

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 28/02/2022 9:22:04 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NSD1303/2021  
File Title: LORETTA KIKUYU v BRADLEY RONALD HAZZARD, MINISTER FOR HEALTH NSW & ANOR  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 28/02/2022 11:08:56 AM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## **Amended Statement of claim**

Filed pursuant to orders of His Honour Lee J dated 25 January 2022

No. \_\_\_\_\_ of 20

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Loretta Kikuyu**

Applicant

**Bradley Ronald Hazzard, Minister for Health NSW and another**

Respondents

### **Applicant**

1. The Applicant is and was at all material times an individual ordinarily resident in New South Wales (**NSW**) and capable of suing.

### **Representative Proceeding**

2. ~~The Applicant brings this proceeding as a representative proceeding pursuant to:~~

(a) as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth); and

2.(b) pursuant to section 39B(1A)(c) of the *Judiciary Act 1903* (Cth).

3. The Applicant brings the proceedings against the First Respondent on behalf of herself and every person who is defined as a "health care worker" under either any of the Orders (as defined in paragraph 8), save for:

(a) those to whom the directions to be vaccinated, or not to work unvaccinated, expressly do not apply; and

(b) those to whom an exemption applies.

(collectively, the **Class Members**).

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Filed on behalf of (name & role of party) Loretta Kikuyu, Applicant

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Prepared by (name of person/lawyer) Peter Maatouk

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4. Further, the Applicant brings the proceedings against the Second Respondent on behalf of herself and every Class Member who:
- (a) is or has been affected by Determination number 33 of 2021 made by the Second Respondent dated 12 November 2021 (**Determination**); and
  - (b) is defined as a "NSW Health Service Employee" for the purposes of the Determination –
- save for:
- i. those to whom the directions to be vaccinated, or not to work unvaccinated, expressly do not apply; and
  - ii. those to whom an exemption applies.

**(Sub-Class Members)**

5. There are more than 7 Class Members and Sub-Class Members as at the commencement of this proceeding.

**Respondents**

6. The First Respondent (the **Minister**) is and was at all material times the Minister for Health in NSW and capable of being sued.
7. The Second Respondent (the **Secretary**) is and was at all material times the Secretary of the Ministry of Health in NSW and capable of being sued.

**Public Health Orders**

8. The Minister made certain written Public Health Orders affecting the Applicant and Class Members.
- (a) *Public Health (Covid-19 Vaccination of Health Care Workers) Order 2021* dated 26 August 2021 (**First Order**);
  - (b) *Public Health (COVID-19 Vaccination of Health Care Workers) Amendment Order 2021* dated 29 September 2021 (**Amendment**); and
  - ~~(c)~~ *Public Health (Covid-19 Vaccination of Health Care Workers) Order (No 2) 2021* dated 22 October 2021 (**Second Order**); ~~and~~
  - ~~(e)~~(d) *Public Health (Covid-19 Vaccination of Health Care Workers) Order (No 3) 2021* dated 23 December 2021 (**Third Order**).
- (together, the First Order, ~~and~~ the Second Order and the Third Order are the **Orders**)

**First Order**

9. By the First Order, the Minister gave certain directions to the Applicant and Class Members.

Particulars

- i. The First Order is expressed to be made pursuant to section 7 of the *Public Health Act 2010 (NSW) (PH Act)* (page 1).
- ii. The Explanatory Note states “The object of the Order is to require certain health care workers be vaccinated against Covid-19” (page 1).
- iii. Clause 2 sets out definitions, including “Covid-19 vaccine” and “health care worker”.
- iv. Clauses 3, 4 and 5 provide as follows.

**3 Grounds for concluding that there is a risk to public health**

It is noted that 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, and there is an ongoing risk of continuing introduction or transmission of the virus in New South Wales, including by means of community transmission,
- (d) 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.

**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.

## Amendment

10. The Amendment affected certain Class Members.

### Particulars

- i. The Amendment amended the First Order to exclude certain health care workers who are remotely providing non-health services from the requirement to be vaccinated with a COVID-19 vaccine.

## Second Order

11. By the Second Order, the Minister gave certain directions to the Applicant and Class Members.

### Particulars

- i. The Second Order is expressed to repeal and remake the First Order.
- ii. Clauses 3, 4 and 5 provide as follows.

### **3 Grounds for concluding that there is a risk to public health**

It is noted that 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 been confirmed in New South Wales and other Australian jurisdictions, and there is an ongoing risk of continuing transmission of the virus in New South Wales,
- (d) those cases include individuals with the Delta variant of COVID-19, which is more contagious than previous variants and has increased the risk and speed of community transmission,
- (e) health care workers work with vulnerable and sick members of the community, including those who have COVID-19,
- (f) ensuring that health care workers are vaccinated will reduce—
  - (i) the risk of infection, severe disease and death in the workers, and
  - (ii) the risk of transmission of infection from workers to patients and other workers,
- (g) public health and hospital services are at risk without appropriate and proportionate mitigation strategies, including vaccination to protect health care workers and patients.

## **Part 2 Vaccination of health care workers**

### **4 Introduction**

This Part sets out the directions of the Minister about the vaccination of health care workers.

### **5 Health care workers not to work unvaccinated**

- (1) A health care worker must not do work as a health care worker on or after the commencement of this Order but before 30 November 2021 unless the worker has received at least 1 dose of a COVID-19 vaccine.
- (2) A health care worker must not do work as a health care worker on or after 30

November 2021 unless the worker has received at least 2 doses of a COVID-19 vaccine.

- (3) Subclauses (1) and (2) do not apply in relation to work done for a public health organisation, the Health Administration Corporation, the Ambulance Service of NSW or the Ministry of Health under a contract of service or a contract for services if—
  - (a) the work does not involve the provision of a health service within the meaning of the *Health Services Act 1997*, and
  - (b) the person doing the work is not physically present, while doing the work, at premises operated by the public health organisation, Health Administration Corporation, Ambulance Service of NSW or Ministry of Health.
- (4) 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.
- (5) Subclauses (1), (2) and (4) 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.

### **Third Order**

**12. By the Third Order, the Minister gave certain directions to the Applicant and Class Members.**

#### **Particulars**

- i. Clause 12 repeals the Second Order.
- ii. Clauses 4, 5 and 6 provide as follows.

### **Part 2 Vaccination of health care workers—stage 1**

#### **4 Introduction**

This Part sets out stage 1 of the Minister's directions about the vaccination of health care workers.

#### **5 Stage 1 health care workers not to work unvaccinated**

- (1) A stage 1 health care worker must not do work as a health care worker unless the worker has received at least 2 doses of a COVID-19 vaccine.
- (2) Subclause (1) does not apply in relation to work done for a public health organisation, the Health Administration Corporation, the Ambulance Service of NSW or the Ministry of Health under a contract for the provision of services if—
  - (a) the work does not involve the provision of a health service within the meaning of the *Health Services Act 1997*, and
  - (b) the person doing the work is not physically present, while doing the work, at premises operated by the public health organisation, Health Administration Corporation, Ambulance Service of NSW or Ministry of Health.
- (3) To remove any doubt, subclause (2) does not apply to work done under a contract of employment.
- (4) A stage 1 health care worker must, if required to do so by an authorised person, provide vaccination evidence for the worker.
- (5) Subclauses (1) and (4) 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.

Example— A fire, flooding or a gas leak.

### **6 Responsible persons for stage 1 health care workers**

Each responsible person for a stage 1 health care worker must take all reasonable steps to ensure the worker complies with clause 5.

iii. Clauses 7, 8 and 9 provide as follows.

## **Part 3 Vaccination of health care workers—stage 2**

### **7 Introduction**

This Part sets out stage 2 of the Minister's directions about the vaccination of health care workers.

### **8 Stage 2 health care workers not to work unvaccinated**

- (1) A stage 2 health care worker must not do work as a health care worker on or after— (a) 31 January 2022 unless the worker has received at least 1 dose of a COVID-19 vaccine, and  
 (b) 28 February 2022 unless the worker has received at least 2 doses of a COVID-19 vaccine.

Note— A person who is a stage 1 health care worker is not a stage 2 health care worker.

- (2) A stage 2 health care worker must, if required to do so by an authorised person on or after 31 January 2022, 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.

Example— A fire, flooding or a gas leak.

### **9 Responsible persons for stage 2 health care workers**

Each responsible person for a stage 2 health care worker must take all reasonable steps to ensure the worker complies with clause 8.

## **The Applicant's Circumstances**

42.13. The Applicant is a Registered Nurse employed by NSW Government Health, South Eastern Sydney Local Health District (**Employer**) until 8 December 2021.

43.14. Since 2018, the Applicant has performed her duties on a permanent part-time basis at St George Hospital and Health Service.

44.15. On 16 September 2021, the Employer advised the Applicant by letter that the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak Order) No. 2* required all authorised workers who live in an area of concern and need to leave the area of concern for work to have had at least 1 dose of a COVID-19 vaccine or to have been issued with a medical contraindication certificate by Monday 19 September 2021 to attend work.

45.16. On 17 September 2021, the Applicant was stood down.

~~16-17.~~ On 5 October 2021, the Employer advised the Applicant by letter of her obligations to be vaccinated pursuant to the First Order, that she is unable to work at NSW Health and that by default she would be placed on unpaid leave.

~~17-18.~~ On 10 November 2021, the Applicant wrote to the Employer requesting to discuss options to return to work and raising various concerns.

Particulars

- i. The risks of her taking a provisionally approved vaccine still undergoing trial.
- ii. The opportunity of working remotely.
- iii. The possibility of undertaking regular rapid antigen testing at her own cost.

~~18-19.~~ On 20 November 2021, the Employer further advised the Applicant by letter of possible termination of her employment for failing to meet vaccination requirements.

Particulars

- i. The letter confirmed that the First Order was rescinded and replaced by the Second Order.

~~19-20.~~ On 8 December 2021, the Employer advised the Applicant by letter of her termination.

Particulars

- i. The Employer stated that the Applicant had not provided evidence of Covid-19 vaccination or an exception in order to comply with the First Order, the Second Order or the Determination.

~~21.~~ The Applicant is precluded from obtaining work in the NSW health sector due to the continuation of the requirements under the Third Order and the Determination.

**Authorising provision**

~~20-22.~~ Section 7 of the PH Act authorises the Minister to give directions by order:

- (a) if he considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health (s.7(1)); and
- (b) such as he considers necessary in the circumstances to deal with the risk and its possible consequences (s.7(2)).



~~21:23.~~ The Minister's power to make directions by order under ss.7(1) and (2) is subject to:

(a) any express limitations in s.7; and

Particulars

- i. An order expires after 90 days (s.7(5)).
- ii. An order has no effect in relation to any part of the State where a state of emergency exists under the *State Emergency and Rescue Management Act 1989 (SERM Act)* (s.7(6)).

(b) any limitations implied by operation of law, as set out below.

**Outline**

~~22:24.~~ The powers conferred on the Minister to make the Orders under s.7 of the PH Act are limited by the operation of the *Biosecurity Act 2015 (Cth) (BSC Act)* and the common law.

~~23:25.~~ In making the Orders, the Minister exceeded the limitations implied by operation of the BSC Act and common law.

(a) The Orders cannot be validly made in the circumstances without a declared state of emergency in NSW.

(b) Alternatively, the Orders cannot be validly made without:

- i. the Minister first being satisfied of certain matters; or
- ii. ~~the Minister acting reasonably (or not acting unreasonably); or~~
- iii. ii. certain procedural and substantive rights being afforded to each affected person, including the right to informed consent to vaccination and the right to sufficient information about the vaccine.

~~24:26.~~ Similar claims are made against the Secretary in relation to the determination under s.116A of the *Health Services Act 1997 (NSW)*.

**Ultra vires – Emergency Declaration**

~~25:27.~~ The objects of the BSC Act include to provide for managing the risks of contagion and spread of listed human diseases, and for human biosecurity emergencies (s.4(a)).

~~26:28.~~ Subject to certain exceptions, the BSC Act provides that the operation of a law of a State or Territory is excluded or limited to the extent that it is incapable of operating concurrently with the BSC Act (s.8) (**Concurrency provision**).

~~27.29.~~ As at the date of the Orders, a Commonwealth national human biosecurity emergency (**National emergency**) under part 2 of chapter 8 of the BSC Act (**National emergency provisions**) was in effect in relation to the listed human disease known as Covid-19.

Particulars

- i. Sections 473 to 479 (inclusive) of the BSC Act.
- ii. *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (National emergency declaration)* as extended by instruments of variation, made pursuant to section 475 of the BSC Act.

~~28.30.~~ Pursuant to sections 477 and 478 of the BSC Act, the Health Minister (Cth) may determine requirements or give directions during a human biosecurity emergency period to prevent or control the spread of a declaration listed disease.

~~29.31.~~ The Orders are aimed at managing the risks of contagion and spread of Covid-19.

Particulars

- i. First Order, clause 3.
- ii. ~~Second Order, clause 3.~~
- iii. ~~Third Order, clause 3.~~

~~30.32.~~ At the date of each Order, the Minister considered that a situation constituted by a human biosecurity emergency existed in NSW due to Covid-19, for the purposes of s.7(1) of the PH Act.

Particulars

- i. The Minister was or ought to have been aware of the National emergency when making each of the Orders.
- ii. At all material times, the Minister or the NSW Department of Health held out to the general public that an emergency situation in relation to Covid-19 existed in NSW.
- iii. NSW Department of Health webpages containing Covid-19 information for the public and media releases include in the header bar a red boxed highlighted caption stating, "Emergency Information".

- iv. As at the date of the Orders, an emergency existed in NSW in relation to Covid-19 within the meaning of section 4(1) of the SERM Act, notwithstanding that no state of emergency was declared in NSW under section 33 of the SERM Act (**State of emergency**).
- v. Section 8 of the PH Act provides for the Minister to make orders and directions under an State of emergency.

~~34.33.~~ The Minister was obliged to exercise powers under s.7(2) of the PH Act consistently with the National emergency provisions.

Particulars

- i. A National emergency was in force in relation to Covid-19, pursuant to the National emergency declaration.
- ii. The Orders are aimed at managing the risks of contagion and spread of Covid-19.
- iii. The Minister considered that a human biosecurity emergency situation existed in NSW in relation to Covid-19.
- iv. The Concurrency provision affected s.7 in its operation.

~~32.34.~~ The Minister acted *ultra vires* s.7(2) of the PH Act.

Particulars

- i. ——— To be consistent with the National emergency, the Minister ought to have ensured a State of emergency declaration was in force under Section 33 of the SERM Act and consequently made the Orders under s.8 of the PH Act.

i. ———

**Ultra vires – Considerations**

~~33.35.~~ Alternatively, in making the Orders, the Minister was obliged to exercise his powers under s.7 consistent with the National emergency provisions applying to the determining of emergency requirements or the giving of directions under s.477 or s.478 of the BSC Act.

~~34.36.~~ Under the National emergency provisions, before the Commonwealth Health Minister gives a direction to prevent or control the spread of a declaration listed disease, he must be satisfied of certain matters as set out in section 477(3)(a) to (d) or 478(3)(a) to (d) of the BSC Act (**Proportionality requirements**).

Particulars

The Minister must be satisfied that:

- i. the direction is likely to be effective in, or to contribute to, achieving the purpose for which it is to be given;
- ii. the direction is appropriate and adapted to achieve the purpose for which it is to be given;
- iii. the direction is no more restrictive or intrusive than is required in the circumstances; and
- iv. the period for which the direction is to apply is only as long as is necessary.

~~35.37.~~ Prior to making the Orders, the Minister was required to be satisfied of the Proportionality requirements (or requirements consistent with the Proportionality requirements), by operation of the Concurrency provision.

~~36.38.~~ The Orders are invalid to the extent that the Minister purported to give the directions absent satisfaction of requirements consistent with the Proportionality Requirements.

#### Particulars

- i. Section 7 does not provide for consideration of the Proportionality Requirements, apart from necessity – that is, adapted to achieve the purpose.
- ii. Nothing in the Orders indicates that the Minister considered or was satisfied that the directions are no more restrictive or intrusive than is required in the circumstances.
- iii. The Department did not consult the Applicant as to less restrictive or intrusive alternatives.

#### **Unreasonableness**

~~37. Further or alternatively:~~

~~(a) the Minister could not reasonably have been satisfied that all the Proportionality requirements could be met; or~~

~~(b) the Orders are an unreasonable, disproportionate or irrational exercise of power by the Minister.~~

~~38. In order to give proper consideration and/or form the requisite level of satisfaction, the Minister required, at a minimum, sufficient and accurate advice in relation to:~~

~~(a) the seriousness of the public health risk posed by Covid-19;~~

~~(b) the effectiveness of vaccination of the Class Members to reduce the risk of transmission, infection, severe disease and death to the Class Members and to patients;~~

~~(c) the health risk to the Class Members posed by the Covid-19 vaccines; and~~

~~(d) the available alternative measures.~~

~~(together, the Advice)~~

~~39. Had the Minister received the Advice, he could not have reasonably considered to the requisite level of satisfaction that the Orders were consistent with the Proportionality Requirements or were otherwise reasonable, as the Advice would have disclosed that, at the time of each of the Orders:~~

~~(a) there was no reliable evidence that SARS-CoV-2 poses a significant public health risk;~~

Particulars

~~i. There is no worldwide Covid-19 pandemic on any reasonable definition.~~

~~ii. The average age of death in Australia for those with and without Covid-19 is not significantly different.~~

~~iii. The infection survival rate for Covid-19 is around 99 percent, and similar to that of influenza.~~

~~iv. Covid-19 does not present an appreciable mortality risk for a working age person in average health.~~

~~v. The worst case chances of a person dying with Covid-19 in the developed world are akin to death by pedestrian accident.~~

~~vi. Covid-19 presents as a mild influenza-like illness in approximately 80 percent of cases, who fully recover within 14 days without the need for medication.~~

~~vii. The case, serious illness and death figures are inflated, biased or skewed due to generic case definition, presumptive diagnosis, systematic misdiagnosis, conflation of case and disease due to false assumptions as to infection and infectivity, causative role of comorbidities, and unreliability of mass testing.~~

~~viii. Further particulars may be provided in due course.~~

~~(b) there was no reliable evidence that Covid-19 vaccines reduce transmission, infection, serious illness or death;~~

Particulars

- ~~i. Covid-19 infections and deaths tend to increase as vaccination increases, relying on published consolidated international data.~~
  - ~~ii. Evidence from countries with advanced Covid-19 mass vaccination programs including the United Kingdom and Israel shows negative, null or negligible effectiveness of the vaccines against transmission, infection, reduction of severity of symptoms and death.~~
  - ~~iii. Vaccine rollouts are associated with Covid-19 related death spikes.~~
  - ~~iv. It is not mathematically possible to achieve vaccination induced herd immunity.~~
  - ~~v. Vaccination has not been shown to slow the spread of disease.~~
  - ~~vi. The Doherty modelling report prepared for National Cabinet and used to predict transmission is unscientific and merely hypothetical.~~
  - ~~vii. Further particulars may be provided in due course.~~
- ~~(e) there was no reliable evidence that Covid-19 vaccines are safe; or~~

Particulars

- ~~i. Myocarditis and pericarditis are serious and potentially lethal side effects of the Pfizer vaccine, as acknowledged in the Product Information and Consumer Medical Information published by the Therapeutic Goods Administration (TGA) and the ATAGI advice.~~
- ~~ii. Thrombosis and thrombocytopenia are serious and potentially lethal side effects of the Astrazeneca vaccine, as acknowledged in the Product Information, Consumer Medical Information published by the TGA and the ATAGI advice.~~
- ~~iii. The acknowledged serious side effects and many others were identified by Pfizer in post-market monitoring in a report to the United States Food and Drug Administration titled "5.3.6 cumulative analysis of post-authorization adverse event reports of pf-07302048 (bnt162b2) received through 28-feb-2021".~~
- ~~iv. The acknowledged serious side effects were not identified as safety issues by the TGA in the Australian Public Assessment Reports for the Pfizer vaccine in January 2021 or the Astrazeneca vaccine in February 2021.~~

- v. ~~The Commonwealth has published a risk/benefit model for the Astrazeneca vaccine that tends to show more risk from blood clots than lives saved for persons under 60.~~
- vi. ~~The Commonwealth has not published any risk/ benefit model for the Pfizer or Moderna vaccines.~~
- vii. ~~Many and frequent cases of predicted serious safety risks including death, paralysis, anaphylaxis, blood clots and heart inflammation have been reported in Australia and overseas.~~
- viii. ~~Medium and long term side effects are completely unknown, due to the expedited clinical trials and limited evaluation period of the vaccines.~~
- ix. ~~Worldwide data and numerous studies show strong correlations between vaccination and increased risk of death and serious illness.~~
- x. ~~Further particulars may be provided in due course.~~

~~(d) there were less restrictive or intrusive alternatives available.~~

Particulars

- i. ~~Measures that bolster innate immunity.~~
- ii. ~~Measures that support acquired natural immunity.~~
- iii. ~~Measures that promote early treatment with inexpensive and safe alternatives.~~
- iv. ~~Promoting proper diagnostic methods.~~
- v. ~~Regular testing.~~
- vi. ~~Working remotely.~~
- vii. ~~Further particulars may be provided in due course.~~

~~40. Further or alternatively, prior to giving the Orders the Minister had a duty to inquire into the matters constituting the Advice and failed to so inquire, or to adequately so inquire.~~

~~41. No reasonable decision maker, having the Materials before them or having made the necessary enquiries, could reasonably have given the Orders.~~

**Ultra vires – BSC protections**

~~42.39.\_\_\_\_\_ Alternatively, the Minister must exercise powers consistently with applicable provisions of the BSC Act, other than the National emergency provisions.~~

Particulars

- i. Paragraphs ~~2727272625~~ and ~~2828282726~~ herein are repeated.
- ii. BSC Act s.477(6) and s.478(6) operate to limit the Minister's power to direct individuals to be vaccinated.

~~43.40.~~ BSC Act provisions applicable to medical treatment and vaccination of individuals at risk of Covid-19 are set out in Parts 3 and 4 of Chapter 2 (ss.59-116).

Particulars

- i. Human biosecurity control orders (**HBSC control orders**) containing certain biosecurity measures (**BSC measures**) on individuals are set out in Parts 3 and 4 of Chapter 2 (ss.59-116).
- ii. The BSC measures include a requirement for an individual under a HBSC control order to receive a vaccination (**vaccination measure**) or treatment at a medical facility (s.92).
- iii. A vaccination measure is subject to requirements which include the following.
  1. A HBSC control order must be imposed on an individual (s.60(2)) (**personal order**).
  2. An officer making an HBSC control order must first be satisfied of principles similar to the Proportionality Requirements (s.60, note 2)
  3. A HBSC control order may only be imposed by a suitably qualified officer authorised by the Director of Human Biosecurity ("Director HBSC") (s.563(1)), or under a State or Territory arrangement (s.564(1)) (**authorised officer**).
  4. The officer must conduct a risk assessment and impose a biosecurity measure suitable for purpose and be satisfied that the BSC measure contributes to managing the risk of contagion or the entry, emergence, establishment or spread of the disease in Australian territory ((s.60(1), s.34(2)) and s.84) (**risk assessment**).
  5. The individual must have signs or symptoms (s.60(2)) (**symptom check**); or the individual has been exposed to the disease or to another individual who has signs or symptoms through physical contact, close proximity and/or direct exposure to infection (s.60(2), s.17) (**contact tracing check**).
  6. The HBSC control order must be in prescribed form and contain prescribed contact information of the individual, including signs and



symptoms of the disease, why the measure is required (**reasons for decision**) and rights of review under the BSC Act, the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ss.61, 62) (**external rights of review**).

7. The individual must not be subject to a HBSC control order for more than 3 months (s.61(1)(f)) (**3 months rule**).
8. The HBSC control order must be given to the individual (personally served) within 24 hours and its contents read aloud (s.63) (**personal notice and service**).
9. The individual's consent must be procured and recorded in writing on the HBSC control order (s.71(2)) (**consent**).
10. If the individual does not consent, the individual is only required to comply at the direction of the Director HBSC after a review of the measure is conducted considering the reasons for the individual's refusal to consent and impacts on their health (s. 72(3), 74(3) and (4)) (**internal rights of review**).
11. A biosecurity measure set out in s.92 (vaccination or treatment) or s.93 (medication) must be carried out in a manner consistent with appropriate medical standards (**medical standards**) and/or appropriate other relevant professional standards (s.94) (**professional standards**).

(collectively referred to as the **BSC Act requirements**).

44.41. NSW statutory requirements for medical treatment of persons at risk of Covid-19 are set out in s.62 of the PH Act which specifically provide for the making of public health orders for treatment of persons at risk of Covid-19 (**PH Act requirements**).

45.42. The Minister failed to ensure the Orders are consistent with the BSC Act requirements, by operation of the Concurrency provision, taking into account the PH Act requirements.

46.43. The exercise of powers was invalid to the extent that the Orders are inconsistent with the regime at Parts 3 and 4 of Chapter 2 of the BSC Act and the rights and protections afforded by the BSC Act requirements.

#### **BSC Act requirement – vaccination**

47.44.\_\_\_\_ Specifically, the requirements for vaccination under the Orders must be consistent with applicable BSC Act provisions applying to vaccination measures.

Particulars

- i. BSC Act section 92 deals with vaccination measures.
- ii. BSC Act section 94 deals with medical standards and professional standards.

48.45.\_\_\_\_ The Orders impose a requirement on the Applicant to undergo a vaccination measure.

Particulars

- i. The title of the Orders.
- ii. The object of the Orders.
- iii. The grounds in clause 3 of the Orders.
- iv. The purpose or effect of directions at clause 5 of the Orders.

49.46.\_\_\_\_ A vaccination direction may only be given by the Minister consistently with the BSC Act requirements for vaccination if given:

- (a) subject to the consent requirement;
- (b) pursuant to a personal order requirement, subject to other BSC Act requirements including requirements for an authorised officer, symptom check, risk assessment, reasons for decision, personal service, internal rights of review and external rights of review; or
- (c) subject to the medical standards and professional standards requirements.

50.47.\_\_\_\_ Medical standards and professional standards requirements apply to obtaining consent to a vaccination requirement.

Particulars

- i. Australian Government, *Australian Immunisation Handbook, Preparing for Vaccination, Valid Consent (Immunisation Handbook)*.
- ii. ATAGI, *Information for Providers: Covid-19 Vaccination Consent and FAQs*, version 7.1, 15 September 2021.
- iii. Australian Medical Association, *AMA Code of Ethics 2004. Editorially Revised 2006. Revised 2016 (AMA Code)*.

- iv. Standards implied by common law duty of care.
- v. Further particulars may be provided in due course.

(together the **Consent standards**)

~~51.48.~~ The inducements to providing consent under the Orders are inconsistent with the Consent standards.

Particulars

- i. The threat of loss of employment constitutes undue pressure or manipulation, contrary to item 2 of Criteria for valid consent in the Immunisation Handbook.
- ii. The threat of loss of employment derogates from or infringes the doctor's ethical duties under clause 2.1 of the AMA Code.

~~52.49.~~ Further, the Consent standards provide that consent is invalid unless information is first provided.

Particulars

- i. The Immunisation Handbook states that valid consent is given after sufficient, appropriate and reliable information about the procedure, including the potential risks and benefits, has been conveyed to that individual.
- ii. The Immunisation Handbook, Criteria for valid consent, item 4, provides that valid consent can only be given after the potential risks and benefits of the relevant vaccine, the risks of not having it, and any alternative options have been explained to the person.
- iii. The Immunisation Handbook further provides that sufficient information about risks and benefits to be given to patients includes what adverse events are possible, how common they are and what they should do about them.
- iv. The common law duty of care requires that a patient be given information or warnings sufficient to permit a balanced, cautious and informed judgment to be made as to the side effects.

(together, the **Information Standards**)

~~53.50.~~ The Orders are inconsistent with the Information standards.

- (a) Sufficient safety information on the Covid-19 vaccines is not available.

Particulars

- i. The worldwide clinical trials of the Pfizer, Astrazeneca and Moderna vaccines have estimated completion dates of 2 May 2023, 14 February 2023 and 27 October 2022 respectively.
- ii. No information exists as to the medium and long-term side-effects.
- iii. Vaccine research and development timeframes normally require at least 10 years of data collection.
- iv. Messenger ribonucleic acid and vector based human coronavirus vaccine technology is novel.
- v. Further particulars may be provided in due course.

(b) The nature, severity and frequency of side-effects is not well-known.

Particulars

Particulars

- i. Myocarditis and pericarditis are serious and potentially lethal side effects of the Pfizer vaccine, as acknowledged in the Product Information and Consumer Medical Information published by the Therapeutic Goods Administration (TGA) and the ATAGI advice.
- ii. Thrombosis and thrombocytopenia are serious and potentially lethal side effects of the Astrazeneca vaccine, as acknowledged in the Product Information, Consumer Medical Information published by the TGA and the ATAGI advice.
- iii. The acknowledged serious side effects and many others were identified by Pfizer in post-market monitoring in a report to the United States Food and Drug Administration titled "5.3.6 cumulative analysis of post-authorization adverse event reports of pf-07302048 (bnt162b2) received through 28-feb-2021".
- iv. The acknowledged serious side effects were not identified as safety issues by the TGA in the Australian Public Assessment Reports for the Pfizer vaccine in January 2021 or the Astrazeneca vaccine in February 2021.
- v. The Commonwealth has published a risk/benefit model for the Astrazeneca vaccine that tends to show more risk from blood clots than lives saved for persons under 60.
- vi. The Commonwealth has not published any risk/ benefit model for the Pfizer or Moderna vaccines.

- vii. Many and frequent cases of predicted serious safety risks including death, paralysis, anaphylaxis, blood clots and heart inflammation have been reported in Australia and overseas.
- viii. Medium and long term side effects are completely unknown, due to the expedited clinical trials and limited evaluation period of the vaccines.
- ix. Worldwide data and numerous studies show strong correlations between vaccination and increased risk of death and serious illness.
- i. ~~The particulars at paragraph 39(c) are repeated.~~
- ii-x. Further particulars may be provided in due course.

54.51. Alternatively, if the Orders are not required to be consistent with the Consent standards or the Information standards, the Orders are nonetheless not consistent with BSC Act requirements that apply in the event that consent is not required.

Particulars

- i. The particulars at paragraph ~~4040404443~~(iii)(1) to (11) except for (9) are repeated.

55.52. The Orders are therefore invalid to the extent that they require vaccination absent consistency with:

- (a) the Consent standards;
- (b) the Information standards; or
- (c) the rights and protections conferred by the remaining BSC requirements.

**Determination**

56.53. The Determination provides, *inter alia* that:

In accordance with the provisions of section 116A(1) of the *Health Services Act 1997* I, Elizabeth Koff, Secretary, Ministry of Health, hereby fix as a condition of employment of all persons employed in the NSW Health Service under Part 1 of Chapter 9 of the *Health Services Act 1997* (**NSW Health Service Employees**), that to be employed, or remain employed:

- (1) a NSW Health Service Employee, other than a NSW Health Service Employee to whom paragraph (2) below applies, must have received:
  - (a) at least 1 dose of a COVID-19 vaccine as at the date of this determination; and
  - (b) at least 2 doses of a COVID-19 vaccine on and from 30 November 2021.
- (2) A NSW Health Service Employee who works in an residential aged care facility operated by NSW Health on or after the date of this determination must have received at least 2 doses of a COVID-19 vaccine.

- (3) A NSW Health Service Employee must, on request by his or her employer, produce vaccination evidence.

This determination does not apply to a NSW Health Service Employee who:

- (a) is unable, due to a medical contraindication, to be vaccinated against COVID-19, and  
(b) presents to his or her employer a medical contraindication certificate issued to the NSW Health Service Employee.

~~57.54.~~ In making the Determination, the exercise of power by the Secretary was *ultra vires* s.116A of the *Health Services Act 1997* (NSW) (**HS Act**) in relation to the Applicant and Sub-Class Members, due to inconsistency with:

- (a) the National emergency provisions of the BSC Act;

Particulars

- i. Paragraphs ~~2727272625~~ to ~~3434343332~~ inclusive and particulars thereto are repeated in relation to the Secretary (instead of the Minister), s.116A (instead of section 7) and the Determination (instead of the Orders).

- (b) the Proportionality Requirements; or

Particulars

- i. Paragraphs ~~3535353433~~ to ~~3838383736~~ inclusive and particulars thereto are repeated in relation to the Secretary (instead of the Minister), s.116A (instead of section 7) and the Determination (instead of the Orders).

- (c) alternatively, the applicable provisions of the BSC Act, other than the emergency provisions.

Particulars

- i. Paragraphs ~~3939394342~~ to ~~5252525655~~ inclusive and particulars thereto are repeated in relation to the Secretary (instead of the Minister), s.116A (instead of section 7) and the Determination (instead of the Orders).

~~58. Further, the Determination is an unreasonable, disproportionate or irrational exercise of power by the Secretary.~~

Particulars

- ~~i. Paragraphs 3837 to 4241 inclusive and particulars thereto are repeated in relation to the Secretary (instead of the Minister), s.116A (instead of section 7) and the Determination (instead of the Orders).~~

~~59.55.~~ Further or alternatively, the Determination is *ultra vires* the s.116A on the grounds that:

(a) vaccination is a condition of employment fixed by or under another law; or

Particulars

- i. Section 7 of the PH Act and directions 3 to 6 inclusive of the Orders.
- ii. The Orders were in force when the Determination was made.

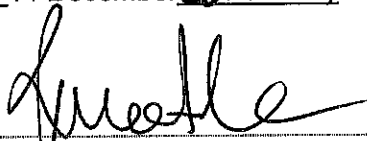
(b) vaccination may not be fixed as a condition of employment.

~~60.56.~~ The Determination is therefore invalid in whole or in part.

**Claim for Relief**

1. A declaration that each of the Orders is invalid.
- ~~2. An order quashing the Second Order.~~
- ~~3. Alternatively, an order varying the Second Order so as to provide that the operation of clauses 4, 5 and 6 are subject to rights and entitlements for the worker consistent with the BSC Act requirements.~~
- 4.2. A declaration that the Determination is invalid.
- ~~5. An order quashing the Determination.~~
- ~~6. Alternatively, an order varying the Determination so as to provide that vaccination is subject to rights and entitlements for NSW Health Service Employees consistent with the BSC Act requirements.~~
- 7.3. Costs.
- 8.4. Such other orders as the Court deems fit.

Date: ~~\_14 December~~ **28** February 2022



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Signed by Peter Maatouk  
Lawyer for the Applicant

This pleading was prepared by Peter Maatouk, lawyer and settled by counsel, Karen Conte-Mills.

**Certificate of lawyer**

I Peter Maatouk certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~14 December 2021~~ 28/2/2021



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Signed by Peter Maatouk  
Lawyer for the Applicant