HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **JULIAN KINGSFORD GERNER**
First Plaintiff

MORGAN'S SORRENTO VIC PTY LTD
Second Plaintiff

AND: **THE STATE OF VICTORIA**
Defendant

SUBMISSIONS OF THE DEFENDANT ON UTILITY

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PART I: ONLINE PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ARGUMENT

A. INTRODUCTION

2. By their ASOC filed on 20 October 2020, the plaintiffs seek declaratory relief concerning the validity of s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) (the **PHW Act**) and certain Directions identified in the ASOC (the **Impugned Directions**).

3. By 27 October 2020, all the Impugned Directions save for one were revoked (the Area Directions, which defined the Restricted Area for the purposes of other directions, but imposed no restrictions on the plaintiffs or other persons, were not revoked).

4. In addition, the Victorian Government announced that it proposed to remove limits on intrastate movement from 11:59pm on 8 November 2020.

5. These submissions respond to the issue raised by the Court on 2 November 2020, namely the utility of the proceeding in light of these matters.

6. In summary the Defendant contends that:

   (1) now that the Impugned Directions have been revoked, the declarations sought by the plaintiffs would produce "no foreseeable consequences for the parties";[1] and

   (2) it follows that, as a consequence, the proceeding has no ongoing utility (and, perhaps, that the plaintiffs lack standing to seek the relevant remedies).

B. PUBLIC HEALTH DIRECTIONS

7. The parties have filed an agreed document identifying:

   (1) which of the Impugned Directions have been revoked;

   (2) the relevant public health directions that are currently in force;

   (3) how the directions currently in force affect the plaintiffs;

   (4) the Victorian Government's proposed changes, which are proposed to come into effect at 11:59pm on Sunday 8 November 2020; and

   (5) how those proposed changes will affect the plaintiffs, if they are made.

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[1] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

8. In summary:

(1) At present the Stay Safe Directions (Melbourne) (No 2):

(a) affect the first plaintiff by limiting his movement to within 25km of his home or workplace (subject to exceptions), and by preventing him from moving from Greater Melbourne to a place outside Greater Melbourne (subject to exceptions); and

(b) affect the second plaintiff by limiting the ability of potential customers to attend its business premises if they live further than 25km from those premises.

(2) If the proposed changes identified in the roadmaps attached to the agreed statement are implemented, there will be no directions that affect the plaintiffs in the manners identified in (1) above.

C. NO FORESEEABLE CONSEQUENCES

9. "As a general rule … declaratory relief cannot be claimed as a way of obtaining legal advice from a court or answering an hypothetical question divorced from a real controversy".[2] Consistent with that general rule, Mason CJ, Dawson, Toohey and Gaudron JJ explained in *Ainsworth v Criminal Justice Commission* that declaratory relief "will not" be granted if "the Court's declaration will produce **no foreseeable consequences** for the parties".[3]

10. In support of that proposition, their Honours cited *Gardner v Dairy Industry Authority of New South Wales*.[4] *Gardner* involved a challenge to the validity of four arrangements imposed under a New South Wales statute. Mason J (with whom Jacobs and Murphy JJ agreed) upheld the validity of the fourth arrangement, which had superseded the previous three arrangements. There was thus no occasion for his Honour to consider the validity of the previous arrangements.

11. His Honour went on to observe that:[5]

> had I been of a different opinion in relation to the first three rearrangements I would not have been disposed to grant declaratory relief to the appellants. **The rearrangements were no longer in operation when the appellants commenced their proceedings**. They had been superseded by the fourth rearrangement which had been set up under the auspices of amending legislation. **It was not contended that the appellants, had their argument been correctly founded, were entitled to damages or other consequential relief**. All that was suggested

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2 *Kuczborski v Queensland* (2014) 254 CLR 51 at 61 [6] (French CJ).

3 (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ) (emphasis added).

4 (1977) 52 ALJR 180.

5 *Gardner* (1977) 52 ALJR 180 at 188 (Mason J) (emphasis added), see also at 188-189 (Aickin J).

> was that the Executive might in some undefined way initiate administrative or legislative action which would improve the lot of the appellants and persons in the appellants' position. It is one thing to say that declaratory relief will be granted against the Executive or a statutory authority in relation to existing rights and transactions. **It is quite another thing to say that it should be granted in respect of past transactions under legislation which has been repealed or amended when the Court's declaration will produce no foreseeable consequences for the parties**.

12. Those observations are consistent with similar observations made by Dixon CJ in *Wragg v New South Wales*.[6] That case involved an administrative order, made under a statute, that imposed a maximum price on the sale of potatoes. A proceeding challenging the constitutional validity of the statute was commenced by potato growers and sellers. However, before the hearing, the order applying to potatoes was revoked. Dixon CJ found against the plaintiffs on the substantive issue, and therefore did not need to express a final view on the availability of declaratory relief in the circumstances. Nonetheless, his Honour said:[7]

> **After the case was stated the orders went out of force**. It is perhaps desirable to add that, even had my opinion been that they could not, while in force, validly apply to the selling of Tasmanian potatoes in New South Wales, **I should doubt whether we ought in such circumstances to make any declaration of right in the plaintiff's favour concerning the operation of the revoked orders**.

13. Those observations of Mason J in *Gardner* and Dixon CJ in *Wragg* are apposite to the present circumstances. The Impugned Directions are no longer in operation. And it was only through the Impugned Directions that the PHW Act had any relevant potential operation upon the plaintiffs (through the sanction for their breach imposed by the offence provision in s 203). Notably, the plaintiffs have not contended that, if the relief they sought were granted, they would be entitled to damages or any other consequential relief. Indeed, it is not apparent that the plaintiffs would have any viable cause of action against the defendant.

14. And so, like the position adopted by a majority of the Court in *Smethurst v Commissioner of Police* in circumstances where an impugned provision had been repealed, the fact that the Impugned Directions have been revoked means that "[t]here would be no utility in making a declaration of the kind sought".[8] As was the case in *Smethurst*, the plaintiffs have not been charged with an offence or contended that they have engaged in activity that would breach

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6 (1953) 88 CLR 353.

7 *Wragg* (1953) 88 CLR 353 at 388 (emphasis added). See also *Smethurst v Commissioner of Police* (2020) 94 ALJR 502 at 529 [105] (Kiefel CJ, Bell and Keane JJ).

8 (2020) 94 ALJR 502 at 529 [105] (Kiefel CJ, Bell and Keane JJ), 550 [198] (Gordon J, agreeing).

the PHW Act.[9] And similarly to *Smethurst*, this proceeding can be distinguished from *Croome v Tasmania*,[10] because the revocation means that neither the Impugned Directions (nor the PHW Act) have any ongoing effect on the plaintiffs' freedom of movement.[11]

15. Nor is this a case like *Ainsworth*, where the appellants' personal reputations were impugned by the Commission's report in circumstances where they had been denied procedural fairness by the Commission. In holding that a declaration could be granted in the circumstances of that case, Mason CJ, Dawson, Toohey and Gaudron JJ observed that the report had "already had practical consequences for the appellants' reputations" and that those consequences "may extend well **into the future**".[12] The impact of the Impugned Directions on the plaintiffs is not of that kind. The effect of the Impugned Directions upon the plaintiffs ceased immediately upon their revocation (as did the operation of the PHW Act).

16. Nor is this a case like *Plaintiff M61/2010E v Commonwealth*.[13] There, the Court concluded that a statutory reviewer, acting under administrative procedures established for the purpose of informing the Minister about matters relevant to the exercise of certain statutory powers,[14] did not afford procedural fairness to the plaintiffs.[15] The Court held that in the circumstances of that case, it could not be said that declaratory relief would produce no foreseeable consequences. The Court noted that the plaintiffs had "a real interest" in raising the questions to which the declarations were directed, and added that there was a "considerable public interest in the observance of procedural fairness in the exercise of the relevant powers".[16]

17. Here, it can be accepted that the powers in s 200 of the PHW Act are likely to be exercised in the future. In the abstract, there is some public interest in ensuring those powers are properly exercised. But the Court should avoid deciding matters in the abstract. That is, the Court should not entertain a challenge to the validity of ss 200(1)(b) and (d) divorced from any exercise of the powers conferred by those provisions. That also raises a further (related)

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9 See *Smethurst* (2020) 94 ALJR 502 at 529 [106] (Kiefel CJ, Bell and Keane JJ).

10 (1997) 191 CLR 119. It may be noted that in *Croome* the State of Tasmania conceded that Mr Croome had standing. Brennan, Dawson and Toohey JJ held that concession was rightly made because Mr Croome had engaged in the prohibited conduct, which rendered him liable to prosecution, conviction and punishment (see 127; see also 138-9 (Gaudron, McHugh and Gummow JJ)). That is not the case here on the facts as pleaded.

11 See *Smethurst* (2020) 94 ALJR 502 at 529-530 [106]-[107] (Kiefel CJ, Bell and Keane JJ). See also *Kuczborski* (2014) 254 CLR 51 at 61 [6] (French CJ).

12 *Ainsworth* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ) (emphasis added).

13 (2010) 243 CLR 319.

14 *Plaintiff M61* (2010) 243 CLR 319 at 342-344 [37]-[49] (the Court).

15 *Plaintiff M61* (2010) 243 CLR 319 at 356 [88]-[90], 358 [97]-[98] (the Court).

16 *Plaintiff M61* (2010) 243 CLR 319 at 359-360 [103] (the Court). See also *Plaintiff M68/2015 v Commonwealth* (2016) 257 CLR 42 (***Plaintiff M68***).

issue of standing akin to that which arose in *Smethurst*: here, as there, the plaintiffs would have no more interest than anyone else in clarifying what the law is as regards the validity of those statutory provisions.[17]

18. No doubt for those reasons, the plaintiffs' challenge is brought by reference to particular directions made under s 200. But those directions have now been revoked. And as to the challenge to the validity of the Impugned Directions themselves, each exercise of the power in s 200 will necessarily turn on its own facts and circumstances. A declaration in the present case in relation to the Impugned Directions could have no wider significance. "Any challenge to a subsequent or replacement [direction] would necessarily involve considering the content of that [direction] and the circumstances leading to its imposition".[18]

19. Those difficulties are not avoided by the plaintiffs' reliance on *Plaintiff M68*. In that case, the plaintiff was "detained in custody" in a Regional Processing Centre on Nauru,[19] but was brought to Australia for medical treatment. She then sought an injunction and prohibition against the Commonwealth, restraining it from returning her to "detention in custody" on Nauru. The basis for that relief included a claim that the Commonwealth's conduct in relation to her detention on Nauru was not authorised by a valid Commonwealth law.[20]

20. However, following the commencement of the proceeding but prior to the hearing, the legal arrangements under Nauruan law changed. Those changes meant that, upon her return to Nauru, the plaintiff would no longer be detained.[21] Accordingly, there was no basis for the Court to grant the injunction or prohibition that the plaintiff had originally sought.[22] The question was whether, in those circumstances, a declaration about the lawfulness of her past detention would produce "foreseeable consequences" for the parties.[23] All members of the Court concluded that it would. However, five separate judgments (including one dissent) were given, and the reasons for that conclusion differed to a significant degree.

21. Given that division in opinion, *Plaintiff M68* provides little clear guidance on whether a declaration would produce "foreseeable consequences" in circumstances such as the present.

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17 (2020) 94 ALJR 502 at 529-530 [106]-[107] (Kiefel CJ, Bell and Keane JJ). Compare *Plaintiff M68* (2016) 257 CLR 42 at 65-66 [22]-[23] (French CJ, Kiefel and Nettle JJ), 123 [235]-[236] (Keane J).

18 *Dolan v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin) at [32] (Lewis J), refusing permission to bring a judicial review proceeding in relation to coronavirus regulations that had been revoked.

19 See (2016) 257 CLR 42 at 67 [30], [32] (French CJ, Kiefel and Nettle JJ).

20 See (2016) 257 CLR 42 at 66 [27], 68 [34], 69 [37], 70 [41] (French CJ, Kiefel and Nettle JJ).

21 See *Plaintiff M68* (2016) 257 CLR 42 at 64-65 [19] (French CJ, Kiefel and Nettle JJ).

22 *Plaintiff M68* (2016) 257 CLR 42 at 65 [19] (French CJ, Kiefel and Nettle JJ).

23 See *Plaintiff M68* (2016) 257 CLR 42 at 65 [20] (French CJ, Kiefel and Nettle JJ), 75 [59] (Bell J).

But none of the different approaches assist the plaintiffs. That can be demonstrated by reference to the following three points.

22. *First*, and critically, the plaintiff's position in *Plaintiff M68* did not change as a result of any change to the Commonwealth law impugned in the proceeding, or any instrument made under that law.[24] That law was not repealed or amended. Rather, the relevant change was to the factual circumstances on Nauru (arising as a consequence of a change to Nauruan law, a question of fact). The significance of that point most clearly appears in Bell J's reasons. Her Honour said that the proceeding had foreseeable consequences "because Nauru may choose to resume the detention scheme in the future".[25] If Nauru so chose, the validity of the extant Commonwealth law would again be in issue. To similar effect, French CJ, Kiefel and Nettle JJ said this:[26]

> [T]he declaration sought by the plaintiff would resolve the question as to the lawfulness of the Commonwealth's conduct with respect to the plaintiff's detention and whether such conduct was authorised by Commonwealth law. This is not a hypothetical question. It will determine the question whether the Commonwealth is at liberty to repeat that conduct **if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre**.

23. That is not the position in the present proceeding. The Impugned Directions have been revoked. They will never again have any operative legal effect, regardless of what happens, as a matter of fact, in the future. And, as submitted above, it was only through the Impugned Directions that the PHW Act had any relevant potential operation upon the plaintiffs. Even if new restrictions on movement were to be imposed at some later point, that would occur as a result of a new exercise of statutory power pursuant to ss 200(1)(b) and (d). And, for the reasons given at paragraph 17 above, the Court should not entertain a challenge to the validity of those provisions divorced from their exercise.

24. *Second*, Keane J said:[27]

> A party who has been **detained in custody** has standing to question the lawfulness of that detention even though that party has not chosen to pursue a claim for damages for false imprisonment. The interference with the liberty of that person is sufficient to confer **standing** to seek a declaration of the legal position from a court even though no other legal consequences are said to attend the case.

25. His Honour did not separate the issue of standing from the issue of "foreseeable consequences". However, it is evident that his Honour was heavily influenced by the fact

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24 Cf *Gardner* (1977) 52 ALJR 180.

25 *Plaintiff M68* (2016) 257 CLR 42 at 76 [64] (Bell J).

26 *Plaintiff M68* (2016) 257 CLR 42 at 66 [23] (French CJ, Kiefel and Nettle JJ). See also Gageler J at 90 [112].

27 *Plaintiff M68* (2016) 257 CLR 42 at 123 [235].

that the plaintiff had been subject to "detention in custody". The present case is distinguishable, because the Impugned Directions have never operated to subject the plaintiffs to "detention in custody".[28]

26. *Third*, Gordon J (in dissent) considered it sufficient that the declaration sought by the plaintiff "may provide the plaintiff with a possible entitlement to damages against the Commonwealth for false imprisonment".[29] However, no other judge took that view. Moreover:

(1) as submitted above, it is not apparent that the plaintiffs would have any viable cause of action against the defendant (certainly the plaintiffs do not suggest that they do have such a cause of action); and

(2) previous authority indicates that the utility of a declaration in potential future proceedings cannot be assumed. As Kiefel J said in *Minister for Immigration and Multicultural Affairs v Ozmanian*, "[i]f the utility of a declaration is to be found in its operation within other proceedings between the parties, the Court must consider what use it will serve and what it might resolve".[30]

27. For those reasons, the declaratory relief sought by the plaintiffs would produce no foreseeable consequences.

28. Finally, to the extent that the plaintiffs might seek to amend their ASOC to include a challenge to the public health directions currently in force, such an amendment is unlikely to resolve the underlying issue of utility because the current directions are likely to be revoked effective at 11:59pm on Sunday 8 November, and are likely to be replaced by new directions that do not contain restrictions on intrastate movement. If that occurs, the relief sought would lack utility from that time.

D. STANDING AND "MATTER"

29. The above analysis is sufficient to conclude that the proceeding has no ongoing utility. As noted above, that analysis may also suggest that the plaintiffs do not have standing.[31]

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28 See *Thomas v Mowbray* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ), 356 [116] (Gummow and Crennan JJ).

29 *Plaintiff M68* (2016) 257 CLR 42 at 152 [350].

30 (1996) 71 FCR 1 at 32-33.

31 *Smethurst* (2020) 94 ALJR 502 at 529 [106] (Kiefel CJ, Bell and Keane JJ), citing *Kuczborski* (2014) 254 CLR 51 at 106 [175]-[176] (Crennan, Kiefel, Gageler and Keane JJ).

30. The question of "standing" in the context of a matter in federal jurisdiction is "subsumed" within the constitutional requirement of a "matter".[32] However, consideration of that issue by the Court would require further notices to be issued pursuant to s 78B of the *Judiciary Act 1903* (Cth). The defendant contends that that course is not necessary if the Court concludes that the proceeding lacks utility.

E. CONCLUSION

31. If the Court concludes that the proceeding lacks utility, then it would be unnecessary for the Court to proceed to hear and determine the demurrer. That is because "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".[33]

32. In those circumstances the proper course would be to dismiss the proceeding.

33. Alternatively, the defendant respectfully suggests that the Court defer the hearing of the demurrer until Monday 9 November 2020 (noting that provision has been made for the hearing to continue on Monday if needed), at which point it will be apparent whether Victoria still has in place any directions that limit movement.

Dated: 3 November 2020

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32 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 611 [45] (Gaudron J). See also *Kuczborski* (2014) 254 CLR 51 at 130-131 [278] (Bell J).

33 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (the Court), quoted in *Tajjour* (2014) 254 CLR 508 at 587 [173] (Gageler J), *Knight v Victoria* (2017) 261 CLR 306 at 324 [32] (the Court) and *Clubb* (2019) 93 ALJR 448 at 465 [32] (Kiefel CJ, Bell and Keane JJ), 479 [135] (Gageler J), 497 [230] (Nettle J), 520 [332] (Gordon J).