed with Professor Macartney I accept her evidence.

The Kassam Plaintiffs' Evidence Concerning Alternative Treatments and Professor Macartney's Response

146 The Kassam plaintiffs read an affidavit from Professor Thomas Borody who is the founder and Medical Director of the Centre for Digestive Diseases and holds three Doctorates in Medicine, Philosophy and Science.[49] He stated that he has previously developed the so-called "triple therapy" for the cure of ulcers. In his affidavit he states that he has developed an "effective and cheap Covid-19 treatment that is comprised of ivermectin, zinc and doxycycline". He states his treatment has been effective in treating patients with COVID-19 and refers to an article documenting a study of its use which has been submitted for publication. He accepts that ivermectin is not an approved medication for the treatment of SARS-COVID-19 and says, for that reason, has not been through an approval process for COVID-19 indication. He states that the treatment can complement the use of vaccines.

147 In his affidavit Professor Borody asserts that the Federal Minister for Health wrote to him on 27 August 2020 and "specifically instructed me that doctors in Australia can prescribe ivermectin and other components of 'off label'.[50] He annexes that letter. The letter does not contain any instruction that doctors in Australia can prescribe ivermectin and other components off label. In fact, what the Minister stated was:

> "Whilst shown to be effective in the lab environment, ivermectin cannot be used in humans for COVID-19 until further testing and clinical trials have been completed to

> show that it is safe and effective in humans.
>
> … I acknowledge some physicians are prescribing ivermectin off label. As you would know the practice of prescribing registered medicines outside their approved indications is not regulated nor controlled by therapeutic goods Association as it is at the discretion of a prescribing physician."

148 The balance of the letter encourages Professor Borody to seek funding for trials of ivermectin. It suffices to state that nothing in Professor Borody's report provides any assistance for the Kassam plaintiffs claim that the impugned orders are unreasonable.

149 The Kassam plaintiffs read an affidavit from Professor Ian Brighthope. Professor Brighthope's speciality is nutritional medicine. He graduated from medicine and surgery in 1974. According to his curriculum vitae, he developed an interest in nutritional and environmental medicine and developed the "Brighthope Clinics and Biocentres" in the 1970's. These centres specialised in treating a range of conditions such as heart disease, psychological disorders, arthritis, asthma and autoimmune diseases with "megadoses of intravenous vitamin C and other nutrients". He is currently a director of the National Institute of Integrative Medicine at Swinburne University which he states "honoured [him] with a Full Professorship" in 1996.

150 Professor Brighthope's affidavit addresses the use of vitamin C, vitamin D and zinc in the treatment of COVID-19. The following summarises his opinion[51]:

> "41) In summary, Covid-19 poses very little risk to people of good health. The judicious use of nutritional supplements as described above will prevent most respiratory infections and in particular, Covid-19. Supplementation will prevent the serious infections and hospitalisation and should be managed by trained medical practitioners, nurse practitioners and scientists with appropriate training in nutritional immunology. The most important supplements are oral and/or injectable Vitamin D, oral and injectable Vitamin C and Zinc. The injectables are only used on a case by case basis and would apply to a very small percentage of the population. The entire population should be educated as to the value of these nutrients and it should not be a difficult task. Over 70% of Australians take vitamins. The proper use of Vitamin D by elevating the blood levels of the entire population to 120 and preferably 150nmol/L will remediate the deficiency and protect everyone against severe illness and death. The vast majority will be asymptomatic if infection occurs.
>
> 42) Should there be individuals who do develop a breakthrough and moderate infection, on admission to hospital they should be administered High Dose Intravenous Vitamin C immediately and if their Vitamin D is insufficient or deficient, an injunction of calcifediol should be administered to achieve optimal Vitamin D status. Intravenous zinc and other nutrients may be necessary but again individual needs must be assessed. These procedures will effectively prevent clinical deterioration and complications including inflammation, thrombosis, ARDS, ALI, sepsis and opportunistic bacterial and viral infections. This also applies to other acute, severe, viral respiratory infections including coryza, influenza and coronaviruses. It is the best non-specific defensive management of the patient.

151 No academic publications, research papers or regulatory approvals are referred to in Professor Brighthope's affidavit as supporting these opinions.

152 The Kassam plaintiffs also read an affidavit from Dr Brian Tyson who is a board-certified physician based in California.[52] He owns three "Urgent Care Centres" in Imperial County of California. He says he has treated almost 6,000 patients with COVID-19. From his review of his records of treating approximately 5,700 patients, he said he had lost no patients where treatment was started before day 7 and lost 4 patients where treatment was started after day 7. He annexes a report setting out his

opinions on appropriate health responses to the pandemic. One part of his report addressing the New South Wales government's response was rejected as inadmissible. However, the balance of his report was admitted and addressed what he considered to be the proportionate reasonable public health response to Covid-19.

153 Dr Tyson contended that the appropriate response should focus on early treatment as it minimises morbidity and mortality, that healthy people should be allowed to function in their day to day activities as normal and that mass vaccination should exclude those with natural immunity, those under the age of 20 and those with unknown long-term adverse effects, such as fertility issues, cognitive issues, autoimmune disorders, cancers and dementia.[53]

154 Dr Tyson also opined that hospitalisation should be focussed on the ability to use any and all drugs that have been shown to be efficacious. He asserts that hydroxychloroquine and ivermectin are effective as is a balanced immune system that includes vitamin C. Later in his report he identifies other treatments including, zinc, zithromax, dexamethasone and aspirin.[54]

155 With two exceptions (monoclonal antibody infusion and dexamethasone in some circumstances), Professor Macartney rejected any suggestion that any of the treatments suggested by Professor Borody, Professor Brighthope and Dr Tyson including vitamin C, zinc and ivermectin are safe and effective treatments against COVID-19.[55] She noted that other than those two treatments, none of them were approved by the Therapeutic Goods Administration ("TGA") for treatment of COVID-19, that the TGA had specifically stated that there was insufficient evidence to support the safe and effective use of ivermectin, doxycycline and zinc and that hydroxychloroquine was not recommended for use with COVID-19 outside of clinical trials.[56] Further, she added that, even if they were effective, "disease modifying treatments do not replace the basic tenet that prevention of severe disease through vaccination and other measures (such as public health and social measures) to reduce [the] likelihood of being infected are core to preventing serious widespread harm" from COVID-19.[57] Professor Macartney was cross-examined on these opinions to no effect.[58] She confirmed that she had prescribed ivermectin for what is "indicated" (ie, approved for) namely parasitic infections[59].

156 An affidavit from Dr Tyson was read in reply to Professor Macartney's report.[60] He reiterated the success he says he has had with the various treatments and referred to studies published on websites that appeared associated with those treatments such as https://c19zinc.com in relation to zinc. It was not demonstrated that any of those websites were reputable scientific journals.

157 I reiterate my acceptance of Professor Macartney's evidence on this topic. She is a more qualified expert to opine on the topic on the suitability of these treatments than the witnesses called by the Kassam plaintiffs. At the risk of repetition, save for the two treatments noted in [155], they have not been approved by the TGA and nor was there

tendered any reputable published peer reviewed studies demonstrating their effectiveness.

The Kassam Plaintiffs Evidence Concerning Vaccine Effectiveness and Professor Macartney's Response

158 The Kassam plaintiffs read an affidavit of Dr Sabine Hazan sworn 8 September 2021. [61] Dr Hazan is the owner of a United States based unique sequencing laboratory which undertakes microbiome research. She has been undertaking research into the presence of whole genomes of SARS COV-2 in stools. In her affidavit she states that her laboratory discovered the presence of a simple strain of SARS COV-2 in stools collected in June 2021 from two vaccinated patients. She stated that the simple strain of SARS COV-2 has only a single spike which is different from the complex strains that have been collected from naturally infected patients during the same time which have multiple spikes. She says the presence of simple spikes is surprising at this time when one considers the virus evolves from simple to complex.

159 Professor Macartney, was cross-examined about this aspect of Ms Hazan's affidavit. One proposition put to Professor Macartney was that it indicates that a vaccinated patient may transmit COVID-19. Professor Macartney agreed with that proposition but said it was unclear whether that was all that was sought to be suggested by Dr Hazan's evidence. Professor Macartney added that, if what was sought to be taken from Dr Hazan's evidence was the fact that a virus could mutate or change because of being "passaged through a stool", then she disagreed. [62] This was never clarified by the Kassam plaintiffs. Dr Hazan's affidavit does not advance any aspect of their contention that the impugned orders were unreasonable.

160 The Kassam plaintiffs also relied upon a report of Dr Peter McCullough MD Mph. [63] Dr McCullough is based in Texas and has board certifications in Internal Medicine and Cardiovascular Disease. He currently works at the Texas A & M University College of Medicine in Dallas and has worked at a number of hospitals and health institutes for over 20 years. Dr McCullough provided a report in which, based on the review of various articles, he expresses the opinion that COVID-19 "causes an infection in humans that results in a robust and complete endurable immunity". He further opinions that "natural immunity is superior to vaccination induced immunity". [64]

161 In cross-examination, Professor Macartney was asked about an assessment of the relative strengths of natural immunity compared to the immunity offered by vaccination. She stated that the various reports she has examined "have generally concluded that immunity from vaccination is tracking along similarly to immunity from natural infection" but added that "it may be that we learn over time that vaccination induced immunity does track at a slightly lower rate than infection induced immunity, but that is not yet completely determined". [65]

162 This topic is addressed further below. As this point it suffices to state that no definitive

assessment has yet been made of the relative strength of the immunity offered from having been infected with COVID-19 compared to vaccination. Interesting as this topic may be, it adds nothing to any challenge to the impugned orders on the grounds of unreasonableness. The material suggests that Australia is a long way from arriving at herd immunity based on people having been infected with COVID-19. It would be well open to a Minister to make public other orders on the basis that, even if vaccination is not likely to provide the same level of immunity as that which is acquired from having been infected, the adoption of PHSM measures and a vaccination program that includes "mandates" of the kind here is a preferable method of "dealing" with risk and its possible consequences compared to the toll that would be borne by mass infection.

163 The Kassam plaintiffs also read an affidavit from Michael Palmer MD who is an Associate Professor of Chemistry at the University of Waterloo in Ontario.[66] Mr Palmer states that he is trained and certified in medical microbiology and infectious disease epidemiology by the medical board of the province of Rhenania-Palatinate in Germany. His curriculum vitae indicates that he worked at the Department of Medical Microbiology and Hygiene at the University of Mainz in Germany from 1991 to 2000 and then for one year as a research scientist at the Institute of Medical Biochemistry and Genetics at Texas A & M College.[67] Since that time he has worked at the University of Waterloo. He states that he has spent much of his time in the last year researching the science and medicine of COVID-19. He attaches to his affidavit a memorandum which "summarises my findings pertaining to the necessity and the efficacy and the safety of the Covid vaccines with particular emphasis on the vaccine manufactured by Pfizer and/or AstraZeneca".[68] As best as I can ascertain, his research only consisted of reviewing various papers.

164 In that memorandum, under the heading "Necessity", Mr Palmer contends that the case fatality rate of COVID-19 in the general population is low, that COVID-19 is dangerous to only to those with comorbidities, that most people are now immune to SARS-CoV-2, and wide vaccine mandates have been imposed without consideration of natural immunity. In relation to efficacy, he contends the manufacturers of the mRNA vaccines, namely Pfizer and Moderna, used a contrived and clinically irrelevant case definition to support their data.[69] He asserts that the proportion of cases occurring in vaccinated individuals now is virtually the same as the vaccination rate in the population indicating the vaccination does not affect the risk of infection.[70]

165 So far as safety is concerned, Mr Palmer sets out a number of asserted potential side effects or concerns in relation to Covid vaccinations including potential risks to fertility, the breastfed newborn and blood clotting affecting the autoimmune system.[71] In relation to the AstraZeneca vaccine, he refers to the possibility that its viral DNA could be integrated into the human genome, and it might undergo genetic recombination with naturally occurring known viruses or cause thrombosis.[72]

166 Mr Palmer concluded as follows:[73]

> "The evidence discussed in this document unambiguously shows that the Pfizer and the AstraZeneca COVID-10 vaccines are not safe, not effective, and not needed. The same applies to all other gene-based COVID-19 vaccines. Against this background, imposing mandatory vaccination on the people cannot be rationally or ethically justified."

167 Professor Macartney comprehensively rejected Mr Palmer's conclusions. She said that there was no evidence to support his attack on the methodology adopted by Pfizer, AstraZeneca and Moderna in their clinical trials.[74] So far as adverse health effects from the use of the vaccine are concerned, Professor Macartney noted that "mild to moderate short-term side effects occur very commonly in the first few days after vaccination with Pfizer, Moderna or AstraZeneca being expected reactions from the immune systems response to the vaccine and which generally resolve within a few days of vaccination". [75] Professor Macartney accepted that "serious adverse events attributed to vaccination have been shown to occur very rarely". Professor Macartney described them as including:[76]

> • **anaphylaxis:** this is life-threatening serious allergic reaction which is readily treated with adrenaline. It occurs shortly after vaccination in approximately 1 to 10 out of every 1 million people vaccinated.
>
> • **thrombosis thrombocytopenia syndrome (TTS or VITT):** this is a newly described serious condition involving unusual types of blood clots in association with a low blood platelet count. It is treatable but in some cases will result in serious outcomes or death, if untreated. It occurs between 4 and 31 days after vaccination with AstraZeneca or Janssen COVID-19 vaccine. The estimated rate in Australia is approximately 2-3 cases per every 100,000 people after the first dose of the AstraZeneca vaccine. It is extremely rare after the second dose (approximately 1-2 cases per million doses).
>
> • **myocarditis and pericarditis:** these conditions involve inflammation of the heart muscle (myocarditis) and/or inflammation of the thin sac that surrounds the heart (pericarditis) and occur rarely after either mRNA COVID-19 vaccine (Pfizer or Moderna) particularly in young people aged <40 years. It is most common in males after the second dose. For Pfizer vaccine, the rate in this age group ranges from 1 to 5 cases per 100,000 people vaccinated. It is generally mild and resolves without significant treatment.
>
> No other serious or long-term adverse events have been shown to be definitively caused by COVID-19 vaccines, although some cases of immune thrombocytopenia (ITP) and Gullian-Barre syndrome (GBS) have also been linked to the vaccine, as have very rare cases of capillary leak syndrome. However, many of these events can occur in the absence of vaccination (without other clear cause); any potential risk after vaccination appears very rare and is outweighed by the benefits of vaccination."

168 Professor Macartney added that, just because an adverse event was reported after a vaccination, it does not mean that it was caused by the vaccination. In addition, under cross-examination by Mr Clarke, Professor Macartney stated that there was "reassuring data … on the safety of vaccines in pregnancy".[77]

169 In relation to Mr Palmer's opinions generally, Professor Macartney stated that they were contrary to those held by "reputable health professionals and as published in high-quality scientific and medical journals and regulatory guidance and expert derived practice guidelines in countries around the world." She concluded that Mr Palmer's "opinions are not within the mainstream of scientific opinion". [78]

170 It follows from the above, that I accept Professor Macartney's response to Mr Palmer's report. I have described his qualifications above. Although he has qualifications in microbiology, he is currently teaching biochemistry and his real claim to expertise is that

he has read many articles in the last year about COVID-19 vaccines. Like Dr Parks whose evidence is addressed below, his qualifications are vastly inferior to that of Professor Macartney. That circumstance gives the Court less confidence that his selection of articles from amongst the large array of material concerning COVID-19 was the result of the impartial judgment that is expected of expert witnesses in expressing their opinions.

Professor Bhattacharya's Report

171 The Kassam plaintiffs read an affidavit attaching a report entitled "Lockdowns and the Science of COVID" from Professor Jayanta Bhattacharya.[79] Professor Bhattacharya is a tenured Professor of Medicine at Stanford University in California. He has specialised knowledge in health policy, infectious disease policy and health economics with a focus on infectious disease epidemiology. As its title implies, his report is overwhelmingly directed to the use of lockdowns as a health response to COVID-19. Save for three sections, his report appears to be identical to the report that was tendered during the hearing before Griffiths J in *Athavle v State of New South Wales* [2021] FCA 1075 ("Athavle") and summarised by his Honour at [40] to [53]. The differences appear to be that the report tendered in those proceedings included a section concerning the benefits of religious services which was not included in the report tendered in this case and did not include sections F and G of the report tendered in these proceedings which are described next. The basis of the challenge in *Athavle* was the effect of lockdowns on freedom of religion (at [47]). Given that the focus of the Kassam plaintiffs in these proceedings is not the lockdown measures in Order (No 2) per se, but the provisions concerning vaccination, I am content to adopt Griffiths J's summary of Professor Bhattacharya's report in *Athavle* on the topics common to both reports.

172 Section F of Professor Bhattacharya's report tendered in these proceedings is entitled "Do Vaccine and Natural Immunity Both Provide Durable Protection Against Reinfection and Against Severe Outcomes if Reinfected".[80] Section G of the report is entitled "Are Vaccine Mandates or Passports Warranted as a Public Health Measure"[81]. In section F, Professor Bhattacharya stated that both vaccine-mediated immunity and natural immunity after recovery from COVID-19 infection provide extensive protection against severe disease from subsequent infection.[82] As for protection against reinfection, Professor Bhattacharya considered that "vaccine immunity against reinfection is not particularly long lasting, though vaccine protection versus severe disease appears to be long lasting".[83]

173 In Section G of his report, Professor Bhattacharya identified three reasons not to adopt vaccine mandates. The first is the short duration of the protection against infection. He states that "after 5 months, the vaccines no longer provide protection against infection".[84] The second was that, in his view, such mandates undermine confidence in public health because they will induce a loss of trust.[85] He observed that the "public has lost

trust in officials because they've performed poorly – relying on lockdowns that have failed to keep the disease out of Australia".[86] The third was that "though the COVID vaccines are safe by the standards of many other vaccines approved for use in the population, like all medical interventions, they have side effects".[87] His description of the side effects are consistent with that given by Professor Macartney's noted above.

174 In addressing Professor Bhattacharya's reports in *Athavle*, Griffiths J described him as a "well-regarded expert in his field" (at [54]), an assessment I agree with. However, his Honour did not attribute much weight to his report at that (interlocutory) stage of the proceedings for three reasons. Although those reasons were enunciated by Griffiths J in the context of a challenge to instruments effecting a lockdown and their effect on religion, they are still apposite to the attempt to use Professor Bhattacharya's evidence concerning "vaccination mandates" as a means of demonstrating the unreasonableness of the impugned orders.

175 The first reason given by Griffiths J for giving Professor Bhattacharya's report little weight, was that it was apparent to his Honour that the report was "directed to overseas jurisdictions" and it had "some limited references to Australian conditions" (*Athavle* at [54]). Similarly, in this case, Professor Bhattacharya's assessment about "vaccine mandates" in section G of his report contains a number of highly contestable assertions about Australian conditions. For example, the chosen method for "keep[ing] the disease out of Australia" was not just lockdowns, it was border control measures and lockdowns. Whether those measures have "failed" compared to overseas jurisdictions is matter for real debate. In her report Professor Macartney extracts data indicating that the incidence of COVID cases and deaths per million people in Australia is at the lowest end of the range amongst comparable countries.[88]

176 Further, the Court is in no position to assess whether the "public has lost trust" in the approach of its public officials to COVID-19 and I do not accept that Professor Bhattacharya is either. Clearly, an assessment of whether "public trust" has been lost is highly subjective. The residents of Tasmania, Western Australia and Queensland may have a very different viewpoint on the effectiveness of the combination of lockdowns and border controls to those of Victoria and NSW. Even within NSW and Victoria there is a difference between being weary from lockdown measures and concluding that they and the officials who implement them have "failed". A case that pitches unreasonableness on the basis of an assessment of "public opinion" has obvious difficulties.

177 The third reason given by Griffiths J in *Athavle* for giving Professor Bhattacharya's report little weight, was that Professor Bhattacharya did not directly address the terms or substance of any of the impugned instruments in that case (at [56]). Similarly, in this case, Professor Bhattacharya accepted that vaccines offer at least a short-term level of protection against infection (and thus retransmission). As noted, orders under s 7(2) are limited to 90 days and the operation of the impugned orders coincides with the

period in which significant parts of the population are experiencing the protection against infection that Professor Bhattacharya accepts vaccines provide.

178 The second reason given by Griffiths J for giving Professor Bhattacharya's report little weight was as follows (*Athavle* at [55]):

> "Secondly, and perhaps more importantly, Professor Bhattacharya's evidence represents a different view as to how complex policy choices should be made in a pandemic. Even if it were accepted that his views are reasonable views, merely because reasonable minds might differ on policy choices manifested in the impugned instruments does not demonstrate unreasonableness and/or disproportionality. Nothing in Professor Bhattacharya's evidence rises so high as to suggest that there is a serious question to be tried that any of the impugned instruments is beyond power in the legal sense. In evaluating his evidence, it is important for the Court not to be drawn into a merits review of the impugned instruments."

179 I agree with this assessment. In my respectful opinion, save for the reference to the test for interlocutory relief, it accords with the proper approach to be adopted by a Court considering a challenge to orders of this kind on the basis that they are unreasonable.

Dr Park's Evidence Adduced by the Henry Plaintiffs and Professor Macartney's Response

180 Over an objection from the State parties, the Henry plaintiffs read two affidavits from Dr Christina Parks each of which attached a report from her addressing the efficacy of the COVID-19 vaccines.[89] The objection concerned whether she had the requisite "specialised knowledge based on [her] training study or experience" to opine on that topic (*Evidence Act*, s 79). In the curriculum vitae attached to her first report[90], Dr Parks states that she received a PhD in Cellular and Molecular Biology from the University of Michigan in 1999. Thereafter she was an editor of a biology textbook for secondary schools for four years. Since 2004 she has taught in a high school and then a home study co-operative.

181 After hearing submissions on the State's objection, I granted the Henry plaintiffs leave to file an affidavit supplementing her Curriculum Vitae. In that affidavit,[91] Dr Parks explained that the studies that lead to her PhD enabled her to understand the "mechanisms by which various vaccine technologies affect the immune system" and enabled her to "evaluate vaccine design". Upon considering that affidavit I concluded that Dr Parks met the threshold for her evidence to be admitted in that she appeared to have specialised knowledge based on her "study" of vaccine development. However, she only just overcame that threshold. That study was undertaken some 20 years prior to the making of her affidavits and she had not acquired any further specialised knowledge in the meantime but instead pursued a career as a secondary school educator. The difference between her qualifications to opine on vaccine effectiveness and Professor Macartney was vast. While much of Dr Parks' reports consisted of her documenting conclusions based on particular articles, the level of expertise of an author of such a report is of great significance to the Court's assessment of whether the source materials were truly representative or only selective and whether she was justified in extrapolating from the specific to the general. In the case of Professor

Macartney, her level of qualifications and impression as a witness has given me a high degree of confidence in the process she undertook. In the case of Dr Parks, her level of qualifications has not given me that level of confidence.

182 The questions asked of Dr Parks were all directed to the effectiveness of the COVID-19 vaccines in preventing or inhibiting transmission of COVID-19 especially the Delta variant. Throughout her report, she emphatically stated that they did not. In her report Professor Macartney rejected Dr Parks' opinions.[92] In her second report Dr Parks provided a response to Professor Macartney's report in which she reiterated her conclusions although she accepted that "epidemiological data may infer a reduction in the risk of transmission" but reiterated that there was no study to that effect.[93]

183 Given that the potential for the COVID-19 vaccines to reduce transmission rates was the basis on which the Minister acted in making the impugned orders, the difference between the evidence of Dr Parks and Professor Macartney is best illustrated by what they said on that topic. Thus, Dr Parks was asked whether the COVID vaccines are effective in preventing infection by or transmission of SARS CoV-2 and the Delta variant of SARS COV-2. She replied as follows[94]:

> "No, the current Covid vaccines do not appreciably prevent transmission of SARS-CoV-2 or prevent infection with the virus. The EUA was granted on the basis of symptom reduction *only*, not on stopping transmission. So, they are 95% effective based only on their clinical trials at attenuating symptoms [*ref 1*] and only for the first variant, since the clinical trials only assessed the first variant. The first variant is essentially gone from our population right now. [*ref 2*]
>
> Consistent with the inability of current vaccines to prevent transmission, recent studies have shown, especially with the Delta variant, that the vaccinated and the unvaccinated have similar amounts of virus in their nose and throat. [*ref 3*] Several other recent studies are also instructive. One study showed that persons who were vaccinated were 13 times more likely [*ref 4*] to catch the delta variant than those already naturally immune. This may be why despite 83% of the University of San Diego healthcare workforce being vaccinated, 227 people still got sick with the virus. Of the sick persons, 57.3% were vaccinated. [*ref 5*] The high rate was attributed to "the emergence of the delta variant and waning [vaccine] immunity over time." Likewise, Israel, the most vaccinated nation in the world (>80% vaccinated), is seeing a huge spike in cases, [*ref 6*] while their largely unvaccinated neighbors in the Palestinian territories (11% vaccinated) are not. In one final example, in Barnstable, Massachusetts, the CDC tracked an outbreak of 469 cases of COVID-19. Of those cases 74% occurred in fully vaccinated people. [*ref 7*] Four out of the five who were hospitalized were vaccinated. Clearly, vaccination does not prevent transmission, so unlike natural immunity, vaccination can never result in herd immunity."

184 Professor Macartney responded to a question posed in the same terms and which referenced Dr Parks' answer as follows[95]:

> "Yes, there is ample evidence that the currently available COVID-19 vaccines , particularly those manufactured by Moderna, Pfizer and AstraZeneca, are effective against infection with SARS-CoV-2 and symptomatic and severe COVID-19.
>
> As shown in Appendix: Table 1, as at 19 September, 14 published or pre-print studies report on the effectiveness of one or more of these vaccines against the Delta variant. Additional studies report on the duration of protection. Protection is in the range of 77-100% against severe disease, and 50-93% against any infection with the Delta variant, with prevention of symptomatic COVID-19 at the higher end of that range. The reported effectiveness varies slightly by vaccine type, context, population, study methodology, time since vaccination and other factors.
>
> Previous studies have shown that COVID-19 vaccines reduce the risk of transmission of the Alpha variant and the original (ancestral) Wuhan virus. This occurs in two ways: first, when people are not infected at all they cannot transmit the virus and second,

> studies have shown that the likelihood of a vaccinated person who does become infected with the virus transmitting it to others is reduced by approximately 50%. Taken together, this means that being vaccinated does reduce transmission. Studies estimating the reduction in transmission from vaccinated individuals infected with the Delta variant are not yet available."

185 Throughout her report and evidence, Professor Macartney emphasised that vaccination does not provide absolute protection against infection or transmission to others, although the consensus is that it mitigates the effect of infection. Each of the second and third paragraphs of this extract are directed to a separate step in the process by which a person could transmit COVID-19 including the Delta variant even if they are vaccinated.[96] The second paragraph is directed to the extent to which vaccines prevent a person acquiring the disease. The prevention of infection reduces transmission because as Professor Macartney stated "if you're not infected at all, you don't pass the virus to another person"[97]. The third paragraph is directed to whether an infected person is likely to transmit the disease to another person. Professor Macartney was of the opinion that the likelihood of that is occurring is reduced by approximately 50% if the person is vaccinated.

186 In cross-examination, Professor Macartney was taken to one of the articles cited in her "Appendix: Table 1" the above extract namely Pouwels & Ors, "Impact of Delta on viral burden and vaccine effectiveness against new SARS- CoV -2 infections".[98] The report included the statement to the effect that, with the Delta variant, those who were vaccinated and infected had a similar peak viral burden to those who were unvaccinated and infected.[99] In fact the third reference in the above passage from Dr Parks' report was a magazine article commenting on the same paper (ie, "ref 3").[100] However, as Professor Macartney pointed out that same paper reported that vaccines are protective against infection.[101] This was made clear in the precis of the paper relied on by Dr Parks. It noted that the report found that AstraZeneca and Pfizer "offered good protection against new infections but that performance was less effective against the Delta variant than with the previously dominant Alpha variant" and that protection was "at least the same protection as that afforded through natural infection with the virus."[102] This undermines rather than supports Dr Parks' opinion because, as just noted, if vaccines offer protection against becoming infected in the first place, albeit not complete protection, then they offer protection against transmission to others; ("if you're not infected you can't spread the virus"[103]).

187 Professor Macartney was also taken in cross examination to the fourth reference set out in the above passage from Dr Parks' report (ie "ref 4") which was cited by Dr Parks for the proposition that one study showed vaccinated people were 13 times more likely to catch the Delta variant than those already immune from having previously been infected (Gazit & Ors, "Comparing SARS-COV 2 natural immunity to vaccine induced immunity; reinfections versus breakthrough infections".[104]) The paper reported on the outcome of a retrospective cohort study in Israel which sought to examine the long term effectiveness of vaccinations against new infections. The authors noted that their

analysis demonstrated that natural immunity afforded longer lasting and stronger protection against infection compared with vaccination.[105] Professor Macartney noted that the report had not been peer reviewed.[106] In re-examination she noted that the authors had placed caveats on the analysis in the report and observed that its conclusion is "somewhat out of keeping with a number of the other studies that have come out of Israel".[107] The Pouwels article noted above suggested that the level of immunity provided by vaccination was the same as that acquired from infection.

188 However, even if the article had been peer reviewed and demonstrates what it suggests, it does not undermine Professor Macartney's evidence on this topic and it does not support Dr Parks' evidence. The article is directed to a comparison of the likelihood of infection of vaccinated people compared with the likelihood of others being *re-infected*. However, the relevant comparison for present purposes and the question posed to Dr Parks concerns the relative protection against infection offered to vaccinated people compared to unvaccinated people who have not previously been infected.

189 Professor Macartney was taken to the next article cited by Dr Parks (ie "ref 5") which was a study of COVID-19 infections amongst the San Diego Health Service workforce (New England Journal of Medicine, "Resurgence of SARS-COV2 Infection in a High Vaccinated Health System Workforce").[108] The article noted a high rate of symptoms in the vaccinated members of the workforce especially after the onset of the Delta variant. Professor Macartney noted that the figures on vaccine effectiveness quoted in the article revealed that in June 2021 it was 94.3% and for July 2021 it was 65.5%.[109] Professor Macartney explained the latter figure, which appears referable to the Delta variant, was consistent with the range she nominated in her report.[110] The conclusion to that report reiterated the need for "continued efforts to increase vaccinations" in addition to other measures.[111]

190 Professor Macartney was also cross-examined about the last source document referred to in the above extract from Dr Parks' report namely a study of COVID infections including vaccinated people in a town in Massachusetts (Morbidity and Mortality Weekly Report, "Outbreak of SARS-CoV 2 Infections, Including COVID-19 Vaccine Breakthrough infections, Associated with Large Public Gatherings – Barnstable County, Massachusetts, July 2021).[112] Dr Parks cited its conclusion that 74% of the infections occurred in vaccinated people in the study as support for her answer that the vaccines are not effective in preventing transmissions. However, as Professor Macartney repeatedly emphasised, that figure demonstrates no such thing, because what it omits is an analysis of the comparative rates of infection between those who are vaccinated and those who are unvaccinated.[113] The paper made the same point when it noted that the "data from this report are insufficient to draw conclusions about the effectiveness of COVID-19 vaccines against SARS-COV-2 including the Delta variant".[114] Professor Macartney reiterated this point in her answers to questions posed by Mr

King for the Kassam plaintiffs about the high absolute number of breakthrough infections in the United Kingdom.[115]

191 When the extract from Dr Parks' report set out above is considered in light of the articles relied on, and Professor Macartney's evidence, it follows that the opinion she expressed cannot be substantiated. Her reasoning fails to properly reflect the full effect of, and the limitations on, the articles she cites, addresses the ultimately irrelevant issue of whether natural immunity is superior to vaccinated immunity and fails to appreciate the need to compare rates of infection amongst the vaccinated compared to the unvaccinated rather than merely numbers of infection.

Findings

192 Bearing in mind the misgivings I have about the ultimate relevance of this material to the complaints of unreasonableness, I summarise my findings on this evidence as follows:

(i) To the extent that it is necessary to decide, where there is a conflict between the evidence of Professor Macartney and any witness whose evidence was adduced by the plaintiffs (other than Professor Bhattacharya's evidence on the effectiveness of lockdowns), I accept the evidence of Professor Macartney;

(ii) The evidence of Dr Gale, Professor Macartney and Professor Bhattacharya reveal that suitably qualified experts can reasonably differ on the appropriate response to COVID-19 including the Delta variant; that said, I afford less weight to Professor Bhattacharya's report including his opinion on "vaccine mandates" for the reasons noted above (at [174] to [179]);

(iii) To the extent that it is said that there are alternative COVID-19 treatments of the kind postulated by Professor Brighthope, Professor Borody and Dr Tyson, including vitamin C, vitamin D, zinc and ivermectin, then I am not satisfied they have been shown to be safe and effective. None have been approved by the TGA and no published peer reviewed reputable studies demonstrating their effectiveness were tendered;

(iv) I accept Professor Macartney's description of the risks associated with use of COVID-19 vaccines summarised above;

(v) There was a consensus amongst the experts that the COVID-19 vaccines attenuate the symptoms and sequalae of contracting the disease;

(vi) The weight of proper scientific opinion as reflected by Professor Macartney's evidence and, to an extent, Professor Bhattacharya's evidence, suggests that the COVID-19 vaccines reduce the risk of acquiring an infection and then transmitting the disease once infected, although the vaccines are less effective against the Delta variant. There is uncertainty as to the duration of the protection against infection offered by vaccination and whether it is equal to natural immunity. Those matters are the subject of ongoing debate and investigation.

Henry Plaintiffs – Ground 1: Ultra Vires – Principle of Legality

193 Ground 1 of the challenge by the Henry plaintiffs contended that the impugned orders were not supported by s 7 of the PHA and therefore beyond power.[116] They partly rely on various arguments concerning the scope of s 7(2) including the reference to "necessary", that have already been rejected.[117] They mainly relied on the principle of legality referred to at the outset of this judgment and contend as follows:[118]

> "The Impugned Public Health Orders violate a number of fundamental individual rights and interests, which go well beyond the temporary violations of the rights of liberty and freedom of movement obviously contemplated and intended by parliament under s 7. Parliament has not expressly abrogated these rights in clear, unambiguous language in relation to the exercise of the s 7 discretionary power."

194 To address this contention, it is necessary to say something further about the scope and application of the principle of legality. In *Coco* at 437, Mason CJ, Brennan, Gaudron and McHugh JJ described a principle that has become known as the principle of legality as referable to an "insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity". In *Coco* the principle was engaged because the general words of a statute empowering a judge to authorise the use of listening device were sought to be relied on to support an approval to enter premises to install the device. The relevant fundamental right or freedom that was interfered with was the rights of the person in possession of the property or entitled to possession (at 435). The authorisation purported to authorise what would otherwise be tortious conduct in the form of a trespass (at 436) and there was no "unmistakeable and unambiguous" statutory intention to confer such a power (at 439).

195 In *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 at [313], Gageler and Keane JJ stated that the "[a]pplication of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law" but "extends to the protection of fundamental principles and systemic values". One such principle or value is the accusatorial nature of the criminal justice system (*X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 at [87] per Hayne and Bell JJ).

196 Nevertheless the application of the principle requires precision in the identification of the right, freedom, immunity, principle or value that is said to be infringed without sufficiently clear statutory indication. Hence, in *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599; [2018] HSWCA 209 at [39] Bathurst CJ, Beazley P, Basten, Gleeson and Payne JJA held that:

> "In order to apply the principle of legality, it is necessary to identify with a degree of precision that fundamental right, freedom or immunity which is said to be curtailed or abrogated, or that specific element of the general system of law which is similarly affected. Any presumption of non-interference by general words will carry greater or lesser weight according to the precise issues identified."

197 The approach of the Henry plaintiffs was in one sense consistent with this approach in that they sought to identify the relevant rights and freedoms they contended were

violated by the impugned orders and which it was said were not clearly authorised by s 7 of the PHA. However, in another sense their approach was misconceived. As is apparent from the submission noted at [55], they sought to identify the relevant "right" or "freedom" either by reference to international treaties such as the International Covenant on Civil or Political Rights ("ICPR")[119] or by reference to federal legislation such as the *Disability Discrimination Act 1992* (Cth).[120] Reliance on the former was misplaced as, in the absence of legislation incorporating them, such instruments are not the source of law or rights (*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20 at 286–7 per Mason CJ and Deane J). Similarly, reliance on federal legislation was of no assistance given the repeated disclaimers by the Henry plaintiffs that they were not relying on any inconsistency between the impugned orders (or s 7) and federal legislation so as to engage s 109 of the Constitution.[121] So far as the principle of legality concerns fundamental rights, freedom or immunities it is to the common law that recourse must be had. The most can be gained from treaties and statutes in this respect is as possible sources that encapsulate such rights, freedoms and immunities (as well as principles and values) that the common law already recognises.

198 I have already accepted that the impugned orders severely affect freedom of movement. Even if that engages the principle of legality then, as the above submission accepts, s 7 clearly abrogates it. As noted, the Henry plaintiffs contended that the impugned orders violated the right to bodily integrity and the privilege of self-incrimination. Both the former "right" and the latter "privilege" engage the principle of legality, however neither is violated by the impugned orders. The Henry plaintiffs' reliance on the prohibition on torture in Article 7 of the ICPR[122] and Article 6 of the Universal Declaration of Bioethics and Human Rights has also been addressed.

199 The Henry plaintiffs also contended that the impugned orders interfere with what has long been recognised as a "common law right to work".[123] In fact the common law has refused to recognise a "right' in those terms. Instead, it has struck down unreasonable contractual restraints of trade, but that has nothing to do with provisions such as s 7 of the PHA (*Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 502 citing *Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242 at 260 to 261; *Buckley v Tutty* (1971) 125 CLR 353). The Henry plaintiffs also relied on international recognition of a right to work specifically in Part III of the Article 6 of the *International Covenant on Economic, Social and Cultural Rights.* Those rights are fundamentally different to the restraint of trade doctrine. They are social welfare obligations imposed on State parties. They do not engage the principle of legality. In any event, as noted by Mr Kirk SC, Article 12 of the same treaty obliges state parties to take steps to prevent, treat and control epidemics. Even if the principle of legality was engaged in this respect, by authorising infringement of freedom of movement s 7 of the PHA clearly authorises interferences with movement to and from places of work if that is necessary to address

the relevant risk and its possible consequences.

200 The Henry plaintiffs also sought to contend that, by differentiating between people who are vaccinated and unvaccinated, the impugned order effected a form of discrimination on the basis of disability or required third parties such as employers to effect such discrimination. They rely on Article 27(1) of the *Convention on the Rights of Persons with Disabilities* and the *Disability Discrimination Act 1992* (Cth) (the "DDA"). They noted that the definition of "disability" in s 4 of the DDA includes having present in a person's body a disease and includes a disease that "may exist in the future" as well as a disability that may be "imputed to a person". I understand these aspects of the definition address, inter alia, discrimination against people with a genetic precondition that predispose, or are perceived to predispose, them to the development of a disease. The Henry plaintiffs contend that an unvaccinated person either may develop or may be imputed as developing a disease, namely COVID-19, in the future and, so it is said, being unvaccinated amounts to a disability.[124]

201 Again, this submission erroneously seeks to reason that some right conferred by or at least reflected in federal legislation embodies a right, freedom or immunity presumptively protected by the principle of legality. However, protection from discrimination is not a right, freedom or immunity protected by the principle of legality. The failure of the common law to protect against discrimination is reflected in the necessity for legislation to be passed to prohibit it. That said, and consistent with what I have stated in [10], the fact that a decision under an enactment or subordinate legislation may unjustifiably differentiate between classes of people can be a basis for concluding that it is invalid but that is because the enabling statute does not support that differentiation. Hence, the classic example of unreasonableness provided in *Associated Province Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 to 230 ("Wednesbury") of a teacher having been dismissed because they had red hair. *Wednesbury*, and decisions like it, do not reflect a common law right, privilege or entitlement not to be discriminated against but instead are a reflection of the courts' jurisdiction to supervise the proper exercise of public powers (*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [5] and [11] per Allsop CJ; "Stretton"). Unlike discrimination statutes which provide their own criteria for a lawful discrimen, this area of discourse takes its legitimate criteria for decision making from the governing statute (*Stretton* at [12]) which in this case is the PHA, specifically its objects as set out in s 3. Differentiating between persons according to vaccination status is very much consistent with the objects of that legislation.

202 It follows that it is not necessary to finally determine the proper application of the DDA to unvaccinated persons in this context, although for the sake of completeness I note four matters.

203 First, on the Henry plaintiffs' reasoning, everyone has a disability because even vaccinated people can acquire COVID-19.

204 Second, even if being unvaccinated satisfies the definition of disability, then the differential treatment of people who are not vaccinated may not amount to direct discrimination because it appears that such people are not being treated less favourable "in circumstances that are not materially different" to the vaccinated (s 5(1) and 5(2)). There is a material difference between being a person who is vaccinated and a person who is unvaccinated, namely, the degree of transmission threat they represent to others. Similarly, the definition of indirect discrimination is qualified by a provision that stipulates that any requirement or condition imposed on an aggrieved person that "is reasonable, having regard to the circumstances of the case" is not discrimination (s 6(3)).

205 Third, any such differential treatment by third parties acting in accordance with the impugned orders would appear to be supported by (at least) s 47(2) of the DDA which excludes the operation of the DDA's prohibitions for "anything done by a person in direct compliance with a prescribed law" which includes a state law (s 47(5)).

206 Fourth, there is an exception from the DDA's operation for persons whose disability is an infectious disease and the discrimination is reasonably necessary to protect public health (s 48).

207 The Henry plaintiffs also contended that the impugned orders amount to a form of civil conscription proscribed by s 51(xxiiiA) of the Constitution. This argument was further developed by the Kassam plaintiffs who contended that the impugned orders and s 7 of the PHA are unconstitutional. It is addressed below and rejected.

208 Lastly, the Henry plaintiffs referred to the provisions of *Privacy Act 1998* (Cth), the *Health Records and Information Privacy Act 2002* (NSW) and the *Australian Immunisation Register Act 2015* (Cth) regarding the collection and distribution of information and records concerning a person's vaccination status.[125] In reference to clauses such as cl 4.3(3A) and 5.8(3) of Order (No 2), they contended that:

> "The Impugned Public Health Orders purport to arm the private sector (and/or police officers and various public servants) with the power to compel the provision of health information absent consent of the individual, in circumstances where health privacy legislation (referred to above) expressly sets out a statutory regime for the collection, use and disclosure of health information which is not consistent with such health privacy legislation. The Impugned Public Health Orders are inconsistent with this legislation as they seek to compel production of private health information about unvaccinated persons without the consent of such persons."

209 This contention must be read as qualified by the repeated disclaimers of Dr Harkess that the Henry plaintiffs are not contending that either s 7 or the impugned orders were inconsistent with federal legislation.[126] Otherwise, the common law does not recognise any tort of breach or privacy (*ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63; "Lenah"). To the extent that clause like 4.3(3A) might be seen as compelling the production of private information that they are not in any way authorising what is otherwise tortious conduct. Nevertheless, it can be accepted that a consideration of the extent to which "interests of a kind which fall within the concept of privacy" (*Lenah* at [40] per Gleeson CJ) are potentially affected can bear upon the

construction of a provision that confers powers expressed in wide terms such as s 7(2). However, at the risk of repetition, in circumstances where an inconsistency argument has been disclaimed, that is not to be undertaken by having a copy of the privacy legislation in one hand and the impugned orders in the other. Instead, as noted s 7(2) clearly authorises significant limitations on freedom of movement and that power clearly extends to allowing movement on conditions (s 7(3)(c)). A condition that relates to the production of evidence concerning the person's vaccination status against the very disease that is the identified risk is clearly authorised as well. People are not required to produce evidence of their vaccination status simpliciter; they are only required to do so on request if they are authorised workers who sought to leave their area of concern or remain or enter upon certain places of work.

210 Nevertheless, for the sake of completeness, I will briefly address some of the points Dr Harkess made in relation to the privacy legislation.

211 Sub-section 11(1) of the *Health Records and Information Privacy Act 2002* (NSW) specifies that the Act applies to, inter alia, an "organisation that … collects, holds or uses health information". Various law enforcement bodies are exempted from the Act including the NSW Police Force (s 17) whose members are one of the persons referred to in subclause 4.3(3A) and 5.8(3) of Order (No 2). Subsection 11(2) requires any such organisation to whom or to which the Act applies to comply, inter alia, with the Health Privacy Principles set out in Schedule 1 to the Act. The definition of health information includes information about a "health service provided" to an individual which appears to include their vaccination status. There are 15 Health Privacy Principles in Schedule 1, the first four of which apply to an organisation that only "collects" health information and the next seven of which apply to organisation that "holds" health information. The Act defines what constitutes when health information is "held" but not when it is collected.

212 One matter that was debated in submissions was whether a person to whom vaccination evidence is produced in accordance with, say, subclause 4.3(3A) of Order (No 2) would necessarily be someone who thereby "collects" health information or whether they would have to take some further step in relation to the information such as retaining a copy or making a note recording its production. Save for one matter, it is not necessary to resolve that argument or any issue about the application of the Health Privacy Principles to the categories of persons to whom vaccination evidence is provided as none of them could possibly bear on the validity of Order (No 2), the Aged Care Order or the Education Order. The principles address what happens to the information once it is produced and collected and not the anterior issue as to whether the impugned orders can require its production.

213 The one matter of exception is principle 1 which precludes an organisation from "collecting" health information unless "(a) the information is collected for a lawful purpose that is directly related to a function or activity of the organisation and (b) the collection of the information is reasonably necessary for that purpose." I doubt that

merely showing vaccination evidence to an employer involves that employer "collecting" health information unless they take a record or make a note. In any event, an employer or occupier who is found to have collected vaccination evidence from a person following the making of a request under clause 4.3(3A) and 5.8(3) of Order (No 2), sub-clause 7(2) of the Aged Care Order and sub-clause 4(2) of the Education Order is acting consistently with this principle in that a function or activity of their organisation is providing safe premises for their workforce, the public, students, patients or residents as the case may be.

214 In light of this conclusion, it is not necessary to address a further submission of Junior Counsel for the State entities, Mr Prince, to the effect that s 71 of the *Health Records and Information Privacy Act 2002* precludes any consideration of that Act in *"any civil cause of action"* and does not affect the *"*validity, or provides grounds for review, of any judicial or administrative act or omission" including the impugned orders.

215 Dr Harkess also referred to privacy principle 6 in Schedule 1 to the *Privacy Act 1988* (Cth) which precludes an "APP entity" that holds personal information that was collected for a particular purpose from using or disclosing that information to another person unless the individual has consented to the disclosure (or subclauses 6.2 or 6.3 apply). Dr Harkess referred to the circumstance where a person submits to vaccination because of the effect of Order (No 2), the Aged Care Order or the Education Order and then obtains their vaccination evidence from the Australian Immunisation Register which is described below. He contended that, in those circumstances, there was no consent to the disclosure even though it is the (now) vaccinated person obtaining the information.[127] This argument rises no higher than his contention about the impugned orders vitiating consent in relation to an alleged violation of the right to bodily integrity which has been addressed above and rejected.

216 Ground 1 of the Henry plaintiffs challenge is rejected.

Henry Plaintiffs – Grounds 2 and 4: Improper Purpose and Wrong Question

217 With ground 2 the Henry plaintiffs contended that the impugned orders were made for an improper purpose.[128] With ground 4 they contended that in making the impugned orders the Minister asked the wrong question and took into account irrelevant considerations.

218 In oral argument, Dr Harkess accepted that, save for one matter, both of these grounds rose or fell with ground 1.[129]

219 The one matter of exception was that, by reference to the statement made by the Minister in the press conference on 31 August 2021, it was contended that in making the orders the Minister took into account, or acted on the basis that, people who were not vaccinated were "self-entitled and indulgent". As noted, it was also contended that the Minister acted on the basis that those people who are not vaccinated did not have any rights that were engaged by the exercise of his discretion under s 7.[130] It follows

from the above findings that I do not accept either matter or that, as a matter of fact, it has been established that the Minister acted on the basis that the impact of impugned orders on unvaccinated people was not a matter to be considered.

220 It follows that grounds 2 and 4 raised by the Henry plaintiffs are rejected.

Henry Plaintiffs – Ground 5: Natural Justice

221 With ground 5, the Henry plaintiffs contend that the impugned orders were "apt to affect [their] rights, interests or legitimate expectations" and thus the exercise of power attracted a duty to afford them procedural fairness specifically the opportunity to comment on or respond the impugned orders before they were made.[131]

222 It was accepted by the Henry plaintiffs that, if the impugned orders were classified as legislative acts, then no duty to afford procedural fairness arose, although the classification of the power as legislative is not necessarily determinative (*Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404 at 416, 432; [1981] HCA 69; *Kioa v West* (1985) 159 CLR 550 at 609; [1985] HCA 81; "Kioa"). It is not necessary to determine that question because, even if the impugned orders are characterised as administrative decisions, no duty to afford procedural fairness was attracted in relation to any of the impugned orders. It was accepted that their scope was wide. Order (No 2) affected millions of people. When regard is had to the interests of aged care workers, operators and residents as well as teachers, students and those who manage schools, the number of people affected by the Aged Care Order and the Education Order are also very large.

223 Decisions affecting a very wide class of persons will not normally attract a duty to afford procedural fairness (see for example *Kioa* at 584; *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1996) 44 NSWLR 598 at 622 to 625; [1996] HCA 196). The obligation to afford natural justice in relation to the impugned orders is not synonymous with someone having standing to challenge them (*Botany Bay City Council and Others v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 at 568 per Lehane J; cited in *Griffith University v Tang* (2005) 221 CLR 99 at 118; [2005] HCA 7).

224 The position was stated by Basten JA in *Castle v Director General, State Emergency Service* [2008] NSWCA 231 at [6] as follows:

> "One limitation on the operation of the duty to accord procedural fairness arises from the need to identify the obligation by reference to an individual or class of persons. *The obligation must be capable of identification and fulfilment, in a reasonable and practical sense, prior to the making of the decision*. Some guidance may be obtained by asking whether it was reasonable to expect the officer exercising a particular power to identify, in advance, the applicant as a person whose rights or interests may be affected and the way in which the proposed affectation would occur. *The larger the class of persons reasonably expected to be affected, the less the likelihood that procedural fairness will be attracted and, if it is, the lower the likely content of the duty*." (emphasis added)

225 There was no realistic means for affording any obligation to be heard on the millions affected by the impugned orders. The class of affected persons was so wide that no

duty to afford procedural fairness was engaged.

226 I reject ground 6 of the challenge by the Henry plaintiffs.

Henry Plaintiffs – Ground 3: Irrelevant Considerations

227 Ground 3 of the challenge by the Henry plaintiffs contends that, in making the impugned orders, the Minister failed to take into account relevant considerations. Although this ground was argued by Mr Clarke QC in conjunction with the unreasonableness ground it can be dealt with separately. The considerations that it is alleged that the Minister was obliged to take into account, but failed to, are as follows [132]:

(a) the lack of scientific certainty surrounding the efficacy and safety of COVID-19 vaccinations in relation to all variants of the COVID-19 virus;

(b) the lack of scientific certainty surrounding the efficacy and safety of COVID-19 vaccinations in relation to the delta variant of the COVID-19 virus;

(c) other health measures, alternative to vaccinations, as a means by which to address the risk to public health that COVID-19 represents;

(d) the individual's common law right to bodily integrity;

(e) the individual's common law right not to be subject to medical or scientific experimentation or treatment without the person's consent;

(f) the individual's common law right to liberty and security;

(g) the individual's common law right to earn a living;

(h) the individual's implied right under s 51(xxiiiA) of the Constitution of the Commonwealth of Australia not to be conscripted to take part in a vaccination program amounting to a medical service provided to the public;

(i) the individual's right not to be discriminated against under Part 2 of the *Disability Discrimination* Act 1992 (Cth);

(j) the obligations of healthcare professionals to do no harm to their patients;

(k) the need for individuals to maintain confidence and trust in their healthcare professionals;

(l) the individual's rights to anonymity and privacy under the *Privacy Act* 1988 (Cth);

(m) the individual's rights to anonymity and privacy under the *Personal Information Protection Act* 1998 (NSW);

(n) the individual's rights to anonymity and privacy under the *Health Records Information Privacy Act* 2002 (NSW);

(o) the foreseeable long-term dangers and risks to an individual's rights and liberties in

conferring an entitlement to third parties to access and retain personal and sensitive information concerning the individual's health and medical profile;

(p) the individual's common law right to the presumption of innocence;

(q) the individual's common law right to remain silent;

(r) the individual's common law privilege against self-incrimination;

(s) the International Covenant on Civil and Political Rights;

(t) the International Covenant on Economic, Social and Cultural Rights;

(u) the Convention on the Rights of Persons with Disabilities.

228 The ground of a failure to take into account a relevant consideration can only be made out if the Minister failed to take into account a consideration which he was *bound* by the statute to take into account in making that decision (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39; [1986] HCA 40). The mandatory considerations may be expressly stated in the statute or may be implied from its subject matter, scope and purpose (id). However, contrary to the assumption behind this ground, these considerations are not identified by reference to the facts of particular case but wholly by reference to the enabling statute (*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [7]; "Yusuf"). So far as the considerations (d) to (u) identified by the Henry plaintiffs are concerned, there is nothing expressly stated or which can be implied from the subject-matter, scope and purpose of the PHA to suggest that in making an order under s 7(2) the Minister was obliged to identify and consider various formulations of common law privileges and rights as well as international human rights instruments. Accepting without deciding that, in making such an order, the Minister was obliged to consider the impact on affected peoples' lives from the order, especially freedom of movement, it has not been shown that he did not do so.

229 As for considerations (a) to (c), consistent with *Yusuf*, they are formulated in a manner that is too specific to constitute a mandatory consideration derived from the PHA. A contention about the supposed lack of scientific certainty about the safety and efficacy of the vaccines is a factual assertion not a relevant consideration (*Abebe v Commonwealth* (1999) 197 CLR 510; [1999] HCA 14 at [195] per Gummow and Hayne JJ). If those alleged factors (ie (a) and (b)) were reformulated so as to refer to the Minister being obliged to consider the safety and efficacy of the proposed manner of "dealing" with the identified risk as referred to in s 7 then that would be more consistent with *Yusuf*. However, they fail at a factual level because the evidence suggests the Minister received advice on that topic and it has not been shown he did not consider it. That the Henry plaintiffs dispute the effect of the advice given to the Minister on the safety and efficacy of COVID-19 vaccines only serves to illustrate that this is not truly raising a ground about a failure to take into account a relevant consideration but a

factual complaint. Their real complaint in that regard is taken up with their unreasonableness challenge which is addressed next. The same applies in relation to alleged factor (c).

230 I reject ground 3 of the challenge by the Henry plaintiffs.

Henry Plaintiffs – Ground 6: Unreasonableness

231 Ground 6 of the Henry plaintiffs' challenge is that the impugned orders are unreasonable. They contend that anxious scrutiny should be applied to orders where they interfere with fundamental rights. They submit that, having regard to the evidence they adduced by the plaintiffs, including their expert evidence, it was not reasonably open to the Minister to conclude that it was necessary to make the impugned orders. [133]

232 The starting point for addressing an argument based on unreasonableness is the construction of the statute. Ultimately, the ground is addressed to whether the statutory power has been abused (*Li* at [67] per Hayne, Kiefel and Bell JJ). The scope, purpose and construction of s 7(2) has already been addressed. In terms of the statute, the question is whether it has been shown that no Minister acting reasonably could have considered it necessary, that is appropriate and adapted, to deal with the identified risk to public health and its possible consequences by making the impugned orders (see [29]).

233 As Allsop CJ noted in *Stretton* (at [10]), the discussion of unreasonableness by the plurality in *Li* cannot be reduced to a single test but encompasses a number of concepts that in some contexts and respects considers the manner in which the decision was made, the reasoning that supports the decision (*Li* at [72]), the outcome (*Li* at [76]) or a combination of those matters. In this case, and even acting on the assumption favourable to the plaintiffs that the impugned orders were an administrative decision and not a form of delegated legislation, this ground does not fall for consideration in a context where the relevant decision maker was obliged to give reasons for his decision or did give reasons for his decision. No reasons were required or provided. As noted, the evidentiary material from which one might even infer the Minister's reasoning process was incomplete. In those circumstances, the Henry plaintiffs correctly identified the following passage from *Li* as being of particular relevance (*Li* at [76]): [134]

> "As to the inferences that may be drawn by an appellate court, it was said in *House v The King …* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". *The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power*. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."

234 The last part of this passage addresses the circumstances in which "some reasons

have been provided" which is not this case. Otherwise, this passage directs attention to the outcome of the exercise of the power, in this case, the orders and whether an inference can be drawn from the "facts" and "from the matters falling for consideration" that the power in s 7(2) has been abused. To similar but perhaps more stringent effect Gageler J in *Li* (at [105]) described the application of the test by reference to what was stated in *Dunsmiur* v *New Brunswick* [2008] 1 SCR 190 namely "whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law" and emphasised the strictness of a test that is "so unreasonable that no reasonable repository of the power could have so exercised the power" (at [108]).

235 Two other aspects of the standard of unreasonableness that have already been touched upon should be noted. The first are the very large constraints operating upon a court in arriving at a conclusion of unreasonableness especially in the present context. The judgment in *Li* concerned an unreasonable failure by a tribunal to grant an adjournment, a decision and context with which the Courts are familiar. The present context concerns the formulation of general rules dealing with a risk to public health and its possible consequences, a decision and context with the Courts are not familiar and which is very much "informed by considerations of policy" (*Li* at [108] per Gageler J). In such contexts there is "generally an area of decisional freedom" which is large (*Li* at [28] per French CJ and at [66] per Hayne, Kiefel and Bell JJ). The Courts role is not to review the "merits" and substitute its own decision (*Li* at [66]) or make its own assessment of what is reasonable (*Stretton* at [21] per Allsop CJ).

236 Second, as the focus of the Henry plaintiffs' case concerns the vaccination provisions then, as explained below, the gravamen of the complaint is the alleged arbitrariness of the additional burdens imposed on the unvaccinated. As noted earlier (at [201]), arbitrary decision-making and decisions are very much the concern of this ground of review. Further both *Li* (at [73] per Hayne, Kiefel and Bell JJ) and *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34 (at [3] per French CJ, Kiefel, Bell and Keane JJ) suggest that a "proportionality analysis" by reference to the scope of the power, as opposed to the terms of a constitutional guarantee or implied freedom, might be applicable to a determination of a challenge to the validity of an administration decision based on unreasonableness. However, the full extent of the application of such analysis to a complaint of unreasonableness in relation to an administrative decision has not been fully worked out. I will approach the matter in accordance with the above statements especially *Li* at [76].

237 In oral submissions, Mr Clarke QC refined the submission noted at [231] so that the argument was pitched by reference to the particulars to ground 3 set out above.[135]. By reference to those particulars, he contended that the interference with fundamental rights effected by the impugned orders was disproportionate to the objects of the PHA bearing mind particulars (a), (b) and (c). Although I have rejected the contention that there were violations of fundamental rights beyond freedom of movement that is not

determinative of the complaint as the degree of impairment of that freedom differentiates between vaccinated and unvaccinated people especially so far as their ability to work is concerned.

238 In relation to particular (a) and (b), Mr Clarke QC relied on the evidence that has largely been addressed above. In relation to the safety and efficacy of the vaccines Mr Clarke QC took the Court[136] to the terms of the provisional approvals granted by the TGA for the Pfizer[137] and AstraZeneca vaccines[138] in January 2021 and February 2021 respectively which contained references to the various potential side effects from the use of the vaccines and the approval having been granted on the basis of short term efficacy and safety data.[139] He also referred to other Department of Heath publications to similar effect. As noted, he contended that little weight should be given to Professor Macartney's opinions and emphasized Dr Park's evidence. I have already rejected that submission.

239 Particulars (a) and (b) of ground 3 refer to "scientific certainty" about the safety and efficacy of the COVID-19 vaccines in relation to the disease including the Delta variant. If that is meant to convey absolute certainty, then I agree that there is no absolute certainty on those topics and doubt that there ever could be. Professor Macartney agreed that there was not "absolute certainty" regarding the efficacy of the COVID-19 vaccines in dealing with the Delta variant but concluded that "there's quite a degree of certainty around the effectiveness of the vaccines against the Delta variant".[140] She agreed that there is "some level of uncertainty" about the safety of the vaccines but added that since the clinical trials there has been "an enormous body of safety data" while adding that observation of the safety of the vaccines would continue.[141] As for particular (c), the range of reasonable methods of "deal[ing]" with the identified "risk and its possible consequences" is extremely wide given the multitude of policy considerations at play.

240 In the end result the evidence concerning the effectiveness of the vaccines meant that the Henry plaintiffs did not establish that the differential treatment of unvaccinated people in the impugned orders was an approach that no Minister acting reasonably could have considered to be necessary to deal with the identified risk to public health and its possible consequences.

241 I reject ground 6 of the Henry plaintiffs' challenge.

Kassam Plaintiffs – Ground A: No Active Consideration

242 The first ground raised by the Kassam plaintiffs for invalidating Order (No 2) is that the Minister did not engage in the necessary intellectual engagement required by so much of s 7 that required the Minister to "consider" what is necessary to deal with the relevant risk and its possible consequences.[142] In particular they contended that the evidence demonstrated that he failed to have anything before him other than an email providing him with the draft order for execution. It was submitted there is "no evidence that in

exercising his function, as referred to in the objects provisions under section 3(2) of the Act …, that he had regard to the overriding consideration there set out or actively engaged in any intellectual decision-making process".[143]

243 These submissions confuse an absence of evidence with evidence of absence. The evidence concerning the making of the various orders is described above. As noted, the notice to produce issued by the Kassam plaintiffs was only responded to by reference to the documents "immediately" before the Minister and material was placed before the Minister in a Cabinet subcommittee which was the subject of public interest immunity. The contention of the Kassam plaintiffs that the Minister did not engage in a process of consideration was not demonstrated as a matter of fact.

244 I reject this ground of the Kassam plaintiff's challenge.

Kassam Plaintiffs – Ground B: Scope of Power

245 The second ground raised by the Kassam plaintiffs' challenges raises various issues that appear directed to whether the scope of s 7 supports the making of Order (No 2) or whether the exercise of the power was unreasonable.[144] Those contentions were that Order (No 2) effects a violation of the right to bodily integrity,[145] which having regard to the principle of legality was not authorised by s 7.[146] They also contend that the Minister is required to exercise the discretion conferred by s 7 in accordance with or having regard to the principle of legality,[147] a contention that ignores that it is a principle of statutory interpretation concerning the scope of the power and not the manner of its exercise. In any event, all of these contentions have been addressed and rejected. They also contend that Order (No 2) implements a form of civil conscription,[148] a contention that is addressed below and rejected.

246 I reject this ground of review.

Kassam Plaintiffs – Ground C: Unreasonableness

247 The Kassam plaintiffs also contended that Order (No 2) was manifestly unreasonable for reasons beyond its supposed violation of the right of bodily integrity. Although their submissions in support of ground C refer to unreasonableness by reference to the outcome, their submissions under this ground identify a failure to inquire as well as an alleged unreasonable outcome.[149]

248 In relation to the former they contended that[150]:

> "The Plaintiffs' evidence demonstrates the Minister or those advising him was aware that the Plaintiffs were making available significant new information about available treatments and alternative measures. As the Defendants were aware, this was the only opportunity that the Plaintiffs would have to provide such new information, which could be of considerable importance. On their case, the consequences of refusal to have regard to, or to otherwise independently seek, this information leaves in place far-reaching draconian Orders, which go so far as to breach the fundamental right to bodily integrity of many residents of NSW. A request from the Minister for the correct submissions and all correct expert opinion would have been a very simple matter."

249 The reference to the "Plaintiffs were making available significant new information about

available treatments and alternative measures" appears to be a reference to the matters raised in Mr Nikolic's letter of 7 July 2021 summarised at [126]. In relation to "available treatments" that letter made some reference to the use of ivermectin although presumably the Kassam plaintiffs rely on the evidence summarised at [146ff]. So far as "alternative measures" are concerned, the letter effectively advised the Minister that he was participating in a "socially constructed emergency" and otherwise railed against the use of lockdowns.

250 The principles applicable to the determination of a complaint of unreasonableness have already been addressed. Nothing in the PHA expressly or impliedly imposes any duty of inquiry on the Minister as a condition of validity of the making of an order giving directions under s 7(2) of the PHA. The most favourable approach in the authorities which are derived from a statutory context involving a tribunal is that a failure "to make an obvious inquiry about a critical fact, the existence of which is easily ascertained" and which "could have yielded a different result" *might* constitute some form of jurisdictional error such as a failure to conduct a review of the decision the subject of the application (*Minister for Immigration and Citizenship v SZIAI & Ors* [2009] HCA 39; 259 ALR 429 at [25] to [26]).

251 The matters raised in support of this complaint do not come close to meeting that (minimum) threshold. It has not been shown that the Minister was not aware of the "alternative treatments" but even if he was not and had inquired, all he would have been told was that they were unproven and unapproved. Otherwise, the Minister was no doubt aware of opposition to lockdown measures and there was no attempt to identify what more he might have discovered that would or could have led to him decline to make Order (No 2).

252 As for the challenge based on the outcome, the Kassam plaintiffs submitted that there was no evident or intelligible justification for a one size fits all policy[151] of mass vaccination, a contention that I reject in the context of a pandemic where effective vaccines are available. The balance of the submission was as follows[152]:

> "…. the Plaintiffs rely on the conclusions in their expert evidence as both the risks in adopting the measures contained in the Order but also the adverse effects set out in the analysis of the expert material in the separate schedule. In particular then her evidence is examined Dr Macartney's material, apart from being of doubtful utility having regard to her areas of expertise being more limited than those of the Plaintiffs' experts, it is apparent that Dr Tyson and Professors McCullough and Bhattacharya present a firm factual foundation for addressing the public health risks by a path not taken which is more than just preferable or reasonable."

253 This submission is addressed by the findings made in [158] to [179] and [192].

254 I reject this ground.

Kassam Plaintiffs – Ground D: Inconsistency with LEPRA

255 By this ground, the Kassam plaintiffs challenge clause 2.8 of Order (No 2) which exempts persons from the requirement to wear a mask if they have a "physical or mental health illness or condition, or disability" that makes "wearing a fitted face

covering unsuitable", but requires them to carry evidence concerning their identity and "produces the evidence for inspection by a police officer if requested by the officer." They contend that this is invalid on the ground of inconsistency with LEPRA, in that cl 2.8 confers functions or powers on a police officer which are said to exceed those provided for by LEPRA.[153]

256 Section 6 of LEPRA provides:

> "(1) This section applies to a provision of another Act or regulation that confers functions on a police officer or other person (other than a provision of an Act or regulation referred to in section 5(1)).
>
> (2) *To the extent of any inconsistency*, this Act prevails over an Act or regulation to which this section applies." (emphasis added)

257 The balance of LEPRA addresses powers of police officers including powers of entry (Part 2), a power to require a person's identity to be disclosed (Part 3), powers of search and seizure with and without a warrant (Parts 4 and 5), powers arising in situations of public disorder and threats to public safety (Part 6 and Part 6A) and powers of arrest (Part 8).

258 The Kassam plaintiffs submitted that that the powers conferred by clause 2.8 greatly exceed those conferred by LEPRA.[154] They instance as an example that under s 11 of LEPRA an officer can require a person to disclose their identity if they have a reasonable suspicion that an indictable offence has been committed and that the person is materially involved in the offence. It is submitted that the "power" conferred by clause 2.8 exceeds the power conferred by s 11 of LEPRA.

259 However, nothing in LEPRA indicates that the powers it confers on police officers to make requests of a person's identify are exhaustive. To the contrary, Part 15 of LEPRA suggests that it applies to regulate the exercise of powers conferred by various laws including the making of requests (ss 201 to 203). Further, as the State parties submitted,[155] even if there was an inconsistency between LEPRA and cl 2.8, that would not invalidate Order (No 2). Instead, the effect of s 6(2) would be that Part 15 would apply to any requests made by police officers under Order (No 2).

260 I reject this ground.

Kassam Plaintiffs – Ground E: Constitutional Ground - Civil Conscription

261 The Kassam plaintiffs contend that Order (No 2) creates a form of civil conscription referred to in s 51(xxiiiA) of the Constitution which they contend applies to State laws. In the alternative, if s 51(xxiiiA) is held not to apply to State laws, then the Kassam plaintiffs contend that Order (No 2) was made in furtherance of a joint scheme between New South Wales and the Commonwealth "which had the effect of imposing a civil conscription on State citizens".

262 Both the State parties and the Commonwealth of Australia contended that nothing in Order (No 2) involves a form of civil conscription referred to in s 51(xxiiiA), no such restriction on imposing civil conscription applies to the States, that, even if Order (No 2)

did impose a form of civil conscription the limitation would only be infringed if the Commonwealth required the States to conscript persons and even if the Commonwealth did, it would not invalidate Order (No 2).[156]

Civil Conscription

263 Section 51(xxiiiA) of the Constitution confers on the Federal Parliament legislative power to make laws for the peace, order and good government of the Commonwealth with respect to:

> "[t]he *provision* of maternity allowances, widows pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (*but not so as to authorise any form of civil conscription*, benefits to students and family allowances; …" (emphasis added)

264 This legislative power was inserted into s 51 with effect from 19 December 1946 by the *Constitution Alteration (Social Services) Act 1946* following its passage in a referendum. The historical events that lead to the passage of this provision in this particular form are described in *Wong v The Commonwealth* (2009) 236 CLR 573; [2009] HCA 3 at [18] to [55] per French CJ and Gummow J, at [174] to [191] per Hayne, Crennan and Kiefel JJ and, to an extent, by Heydon J at [271] to [277] ("Wong"). It suffices to note two matters about that history.

265 First, the phrase "civil conscription" has its origins in the debate about whether "industrial conscription", that is, the use of compulsory civilian labour, would or would not be deployed in the war effort, as it eventually was (*Wong* at [31] to [40]; see *Reid v Sinderberry* (1944) 68 CLR 504).

266 Second, the carve out from the referendum proposing the grant of legislative power so as to not authorise any form of civil conscription was suggested by the then opposition and agreed to by then government (*Wong* at [50] to [51]) and no doubt helped secure its passage. It stands in contrast to the nationalisation of medical services that took place in the United Kingdom around the same time (*Wong* at [274]). Thus, the phrase "civil conscription" was deployed so as to preclude compulsory service by medical professionals which might not answer the description "industrial conscription" (*Wong* at [50]).

267 Bearing that in mind, two aspects of the concept of civil conscription of s 51(xxiiiA) should be noted. First, the preclusion on authorising civil conscription only qualifies a (Commonwealth) law for the "provision" of "medical or dental services" (the *BMA* Case at 254 per Rich J, at 261 per Dixon J, at 282 per McTiernan J, at 286 per Williams J, contra per Latham CJ at 253 and Webb J not deciding at 292; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279; [1986] HCA 6; "Alexandra").

268 Second, civil conscription is directed to compulsive service in the *provision* of medical services. In the *BMA* Case a majority, Latham CJ, Rich, Williams and Webb JJ, Dixon and McTiernan JJ dissenting, upheld a challenge to the validity of a legislative

requirement for pharmacists to write scripts for medicines on a particular form regardless of whether the medicine was to be obtained for free by the patient under the Pharmaceutical Benefits Scheme. The widest reading of the majority's conclusion was that the prohibition on civil conscription in relation to medical and dental services strikes down any "compulsion of law requiring that men … perform work in a particular way" (at 249 per Latham CJ). Dixon J in dissent concluded that nothing in the impugned provision compelled the rendering of medical services to patients in any capacity whether regularly, occasionally, for a short period or intermittently (at 278). His Honour's approach was effectively adopted in the *General Practitioner's Case* (1980) 145 CLR 532 at 556-557 per Gibbs J. at 563 per Stephen J, at 564 per Mason J and 571 to 572 per Wilson J; *Wong* at [195]).

269 In *Wong*, Hayne, Crennan and Kiefel JJ also applied the approach of Dixon J in the *BMA* Case while accepting that civil conscription can arise from the practical and not just legal effect of a legislative provision (at [209]). Even so, their Honours concluded that the practical effect of the scheme for the payment of medical benefits in the *Health Insurance Act* did not amount to civil conscription in that it did not compel a medical practitioner, legally or practically, to provide a service on behalf of the Commonwealth or at all to treat any patient or particular patient ([id]). Their Honours also concluded that, accepting that the practical effect of the *Health Insurance Act* was to require doctors who wish to practise to participate in the Medicare scheme (at [224]), a requirement to comply with a standard of practice is not a form of civil conscription (at [226]).

270 Similarly, after reviewing the history of s 51(xxiiiA), French CJ and Gummow J in *Wong* reached the same conclusion. In so doing, their Honours described the meaning of "civil conscription" in s 51(xxiiiA) as follows (at [60]):

> "The legislative history and the genesis of s 51(xxiiiA) supports a construction of the phrase "(but not so as to authorize any form of civil conscription)" which treats "civil conscription" as involving some form of compulsion or coercion, in a legal or practical sense, *to carry out work or provide services*; the work or services may be for the Commonwealth itself or a statutory body which is created by the Parliament for purposes of the Commonwealth … it also may be for the benefit of third parties, if at the direction of the Commonwealth." (emphasis added)

271 The effect of the Kassam plaintiffs' written submissions was that Order (No 2) effected a form of civil conscription because it effectively required unvaccinated persons to obtain a COVID-19 vaccine.[157] This wrongly assumed that s 51(xxiiiA) proscribes the compulsory *acquisition* of medical services which it does not. In oral submissions, counsel for the Kassam plaintiffs, Mr King, was pressed on how any doctors or any other medical professional was compelled to provide a medical or dental service. He contended that[158]

> "…the effect of the order is what is critical in our respectful submission, and the effect of that order is to conscript both patients and doctors, their doctors, to obtain a double vaccination, or in relation to the earlier orders a single vaccination, as the price of giving up their employment and their right to protect and look after their families."

272 This contention was repeated in a written submission filed on 4 October 2021.[159]

Nothing in any part of Order (No 2) or the PHA involves any element of coercion on a doctor or other medical provider to vaccinate anyone. Otherwise, this submission simply repeats the wrong assertion that s 51(xxiiiA) operates on the acquisition of a medical service as opposed to its provision.

273 In his submissions, Dr Harkess contended that a medical or dental service was provided by a person who received a COVID-19 vaccine because they contribute to the eventual establishment of "herd immunity". He submitted that it follows that those who were "compelled" to be vaccinated were civilly conscripted to provide dental and medical services.[160] It suffices to state that contributing to the general health of the community by adding to herd immunity is not providing a medical service.

274 *Wong* establishes that s 51(xxiiiA) is to be interpreted according to its historical purpose as explained above. On any sensible reading of the authorities the impugned orders do not impose any form of civil conscription as referred to in s 51(xxiiiA).

No Application to the States

275 Section 51 of the Constitution, of which s 51(xxiiiA) is part, is directed to the legislative power of the Commonwealth not the states. The reference in s 51(xxiiiA) to the provision of the benefits is confined to the provision of those benefits by the Commonwealth (*Alexandra* at 279; the *BMA* Case at 244 per Latham CJ, at 254 per Rich J, at 260 per Dixon J and at 279 to 280 per McTiernan J and 292 per Webb J). The Kassam plaintiffs sought to rely on a statement by Williams J in the *BMA* Case that the "expression invalidates all legislation which compels medical practitioners or dentists to provide any form of medical or dental service" (at 287). However, that statement came at the conclusion of a passage that commenced "[t]he expression [ie, civil conscription] is a prohibition upon the exercise of the legislative powers of the Commonwealth" (at 287.2). The Kassam plaintiffs also referred to the judgment of Kirby J in *Wong* who construed s 51(xxiiiA) by reference to "emerging norms of fundamental human rights as expressed in international law" (*Wong* at [133]). None of the other judgments in *Wong* endorsed his Honour's approach. In any event, his Honour made it clear that what was being addressed was a restriction on "federal law" (at [145]).

276 The Kassam plaintiffs sought to extend the proscription on civil conscription in the provision of medical and dental services to the States by contending that it gives rise to an "an implied constitutional right of individual patients to reject unless consented to vaccination[s]" binding on the states.[161] Nothing in the text or structure of the Constitution supports any such implication. The express words of s 51(xxiiiA) suggests to the contrary as do the cases just noted. If s 51(xxxi) does not bind the States (*Pye v Renshaw* (1951) 84 CLR 58 at 83; [1951] HCA 8) then there is no possible justification for s 51(xxiiiA) doing so.

277 Even if the impugned orders imposed a form of civil conscription, which they do not, they would not be rendered invalid by the operation of s 51(xxiiiA).

Alleged Joint Scheme

278 On the assumption that Order (No 2) does effect a scheme of civil conscription, but that the proscription on civil conscription in s 51(xxiiiA) does not bind the States, the Kassam Plaintiffs contended that the evidence demonstrates that there was a "joint scheme or ... a co-operative arrangement [between NSW and the Commonwealth] to bring about a civil conscription and that the provisions of Order (No 2), being part of and made in furtherance of the scheme, are for that reason invalid".[162]

279 This contention seeks to rely on the decisions in *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; [1949] HCA 6 ("Magennis") and *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; [2009] HCA 51 ("ICM"). In *Magennis* a majority of the High Court held the Commonwealth exceeded its powers by entering into an intergovernmental agreement with NSW that provided for an infringement of the just terms guarantee in s 51(xxxi). The NSW legislation which effected an acquisition on other than just terms was construed as depending for its operation upon the existence of a valid law of the Commonwealth. The Commonwealth law giving effect to the agreement was held invalid, but the NSW law was only held to be inoperative (at 403 to 404 per Latham CJ; 424 to 425 per Williams J and at 406 per Rich J agreeing). Later the NSW legislation was "decoupled" from the agreement with the federal government and upheld in *Pye* (see *ICM* at [39] per French CJ, Gummow and Crennan JJ). A similar result followed in *Tunnock v Victoria* (1951) 84 CLR 42. The premise of *Magennis* that s 51(xxxi) qualifies the Commonwealth's power to make financial grants to the States under s 96 of the Constitution was reaffirmed by French CJ, Gummow and Crennan JJ in *ICM* (at [46]) as well as by Heydon J (at [174]).

280 One matter that was not expressly determined by either *Magennis* or the majority in *ICM* is whether some restriction that only applies to the Commonwealth, such as s 51(xxxi) or the civil conscription component of s 51(xxiiiA), is engaged by some informal agreement, arrangement or understanding between the Commonwealth and a State that either requires or contemplates the latter legislating to acquire property other than on just terms or effect civil conscription of the providers of medical or dental services as the case may be. This was addressed by Griffiths and Rangiah JJ in *Spencer v Commonwealth* (2018) 262 FCR 344; [2018] FCAFC 17 at [210] ("Spencer") as follows:

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

281 Having regard to these principles and bearing in mind that the reference to "civil conscription" in the Kassam plaintiffs' submission is to some form of mandatory

vaccination, how do they seek to factually support their argument that there was a joint scheme? The Kassam plaintiffs' submissions made reference to numerous documents recording various joint efforts between the Commonwealth and the State to address the pandemic commencing from February to March 2020 which in turn invoked pandemic planning documents prepared prior to then.[163] The main focus of its submissions was the "National Plan to Transition Australian National Covid-19 Response" published on 6 August 2021 (the "National Plan").[164] The National Plan was issued after statements by the Prime Minister on 9 July 2021, 30 July 2021, 2 August 2021 and 6 August 2021 following meetings of the body described as "National Cabinet".[165]

282 Save for one topic, none of these documents or any other document referred to by the Kassam plaintiffs evidences any joint agreement, understanding or consensus between the Commonwealth and NSW to mandate vaccines for COVID-19 much less any requirement imposed by the Commonwealth to do so.

283 The one exception concerns aged care workers. Thus, in his statement on 9 July 2021 the Prime Minister stated[166]:

> "National Cabinet reaffirmed the commitment to implement the decision to mandate vaccination of aged care workers by mid- September 2021, with limited exceptions. All states and territories will work towards implementing this decision using state public health orders or similar state and territory instruments and will provide an indication of timing when it is available. This is consistent with the approach taken for mandating influenza vaccinations for aged care workers."

This statement is consistent with the correspondence noted in [121].

284 However, all this of this material takes the matter nowhere for two reasons. First, there is nothing in any of the materials relied on, including the material concerning aged care workers, to support the contention that NSW was *required* under some agreement to mandate vaccines to anyone (cf *Spencer* at [210]). Second, even if they were, there is nothing in Order (No 2) or the PHA to suggest that any aspect of their operation or validity is dependent on the existence of any agreement with the Commonwealth to require them to mandate vaccines which on the authority of *Magennis* might render them inoperative. As for the Commonwealth, there is not a skerrick of a suggestion that any legislation of the Commonwealth gives effect to any such agreement so as to justify some relief being sought against it, which there was not.

Conclusion on s 51(xxiiiA) Contention

285 Lastly on this topic I note that the Kassam plaintiffs referred the Court to an article by two legal academics recently published in a magazine of political commentary concerning the unconstitutionality of vaccine orders (Augusto Zimmerman and Gabriel Moens, "Emergency Measures and the Rule of Law", (2021) 64(10) Quadrant Magazine). The reliance on the article was misconceived because in fairness to the authors of the article they did not purport to address the state of the authorities on s 51(xxiiiA) and their applications to orders made under s 7(2) of the PHA or similar legislation. Hence, at the commencement of the article, the authors state that is not

"feasible to predict what the Australian High Court might do if it were called upon to consider the constitutionality of vaccination orders and emergency declaration directions" but stated that they "it is still possible to determine what it should do". This Court's task does not involve any determination of what the High Court "might do" much less what it "should" do. Instead, its function is to apply the what the High Court has decided in relation to s 51(xxiiiA).

286 A consideration of the authorities in relation to s 51(xxiiiA) of the Constitution confirms that the contention that it renders any part of Order (No 2) invalid was completely untenable. I reject this ground.

Kassam Plaintiffs – Ground F: s 109 – Australian Immunisation Register Act 2015

287 The Kassam plaintiffs contend that Order (No 2) is rendered inoperative under s 109 of the Constitution because it is inconsistent with the *Australian Immunisation Register Act* ("AIRA").[167]

288 As its name implies, the AIRA establishes and provides for an immunisation register. Division 2 of Part 2 of the AIRA addresses the establishment, contents and purposes of the register. Within that Division, s 10A imposes an obligation on a "registered vaccination provider" who administers a "relevant vaccine" to report that fact within a specified period. There was no challenge in these proceedings to the validity of s 10A. One of the specified purposes of the register is to enable the "checking of an individual's vaccination status" by that individual or a registered vaccination provider (s 10(1)(f)).

289 Part 4 of the AIRA addresses dealings with protected information in the register which includes information about their vaccination status. Section 22(2) enables a person to make a record of, disclose or use "protected information" if, inter alia, "the person is required or authorised to do so by or under a law of the Commonwealth or of a State or Territory" (s 22(2)(d)). Section 23 creates an offence if a person makes a record of, discloses or uses protected information and that is not authorised by s 22. However, s 26 specifies that it does not apply if the protected information is disclosed to or by the person that it relates to or in accordance with their express or implied consent.

290 The test for applying s 109 binding on this Court is set out in the following passage from *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428; [2019] HCA 2 at [32]-[34] (per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ):

> "The first approach has regard to when a State law would 'alter, impair or detract from' the operation of the Commonwealth law. *This effect is often referred to as a direct inconsistency'*. Notions of 'altering', impairing' or 'detracting from' the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth law if the State law in its operation and effect would undermine the Commonwealth law.
>
> The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'. *This is usually referred to as an 'indirect inconsistency'*. A Commonwealth law which expresses an intention of this kind is said to 'cover the field' or, perhaps more

> accurately, to 'cover the subject matter' with which it deals. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law.
>
> The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged that a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation. Where an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive or exclusive with respect to an identified subject matter." (Footnotes omitted.)

291 In oral argument, Mr King relied on indirect inconsistency in that he contended that the AIRA covered the field on the subject matters which it dealt with leaving no room for those aspects of Order (No 2) which deal with the production of vaccination evidence. [168] I do not accept that submission. The AIRA and provisions such as clause 5.8(3) of Order (No 2) address entirely different topics; the former being the establishment and maintenance of the immunisation register, and the latter being a specific occasion when an individual might be required to disclose their vaccination status via information obtained from the register.

292 The Kassam plaintiffs' written submissions also appeared to tie the allegation of inconsistency to the establishment of their case of civil conscription, [169] a case I have rejected. They also appear to raise a claim of direct inconsistency. [170] However, nothing in the AIRA conflicts with the obligation to disclose vaccination evidence in the circumstances addressed in s 4.3(3A) and s 5.8(3) of Order (No 2) (or sub-clause 7(2) of the Aged Care Order or sub-clause 4(2) of the Education Order).

293 This ground is without substance and I reject it.

Conclusion

294 All of the asserted grounds of invalidity raised by both sets of plaintiffs have been rejected. Both proceedings must be dismissed.

295 I will direct the parties to confer on costs but failing agreement I will make orders for the exchange of competing orders and short submissions. On receiving the submissions, I will determine whether any argument over costs can be dealt with on the papers without a further oral hearing.

296 Accordingly, in proceedings No 2021/00252587 brought by the Henry plaintiffs the Court orders that:

(1) The proceedings be dismissed;

(2) On or before 22 October 2021, the parties confer in relation to the appropriate orders as to costs;

(3) In the event that agreement is reached on the appropriate orders as to costs, the parties file the proposed orders on or before 5.00pm on 25 October 2021;

(4) In the event that no agreement is reached on the appropriate orders as to costs, each party to file and serve:

(i) their proposed orders as to costs and any submissions in support of the proposed orders that are not to exceed four pages on or before 5pm on 29 October 2021;

(ii) any submissions in reply that do not exceed four pages on or before 5pm on 5 November 2021.

297 In proceedings No 2021/00252587 brought by the Henry plaintiffs, the Court orders that:

(1) The proceedings be dismissed;

(2) On or before 22 October 2021, the parties confer in relation to the appropriate orders as to costs;

(3) In the event that agreement is reached on the appropriate orders as to costs, the parties file the proposed orders on or before 5.00pm on 25 October 2021;

(4) In the event that no agreement is reached on the appropriate orders as to costs, each party to file and serve:

(i) their proposed orders as to costs and any submissions in support of the proposed orders that are not to exceed four pages on or before 5pm on 29 October 2021;

(ii) any submissions in reply that do not exceed four pages on or before 5pm on 5 November 2021.

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Endnotes

1. Kassam plaintiffs: Supplementary submissions of plaintiffs in closing at [2(i)] (“Kassam sup subs”).
2. Submissions of the State Defendants at [83ff] (“State subs”).
3. Henry plaintiff’s submissions at [82] (“Henry subs”).
4. State subs at [24] to [27].
5. See Submissions of (Henry) Plaintiffs in reply to defendants’ written submissions at [2] (“Henry reply subs”).
6. Exhibit Kassam 2, Tab 6.
7. Exhibit State 1, Tab 8 at p 69.
8. Henry plaintiff’s submissions at [77]; (“Henry subs”).
9. Henry subs at [99].
10. Henry subs at [100].
11. Kassam reply subs at [19].
12. Kassam reply subs at [19].
13. Tr 06/10/2021 p 261.
14. Exhibit Kassam 1 at Tab 10, p 1.
15. Exhibit Kassam 1 at Tab 12.

16. Exhibit State 2 at Tab 9A.

17. Exhibit State 1 at Tab 35.

18. Affidavit of Kathryn Boyd sworn 22 September 2021 at [15].

19. Exhibit KB-1 to the Affidavit of Kathryn Boyd sworn 22 September 2021 at p 40.

20. The affidavit used the word “considered”, however the use of this part of the affidavit was restricted to establishing what advice the committee “received” under s 136 of the Evidence Act.

21. The affidavit used the word “consider”, however the use of this part of the affidavit was restricted to establishing what advice the committee “receive” under s 136 of the Evidence Act.

22. The affidavit used the word “participates”, however the use of this part of the affidavit was restricted to establishing that the Minister “attends” under s 136 of the Evidence Act.

23. Exhibit KB-1 to the Affidavit of Kathryn Boyd sworn 22 September 2021 at p 46.

24. Exhibit KB-1 to the Affidavit of Kathryn Boyd sworn 22 September 2021 at p 98.

25. Exhibit KB-1 to the Affidavit of Kathryn Boyd sworn 22 September 2021 at pp 108, 113 and 117.

26. Exhibit State 2, Tab 9A.

27. Exhibit State 2, Tab 9B, letter of 24 August 2021.

28. Exhibit State 2, Tab 9B.

29. Exhibit State 1 at Tab 32.

30. Exhibit State 1 at Tab 32, p 9.

31. Exhibit State 1 at Tab 33.

32. Exhibit State 1 at Tab 33, p 1.

33. Exhibit State 1 at Tab 34.

34. Annexure TMN11 to the affidavit of Tony Mark Nikolic sworn 30 August 2021.

35. Page 144 of the affidavit of Tony Mark Nikolic sworn 30 August 2021.

36. Page 147 of the affidavit of Tony Mark Nikolic sworn 30 August 2021.

37. Exhibit State 1 at Tabs 16,17 and 18.

38. Exhibit State 1 at Tab 18, p 3.

39. Affidavit of Nathan Buckley sworn 16 September 2021 at [11].

40. Tr 05/10/2021 p 192.6.

41. Tr 05/10/2021 p 192.15.

42. Affidavit of Dr Marianne Gale affirmed 22 September 2021 at [32].

43. Affidavit of Marianne Gale sworn 22 September 2021 at [5].

44. Affidavit of Marianne Gale sworn 22 September 2021 at [81].

45. Tr 01/10/2021 p 117.

46. Tr 04/10/2021 p 203.

47. Tr 04/10/2021 p 203.

48. Tr 30/09/2021 p 37.

49. Affidavit of Professor Thomas Borody sworn 2 September 2021; CB A/1 Tab 11.

50. Affidavit of Professor Thomas Borody sworn 2 September 2021.

51. Affidavit of Ian Brighthope sworn 20 September 2021 at [41] to [42]; CB A/2 Tab 17.

52. Affidavit of Brian Tyson sworn 15 September 2021; CB A/2 Tab 16.

53. Annexure BT1 at pp 10 to 11.

54. Annexure BT1 at p 13.

55. Affidavit of Professor Macartney sworn 22 September 2021 at page 11-12.

56. Affidavit of Professor Macartney sworn 22 September 2021 at page 13.

57. Affidavit of Professor Macartney sworn 22 September 2021 at page 12.

58. Tr 30/09/2021 at pp 37 to 39.

59. Tr 30/09/2021 p 39.

60. Affidavit of Brian Tyson dated 25 September 2021; CB A/2 Tab 21.

61. CB A/1 Tab 10.

62. Tr 30/09/21 at p 42.50.

63. Annexure “PAM-2” to the affidavit of Peter A McCullough dated 14 September 2021; CB A/1 Tab 12.

64. Affidavit of Dr Peter McCullough sworn 14 September 2021 at p 179.

65. Tr 30/09/2021 p 60.

66. Affidavit of Michael Palmer sworn 14 September 2021; CB A/1 Tab 13.

67. Annexure MP2.

68. Affidavit of Michael Palmer at [3]; Annexure MP1.

69. MP1 at p 6.10.

70. MP1 at p 7.

71. MP1 at pp 8 to 17.

72. MP1 at p 15.

73. MP1 at p 17.

74. Affidavit of Professor Macartney sworn 22 September 2021 at page 17.

75. Affidavit of Professor Macartney sworn 22 September 2021 at page 15.

76. Affidavit of Professor Macartney sworn 22 September 2021 at page 16.

77. Tr 30/09/2021 p 70.12.

78. Affidavit of Professor Macartney sworn 22 September 2021 at p 17.

79. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021; CB A/2 Tab 14.

80. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 21.

81. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 25.

82. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 21.

83. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 23.

84. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 25.

85. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 26.

86. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 26.1.

87. Exhibit JB2 to the Affidavit of Professor Jayanta Bhattacharya sworn 15 September 2021 at p 26.

88. Affidavit of Professor Macartney sworn 22 September 2021 at pages 6 to 7.

89. Affidavit of Christina Parks dated 16 September 2021; Affidavit of Christina Parks dated 26 September 2021.

90. Affidavit of Christina Parks dated 16 September 2021 at 14.

91. Affidavit of Dr Christina Parks affirmed 30 September 2021.

92. Affidavit of Professor Macartney sworn 23 September 2021 at pp 17 to 20.

93. Affidavit of Christina Parks affirmed 26 September 2021 at page 4.

94. Affidavit of Christina Parks affirmed 16 September 2021 at page 9.

95. Affidavit of Professor Macartney sworn 22 September 2021 at page 17.

96. Tr 30/09/2021 p 76.

97. Tr 30/09/2021 p 76.30.

98. Tr 30/09/2021 p 52; See Report of Professor Macartney dated 16 September 2021 at p 18 and 22.10; page 108 of the Affidavit of Dr Parks affirmed 16 September 2021.

99. Tr 30/09/2021 p 52.24.

100. Page 108 of the Affidavit of Dr Parks affirmed 16 September 2021.

101. Tr 30/09/2021 at p 52.29.

102. Page 108 of the Affidavit of Dr Parks affirmed 16 September 2021.

103. Tr 30/09/2021 p 60.10.

104. Tr 30/09/2021 58; Page 120 of the Affidavit of Dr Parks affirmed 16 September 2021.

105. Page 120 of the Affidavit of Dr Parks affirmed 16 September 2021.

106. Tr 30/09/2021 at p 58.14.

107. Tr 30/09/2021 p 76.18.

108. Page 152 of the Affidavit of Dr Parks affirmed 16 September 2021.

109. Page 153 of the Affidavit of Dr Parks affirmed 16 September 2021.

110. Tr 30/09/2021 p 59.30.

111. Page 153 of the Affidavit of Dr Parks affirmed 16 September 2021.

112. Page 232 of the Affidavit of Dr Parks affirmed 16 September 2021.

113. Tr 30/09/2021 p 63.38.

114. Page 234 of the Affidavit of Dr Parks affirmed 16 September 2021.

115. Tr 30/09/2021 p 46.11; see also Tr 30/09/2021 p 72.

116. Henry subs at [71] to [72].

117. Henry subs at [80] to [90].

118. Henry subs at [91].

119. Eg Henry subs at [93], [94], [99], [100], [103], [107].

120. Henry subs at [108ff].

121. Tr 06/10/2021 p 253.50.

122. Henry subs at [99].

123. Henry subs at [102].

124. Henry subs at [106] to [118].

125. Henry subs at [121] to [129].

126. Tr 06//10/2021 at pp 253 to 254 and 258 to 259.

127. Tr 05/10/2021 p 184.

128. Henry subs at [134ff].

129. Tr 05/10/2021 p 189.6.

130. Tr 05/10/2021 p 189.

131. Henry subs at [147] to [149].

132. Henry subs at [141].

133. Henry subs at [157].

134. Henry subs at [151].

135. Tr 05/10/2021 pp 190ff.

136. Tr 05/01/2021 p 195.

137. Exhibit TMN10 to the affidavit of Tony Mark Nikolic sworn 29 August 2021.

138. Exhibit TMN9 to the affidavit of Tony Mark Nikolic sworn 29 August 2021.

139. Eg Page 1 of Exhibit TMN10 to the affidavit of Tony Mark Nikolic sworn 29 August 2021.

140. Tr 30/9/2021 at p 50 to 51.

141. Tr 30/09/2021 p 69.

142. Kassam subs at [21] to [33].

143. Kassam subs at [27].

144. Kassam subs at [34] to [78].

145. Kassam subs at [37].

146. Kassam subs at [45] to [58].

147. Kassam subs at [62].

148. Kassam subs at [37] and [72].

149. Kassam subs at [79ff].

150. Kassam subs at [83].

151. Tr 01/10/2021 p 118.17.

152. Kassam subs at [88]

153. Kassam subs at [121ff].

154. Kassam subs at [124].

155. State subs at [98].

156. State subs at [99] to [109]; Commonwealth subs at [2].

157. Kassam subs at [92] to [93]; Tr 01/10/2021 p 142.

158. Tr 01/10/2021 p 144.

159. Kassam plaintiffs supplementary submissions of plaintiffs in closing dated (wrongly) 4 September 2021 at [7].

160. Tr 05/10/2021 p 183.

161. Kassam subs at [92].

162. Kassam subs at [109].

163. Kassam subs, Joint Scheme Tender Document Analysis Schedule to Plaintiff's Submissions at pp 47 onwards.

164. Exhibit Kassam 1 at 61.

165. Kassam subs, Joint Scheme Tender Document Analysis Schedule to Plaintiff's Submissions at pp 55 to 57; Exhibit Kassam 1 at Tabs 57 to 60.

166. Exhibit Kassam 1 at Tab 57.

167. Kassam subs at [126ff].

168. Tr 01/10/2021 at p 149; See also Kassam subs at [128].

169. Kassam subs at [126] and [129] to [130].

170. Kassam subs at [130] and [133].

Decision last updated: 15 October 2021