NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Sydney Registry

BEATA MANIEWSKA-VILKAS
Applicant

BRADLEY RONALD HAZZARD, MINISTER FOR HEALTH, NSW
Respondent

PROPOSED SUBMISSIONS FOR *Davis v Minister for Health [2021]* NSWCATAD 293

Background

1. On 26 August 2021, the Respondent Bradley Ronald Hazzard, the Minister for Health in NSW (**the Minister**) gave directions by order entitled *Public Health (Covid-19 Vaccination of Health Care Workers) Order 2021* under section 7 of the *Public Health Act 2010* (NSW) **(PHA)** **(the Decision).**

2. Relevantly, the Decision states at Part 2 as follows:

> **Part 2 Directions concerning vaccination of health care workers**
>
> **4 Directions of Minister for health care workers to be vaccinated**
>
> (1) The Minister directs that a health care worker must not do work as a health care worker unless—
>
> (a) if the work is done on or after 30 September but before 30 November 2021— the worker has received at least 1 dose of a COVID-19 vaccine, or
>
> (b) if the work is done on or after 30 November 2021— the worker has received at least 2 doses of a COVID-19 vaccine.
>
> (2) The Minister directs that a health care worker must, if required to do so by an authorised person on or after the commencement of this Order, provide vaccination evidence for the worker.
>
> (3) Subclauses (1) and (2) do not apply to—

(a) a health practitioner who does work as a health care worker in response to a medical emergency, or

(b) another person who does work as a health care worker in response to a non-medical emergency, for example, a fire, flooding or a gas leak.

5 Direction of Minister for responsible persons for health care workers

The Minister directs that each responsible person for a health care worker must take all reasonable steps to ensure that the health care worker to whom clause 4 applies complies with the directions of the clause.

(together, **the Directions**).

3. The Applicant has filed an Application for review pursuant to section 7(7) of the PHA on the basis the Directions lack merit on various grounds, together with an application for interim orders to list an urgent expedited hearing.

4. The Applicant notes the decision of *Davis v Minister for Health [2021]* NSWCATAD 293 (**Davis**), involving an application on the Decision by another nurse in similar circumstances. At the conclusion of the hearing directions were made for submissions on jurisdiction, and for the making of any application for summary dismissal, to be heard on 11 October 2021. The Applicant is not aware of any decision of the Tribunal in relation to the question of jurisdiction.

5. The Applicant's Solicitor has carriage of over 800 applications that are ready to be filed contemporaneously by health care workers in a similar position.

6. Accordingly, the Applicant seeks leave to file these submissions on the question of jurisdiction currently considered by the Tribunal in Davis.

The Jurisdiction Question

7. The jurisdictional question proposed by the Respondent is outlined at paragraph 34 of Davis:

> *In addressing the question of the Tribunal's jurisdiction to conduct a review of the directions given under the PHO, the Minister submits that orders made pursuant to the power conferred by s 7(2)(b) of the PH Act may be either administrative in character, that is directed at particular individuals, or legislative in character, that is orders of general application: and the PHO*

> *falls within the latter category. Section 7(7) of the PH Act confers administrative review jurisdiction on the Tribunal, and limits that jurisdiction to only certain decisions made under s 7: what is absent from s 7(7) is any conferral of jurisdiction to review the order itself. The legislature was concerned to give the Tribunal review jurisdiction only in respect of directions made in particular cases as opposed to an order containing directions of general application. The authorisation in s 7(7) of "administrative review" under the ADR Act of directions given by such an order suggests that s 7(7) of the PH Act and s 9(1) of the ADR Act were not intended to give the Tribunal jurisdiction to review an instrument of a legislative kind such as the PHO.*

8. Briefly, we submit that the Tribunal has the requisite jurisdiction to review the directions, on the following bases.

   (a) The relevant provisions on their proper construction do not exempt orders of legislative character;

   (b) The Decision is in any event not an order of legislative character; and

   (c) It would otherwise be unfair and unjust to exempt the Decision from review.

Construction

9. Section 30(1) of the *Civil and Administrative Tribunal Act 2013* (**CATA**) states that the ADRA provides for the circumstances in which the Tribunal has administrative review jurisdiction over a decision of an administrator.

10. Section 7(1) of the ADRA provides that an "administratively reviewable decision" is a decision of an administrator over which the Tribunal has administrative review jurisdiction. Section 9(1) of the ADRA provides:

> *(1) The Tribunal has administrative review jurisdiction over a decision (or class of decisions) of an administrator if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this Act of any such decision (or class of decisions) made by the administrator:*
>
> *(a) in the exercise of functions conferred or imposed by or under the legislation, or*
>
> *(b) in the exercise of any other functions of the administrator identified by the legislation.*

Section 7(7) of the PHA provides as follows:

> *(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.*

11. The manifest intention is that "*any decision*" and "*any direction*" made by the Respondent under section 7 of the PHA may be the subject of application to the Tribunal. This is mirrored by words of section 9(1) of the ADRA "[...] *if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this Act of any such decision.*" [underline added]

12. Given the plain reading of the broad language of the ADRA, PHA and CATA, all of which reinforce the intention of Parliament to be unlimited and consistent, it would be absurd and wrong to impute an intention to the legislature that either:

    (a) an application may be made under section 7 PHA, but access to justice denied under section 9 ADRA; or
    (b) directions given on a large scale under section 7 PHA are somehow immune from review.

13. It may be that Parliament did not contemplate orders of legislative character to be given in the form of directions under section 7 of the PHA. In that event, the provision ought not be construed so as to favour the Minister for exceeding his powers under the section by exempting the decision from merits review, over the plain words of the provisions.

14. Further, section 8 of the PHA applies when an emergency is declared under the *State Emergency and Rescue Management Act 1989*, and provides for agreement with the Minister responsible for that Act as an additional protection under that section in lieu of Tribunal review.

15. The PHA protects the Respondent from civil claims. As per section 132 of the PHA, damages or other compensation is not payable unless bad faith can be proved. This further militates against an additional protection from merits review being implied on an ad hoc basis.

16. The 15 October 2021 decision of the NSW Supreme Court in *Kassam v Hazzard and Henry v Hazzard* [2021] NSWSC 1320 canvassed but did not decide this issue at [27] to [29]. However, the Court there proceeded with the judicial review on the basis of treating the Decision as an administrative decision.

Legislative character

17. The Federal Court set out a factorial test in *Applied Medical Australia Pty Ltd v Minister for Health* [2016] FCA 35, at [47]:

Fourthly, I also take into account the following indicators of a legislative decision, that is, whether the challenged matter:

(i) creates new rules of general application, rather than applying existing rules to particular cases;
(ii) must be publicly notified in the Gazette or similar publication;
(iii) cannot be made until there has first been wide public consultation;
(iv) incorporates or has regard to wide policy considerations;
(v) can be varied or amended unilaterally by its maker, the analogy being to primary legislation;
(vi) cannot be varied or amended by the executive;
(vii) is not subject to merits review in a tribunal;
(viii) can be reviewed in Parliament (for example, as a disallowable instrument);
(ix) triggers the operation of other legislative provisions; and has binding effect.

18. While it is accepted that the Decision applies to a large number of persons and facilities, the preponderance of factors militate against legislative character, because:

(a) the period the Decision may be in force is no more than 90 days (s 7(5) PHA);
(b) the vaccination deadlines in clause 4(1) of the Decision further indicate specific 'point-in-time' requirements;
(c) failure to Gazette does not invalidate (s 7(4) PHA);
(d) the decision is *prima facie* reviewable by the Tribunal (s 7(7) PHA);
(e) it can be varied or revoked unilaterally by the Minister in his executive capacity;
(f) it is not reviewable by Parliament as a statutory rule under the *Subordinate Legislation Act 1989*;
(g) no public consultation was conducted; and

(h) the mode of expression and the terminology of "directions", particularly in clauses 4 and 5, are of a non-legislative flavour.

Unfair and unjust

19. Where the PHA and the ADRA prima facie provide for access to Tribunal merits review, and given the limitations on tort claims against the State under the PHA and the restricted nature of judicial review grounds as expressed in Kassam and elsewhere, and considering the impact and scope of the directions, the Tribunal presents the only realistic legal avenue available to challenge the directions.

20. It is submitted that a denial of access to justice to the Applicant and the many other health workers impacted by the directions on the ground of an implied exemption for a class of decisions would be patently absurd and unjust on any rational measure.

19 October 2021

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