CITATION:	*Phillips & Ors v Chief Health Officer & Anor* [2021] NTSC 97
PARTIES:	PHILLIPS, Ray and HAMMETT, Conan Thomas and ANSTESS, John v CHIEF HEALTH OFFICER and NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2021-03787-SC
DELIVERED:	15 December 2021
HEARING DATES:	13 and 15 December 2021
JUDGMENT OF:	Brownhill J

Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd [2021] NTSC 16; *Elders Rural Finance Ltd v Smith* (1995) 38 NSWLR 395; *Greetings Oxford*

Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd (1989) 18 NSWLR 33; *Xiang Rong Investment Pty Ltd v Ku-ring-gai Municipal Council* [2012] NSWLEC 44; *Unilever PLC v Chefaro Proprietaries Ltd* [1995] 1 WLR 243; *Murphy v Victoria* (2014) 45 VR 119; *Harding v Sutton* [2021] VSC 741; *Harding v Sutton (No 2)* [2021] VSC 789, applied.

Palmer v Western Australia (2021) 95 ALJR 229, considered.

Public and Environmental Health Act 2011 (NT); *Interpretation Act 1978* (NT), ss 4, 62A; *Judiciary Act 1903* (Cth), s 78B, *Supreme Court Rules 1987* (NT), Rules 47.04 and 47.05 considered or applied.

D Pearce, *Statutory Interpretation in Australia*, 9th ed, (2019), LexisNexis Butterworths, [2.11], [2.12] referred to.

REPRESENTATION:

Counsel:

Plaintiffs:	D Kelly
Defendants:	N Christrup SC with L Peattie

Solicitors:

Plaintiffs:	Kelly & Partners
Defendants:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID Number:	Bro2120
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Phillips & Ors v Chief Health Officer & Anor [2021] NTSC 97
No. 2021-03787-SC

BETWEEN:

RAY PHILLIPS
First Plaintiff

AND:

CONAN THOMAS HAMMETT
Second Plaintiff

AND:

JOHN ANSTESS
Third Plaintiff

AND:

CHIEF HEALTH OFFICER
First Defendant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Second Defednant

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered ex tempore 15 December 2021)

Background

[1] These proceedings were commenced by originating motion on 9 December 2021. Initially, the proceedings challenged the validity of the Covid-19

Directions (No 55) 2021: Directions for Mandatory Vaccination of Workers to Attend the Workplace made on 13 October 2021, as amended by the Covid-19 Directions (No 81) 2021: Amendments to Covid-19 Directions (No 55) 2021 made on 10 November 2021 ('Directions') made by the first defendant under the *Public and Environmental Health Act 2011* (NT) ('Act') on five grounds essentially asserting jurisdictional error.

[2] On 13 December 2021, the plaintiffs applied for orders listing the matter for hearing on 23 December 2021. This application was made on the basis that cl 6 has already taken effect and cl 7 of the Directions will take effect on 25 December 2021. Clause 6 provides that, for the period starting on 13 November and ending on 24 December, a worker who has not received the first dose of an approved covid-19 vaccine must not attend the worker's workplace. Clause 7 provides that, on and from 25 December 2021, a worker who has not received 2 doses of an approved Covid-19 vaccine must not attend the worker's workplace. The assumption made by the application was that the Court would deliver a decision determining the matter on 24 December 2021.

[3] On 15 December 2021, this application was abandoned. That notwithstanding, I delivered reasons as to why I would have dismissed that application.

[4] Application was also made by the plaintiffs on 13 December 2021 to file and serve an amended originating motion. The proposed amended originating

motion was not put before the Court, but counsel for the plaintiffs indicated that the proposed amendment was to add a ground asserting inconsistency between the Directions and ss 9 or 10 of the *Racial Discrimination Act 1975* (Cth) ('RDA').

[5] I ordered that the amended originating motion be filed and served by 4.00pm on 13 December 2021. An attempt was made to file an amended originating motion just prior to that time, but it did not comply with the requirements of the Supreme Court Rules and was rejected by the Registry. I granted leave to file and serve the amended originating motion by midday on 14 December 2021, subject to the defendants having been given prior notice of the proposed amendments or notice as soon as practicable after the making of the order. The amended originating motion was filed by that deadline.

[6] The amended originating motion adds an order in the nature of certiorari to the declaratory relief of invalidity sought in the original originating motion. It also adds various specific bases to two of the five grounds in the original originating motion, and adds a sixth ground asserting inconsistency with ss 9 and 10 of the RDA.

[7] These matters are relevant to both applications before the Court because they disclose that the nature and grounds of the proceedings were not finalised until 14 December 2021.

[8] Each of the plaintiffs has filed an affidavit in these proceedings.

[9] Ray Phillips has attested that he works at Buslink as a bus driver and that his employer sent him a letter saying he would be removed from the roster as of 13 November 2021 if he did not show them evidence he had been vaccinated. The letter is dated 30 October 2021 and refers to previous correspondence about the Directions which require workers to be vaccinated within specified timeframes. The letter states his employer believes he has had ample opportunity to consider his position and/or seek advice. It also says without the evidence of vaccination, discussions will commence regarding his employment situation, and the employer is unable to hold his position open indefinitely.

[10] Conan Hammett has attested that he is of Aboriginal descent and works at Coles as a supermarket worker. He attested that his employer sent him an email saying he would not be offered any further shifts from 13 November 2021 if he did not comply with the Directions. The email appears to be dated 28 October 2021. What it says is that, if he fails to have a first vaccination by 13 November 2021, Mr Hammett will not be offered any further shifts until he complies with the Directions. Mr Hammett attested that his manager told him he would be removed from employment.

[11] John Anstess has attested that he is an Aboriginal man who works for the Power and Water Corporation as a cable jointer and electrician. He attested that his employer sent him a letter saying if he did not get vaccinated by the dates in the Directions his employment could be terminated. The email is dated 2 November 2021 and refers to a message sent the previous week

about mandatory vaccinations. The email says that a failure to get vaccinated will be a breach of his obligation to comply with his employer's direction, which may result in suspension from employment and a disciplinary process that could lead to termination of employment.

Mr Anstess also attested that, due to his anxiety about getting vaccinated, he has obtained a temporary exemption from the requirement to do so. The email says people who cannot get vaccinated should discuss the matter with their manager.

[12] In short, two of the plaintiffs (Mr Phillips and Mr Hammett) attest that they cannot obtain work without being vaccinated. This situation with the third plaintiff (Mr Anstess) is unclear. Two of the plaintiffs (Mr Phillips and Mr Anstess) have attested that they *might*, as opposed to *will*, lose their employment if they do not get vaccinated. One (Mr Hammett) has attested he has been told his employment will be terminated if he does not get vaccinated. None of the plaintiffs have shown that any loss of employment will occur on 25 December 2021.

Expedited hearing

[13] The defendants argued that the issues raised in the originating motion would most likely require the presentation of considerable evidence, including expert evidence about covid-19, vaccinations and public health matters, which could not possibly be obtained and filed before 23 December 2021. The defendants pointed to the need to obtain 'particulars' from the plaintiffs

because of the breadth of the relief sought (that the Directions as a whole are invalid) and about at least some of the grounds, in order to understand the case put by the plaintiffs and to consider what evidence would be required to meet that case. The example given was ground 4, which refers to failure to have regard to relevant considerations and/or taking into account irrelevant considerations when making the Directions. The defendants also argued that the Directions were made on 13 October 2021, with considerable publicity and public information beforehand about their impending effect, but the proceeding was commenced almost two months later. The defendants pointed to the correspondence annexed to the plaintiffs' affidavits, which shows that the plaintiffs were put on notice by their employers of the impending mandatory requirements to get vaccinated by at least the latter half of October 2021. The defendants argued that the plaintiffs have delayed commencing the proceedings so any urgency for their determination has been created by them.

[14] Both parties pointed to the broad public importance of the issue of validity of the Directions and acknowledged the need to ensure that the determination of the proceedings is properly founded upon the necessary evidence and is given due consideration by the Court.

[15] The consequences of the Directions are significant for each of the plaintiffs. The consequence of presently being unable to work arose on 13 November 2021 by operation of cl 6 of the Directions. The operation of cl 6 will cease on 24 December 2021, and cl 7 will then take effect. The effect of cl 7 is

that two of the plaintiffs will continue to be unable to work if they do not get vaccinated. Whether or not Mr Anstess will be able to work whilst he has a temporary exemption from the requirement to be vaccinated is not in evidence before me.

[16] Each of the plaintiffs has been aware, since at least mid October 2021, of the effect of the Directions upon their ability to work. Despite that, the proceedings were not commenced until 9 December 2021, only 14 days before the proposed hearing date.

[17] Given various public protests about mandatory vaccinations, the defendants must have been aware of the likelihood of a legal challenge to the validity of the Directions. It is a reasonable expectation that they would have at least contemplated and marshalled the kinds of evidence necessary to defend such a challenge. It must be accepted, however, that what precisely will be relevant evidence depends upon the particulars of the plaintiffs' claims.

[18] I have taken into account the authorities referred to me by the plaintiffs in making their application for an expedited hearing.[1] There is no doubt that the factors of public importance and that the plaintiffs are suffering or will suffer hardship not caused through their own fault warrant an expedited hearing, notwithstanding that the plaintiffs have not necessarily proceeded up to now with due speed. I did not understand the defendants to oppose an

1 *Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd* [2021] NTSC 16; *Elders Rural Finance Ltd v Smith* (1995) 38 NSWLR 395; *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33; *Xiang Rong Investment Pty Ltd v Ku-ring-gai Municipal Council* [2012] NSWLEC 44 and *Unilever PLC v Chefaro Proprietaries Ltd* [1995] 1 WLR 243.

expedited hearing necessarily, but only to oppose a hearing on 23 December 2021 and to seek a hearing date which allows for the adequate preparation of their case. I consider that the plaintiffs' delay in commencing the proceeding is a relevant factor which bears significantly on the application for a hearing on 23 December 2021.

[19] Each of the grounds relied on in the amended originating motion raises quite complex issues of statutory construction, namely the scope of the power to make directions in s 52 of the Act, and the effect and operation of the Directions themselves. It is trite that the terms of statutory provisions and statutory instruments are to be construed in their context, which is to be considered from the beginning of the interpretive process, not merely when ambiguity is observed.[2] That context includes the purpose for which the provisions were made or the mischief to which they were directed, which is to be discerned from the terms of the provisions and extrinsic materials which can legitimately be taken into account for that purpose.

[20] For example, s 62A of the *Interpretation Act 1978* (NT) provides that a construction that promotes the purpose or object underlying the Act is to be preferred to a construction that does not do so. That provision applies to 'statutory instruments'. The term 'statutory instrument' is defined to mean an instrument of a legislative or administrative character, which term is defined to include regulations, rules, by-laws, orders, determinations,

2 See D Pearce, *Statutory Interpretation in Australia*, 9th ed, (2019), LexisNexis Butterworths, [2.11], [2.12].

proclamations, awards, documents and authorities made, granted or issued under a power conferred by an Act.[3] The Directions are 'statutory instruments' within the meaning of s 4 and s 62A applies to the construction of them.

[21] It may be less well known that the context of a provision extends to include time, place and any other circumstances that could rationally assist the understanding of meaning and may include the facts and circumstances within the knowledge or contemplation of the legislature or the maker of a statutory instrument, with the consequence that regard may be had to the matrix of facts in which the provision was made.[4]

[22] In order to properly consider the issues raised by the grounds in the amended originating motion, it would be necessary to have some evidence about the factual context in which the legislative provisions and the Directions were made. Further, whether an administrative decision (to make the Directions) is manifestly unreasonable requires evidence about the bases for the decision and the circumstances in which it was made. Similarly, whether an administrative decision has taken into account irrelevant considerations or has failed to take into account relevant considerations requires evidence about what considerations were taken into account and why. In addition, a ground alleging inconsistency with s 10 (in particular) of the RDA requires evidence about the practical operation of the statutory

3 Sections 4 and 17, *Interpretation Act 1978* (NT).

4 See D Pearce, *Statutory Interpretation in Australia*, 9th ed, (2019), LexisNexis Butterworths, [2.11], [2.12].

instrument on both Aboriginal and non-Aboriginal people, and may raise the issue that the instrument is a 'special measure' made for the benefit of Aboriginal people, which also requires evidence about its practical operation and the reasons for its making.

[23] It is to be expected that, in the context of these proceedings, such evidence will include both factual evidence as to the reasons for the decisions to make the Directions and medical or other expert evidence about the risks to public health and relevant sectors of the public from covid-19, particularly to workers and the people they have contact with in their workplaces, and the risks to individual health from vaccinations.

[24] So much is confirmed by the decision of the High Court in *Palmer v Western Australia* (2021) 95 ALJR 229, which raised constitutional questions about directions prohibiting entry into Western Australia made under the equivalent to the Act, and included a claim by the defendants about the reasonable need for and efficacy of the Directions. Because the parties could not agree on the facts necessary to determine that claim, the High Court remitted the matter to the Federal Court for findings to be made.

[25] The preparation of such evidence, relevant to the issues arising in the proceeding, and the consideration of that evidence by both the parties and the Court, cannot practically be achieved within 10 days. In *Palmer v Western Australia*, despite proceeding on urgency, the process of hearing evidence and deciding the facts took some two months and nine days.

Similarly, in *Harding v Sutton*,[5] a judicial review type challenge to mandatory vaccination directions made under the Victorian equivalent of the Act, involving 129 plaintiffs, the Victorian Supreme Court has programmed the matter to a hearing in March 2022 after the proceeding commenced in October 2021. That is notwithstanding that the mandatory vaccination directions under consideration there require workers to be vaccinated by dates in October, November and December 2021.

[26] The plaintiffs' timetable suggests that the matter could be heard in one day. That estimate is unrealistic given the need for the evidence I have already referred to as well as the need to hear legal argument on the six grounds in the amended originating motion, at least some of which raise reasonably complex issues of law. For the same reason, the plaintiffs' proposition that the Court could and should decide such an important matter having such broad ranging public impacts within a single day is both unrealistic and unwise.

[27] Because the amended originating motion raises inconsistency of the Directions with ss 9 and 10 of the RDA, the parties acknowledged the necessity, as required by SCR 19.02 and 19.03, for filing and service of a notice of a constitutional matter within the meaning of s 78B of the *Judiciary Act 1903* (Cth) upon all Attorneys-General in Australia. Section 78B(1) provides that it is the duty of the Court not to proceed in a

5 See *Harding v Sutton* [2021] VSC 741 and *Harding v Sutton (No 2)* [2021] VSC 789.

case unless and until the court is satisfied that notice of the cause has been given to each Attorney-General and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General of intervention in the proceeding or removal of the cause to the High Court. No notice has yet been filed or served in accordance with s 78B.

[28] For these reasons, if it were pressed, I would have refused the plaintiff's application for a hearing of the proceedings on 23 December 2020.

Preliminary hearing of a separate question – ground 1

[29] In the alternative, on 13 December 2020, the plaintiffs sought a hearing on 23 December 2020 of ground 1 in the amended originating motion. Ground 1 asserts that the Directions are ultra vires and beyond the power conferred by s 52 of the Act because:

(a) the objects of the Act concern the regulation of health whereas the Directions regulate the attendance of workers at their workplace; and

(b) the powers in s 52(2)(c) and (e) and (3)(b) refer to 'a particular place' or 'a stated area or place' and the Directions extend to all workers' workplaces.

[30] The Court has power, pursuant to *Supreme Court Rule* ('SCR') 47.04, to order that a question in a proceeding be tried before the trial of the proceeding. If the determination of the question substantially disposes of the proceeding or renders the trial unnecessary, the Court has power, pursuant to

SCR 47.05, to dismiss the proceeding or make such other order or give such judgment as it thinks fit.

[31] The principles applicable to the exercise of the discretion in SCR 47.04 were set out in *Murphy v Victoria* (2014) 45 VR 119 at [28] and repeated in *Harding v Sutton* [2021] VSC 741 at [205]. The rule applicable there was in the same terms as SCR 47.04. The discretion is to be exercised with great caution and a separate trial should only be embarked on when the utility, economy and fairness to the parties are beyond question. This is so because a separate question is determined without the benefit of all the evidence relevant to the proceeding being before the Court. Trial on a separate question should only occur when the facts are agreed or can readily be determined judicially because otherwise the parties can dispute the facts at any later trial. Generally speaking, it is inappropriate to order isolation of a preliminary issue for determination unless the determination in favour of the plaintiffs or defendants will put an end to the action, or where there is a clear line of demarcation between issues and the determination of one separately from the others is likely to save inconvenience and expense. Factors which tell against a separate determination of a question include where there may be significant contested factual issues at the time of the preliminary hearing and at the time of trial, where there may result significant overlap between the evidence on both occasions, and where the litigation may be prolonged rather than shortened.

[32] The plaintiffs argued that ground 1 is their primary ground of relief, and determination of it one way or another might put an end to the litigation as a whole. This was said to be because the plaintiffs, while presently intent on pursuing all grounds, may well abandon the case if ground 1 is determined against them.

[33] The scope of the power to make directions in s 52 of the Act is raised by grounds 2, 3 and 4 of the amended originating motion, although they raise different questions to the questions raised by ground 1. Grounds 5 and 6 are substantively more stand-alone grounds which in their terms do not depend on the scope of the power and, indeed, are put in the alternative to grounds 1 to 4.

[34] It seems to me that if the concerns of the plaintiffs as raised by their affidavits are as significant for them as their affidavits suggest, it is unlikely that determination of ground 1 against them will cause them to abandon their case on the other five grounds. At its highest, I can accept that there is a bare chance, which I would not describe as a ‘real chance’, that determination of ground 1 will resolve the entire case without the need for a trial on all issues.

[35] The plaintiffs initially argued that ground 1 involves an argument which is purely founded on statutory construction and requires no evidence in order to be determined. As I have already held, some evidence about the factual context of the Directions would be necessary. Ground 1 asserts that the

Directions purport to regulate the attendance of workers at a worker's workplace, rather than public health. That seems to me to raise squarely the proper construction of the Directions as well as s 52 of the Act,[6] and makes relevant the factual context in which the Directions were made.

[36] The plaintiffs subsequently accepted that some factual context is necessary for determination of ground 1. The parties also accepted that, given the tightness of the proposed timetable, the only way a separate trial on ground 1 could proceed is if they agree a set of facts, and that those agreed facts would then be binding on them for the entirety of the trial.

[37] The factual context for the purposes of a separate trial on ground 1 may be largely uncontroversial. I note, for example, the findings made by the Federal Court for the purpose of the High Court's decision in *Palmer v Western Australia* set out at [16]-[18] of the decision. Those facts are as follows:

> COVID-19 is a disease caused by the coronavirus SARS-CoV-2. Clinical and epidemiological knowledge about them is relatively uncertain, their being a new pathogen and disease. SARS-CoV-2 may be transmitted by a person who is asymptomatic and unaware that they have the disease. Where there is community transmission of SARS-CoV-2 its natural growth rate is exponential and must be minimised through certain measures. The risk of community transmission is substantially increased if measures of the kind contained in the Directions are removed. There are no known testing

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6 I consider the issues raised by ground 1 to be distinguishable from the proposed preliminary issue raised in *Harding v Sutton* [2021] VSC 741 which Richards J accepted (at [210]) was a pure question of law which could be answered without having to determine questions of fact. That issue was whether s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* applied to the act of making or the decision to make the directions made under the Victorian equivalent of the Act. The issue did not raise any question about the proper construction of the directions, but concerned whether making of directions fell within the phrase 'to act in a way' in s 38(1) of the Charter law.

> measures which are themselves sufficient to prevent community transmission.
>
> The consequences of community transmission of SARS-CoV-2 and the development of COVID-19 are substantial, including the increased risk of death – particularly for members of the population who are over 70 years of age, members of the population with pre-existing medical conditions or members of the Aboriginal or Torres Strait Islander population – and the risk that the hospital system in Western Australia will be unable to cope. There is no known vaccine, and no treatment presently available to mitigate the risks of severe medical outcomes or mortality for a person who contracts COVID-19.

[38] Of course, the found fact about there being no known vaccine is no longer applicable. It may be that the plaintiffs would deny the found fact that the risk of community transmission is substantially increased if measures of the kind contained in the Directions the subject of these proceedings are removed, and perhaps also the found fact that the consequences of community transmission are substantial, including the increased risk of death to members of the Aboriginal population. The defendants argued that a critical contextual fact would be the efficacy of vaccinations in the prevention of the spread of covid-19 in the community.

[39] It may be that not all of the found facts in *Palmer* are necessarily required to determine the issues raised by ground 1. I simply refer to them by way of example. However, it is clear that determination of the issues raised by ground 1 would be appropriately informed by some similar factual context. The defendants are pessimistic about the prospects of agreeing facts. The plaintiffs are more optimistic. Critically, there is not presently any agreement between the parties as to what facts are required, let alone as to the facts themselves. The plaintiffs suggested I could order a separate trial

on ground 1 subject to the agreement of facts by a certain time. Such an approach is undesirable because the situation in relation to facts and evidence is a critical factor in the determination of these kinds of applications.

[40] In any event, four other important concerns arise.

[41] First, a hearing of ground 1 on 23 December 2021 would give the Court a single day to determine that ground before cl 7 of the Directions becomes operative on 25 December 2021. It would also give the parties very little time to prepare written and oral submissions in relation to what is a very serious issue with broad ranging public impacts.

[42] Secondly, even if the s 78B notice is filed and served today, Attorneys-General around the country would only have six business days to consider whether or not to intervene in the proceedings before the hearing. While s 78B(2) of the *Judiciary Act* does permit a court to continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation, the Court's determination on ground 6 (the constitutional ground) may be impacted by the Court's determination on ground 1, particularly the proper construction of the Directions. To that extent, the latter may well be assisted by submissions made on behalf of any intervener in relation to the former.

[43] Thirdly, the defendants have yet to form a view about whether to make an application for me to recuse myself on the basis of my giving advice to the

Northern Territory Government about the operation of the Act in the context of the covid-19 pandemic in my former role as Solicitor-General for the Northern Territory. I did not give any advice about mandatory vaccinations, and do not intend to recuse myself on my own motion, but I would of course hear any application to do so. The plaintiffs have indicated they are content for me to hear the matter. Whether any such application is to be made by the defendants will not be known until 17 December 2021, and the availability of another judge to hear the matter has not yet been explored.

[44] Fourthly, determining the proposed question before trial could fragment the proceeding because of the obvious prospect of an appeal by the parties against whom the question is answered. While the plaintiffs' position may be more equivocal, it seems highly likely that any decision adverse to the defendants would be the subject of an appeal.

[45] While it is obviously highly desirable for a challenge to the validity of a statutory instrument such as the Directions to be determined as soon as possible, on balance, the matters pointing away from a determination of a separate question (including the absence as yet of any agreement as to the facts comprising the relevant factual matrix) are not outweighed by what is no more than a bare chance that determination of ground 1 would lead to a resolution of the proceeding as a whole. This is not a clear case in which the utility, economy and fairness of separate trials are beyond question.

[46] For these reasons, I refused the application for a preliminary hearing on 23 December 2021 of ground 1 separately from the rest of the trial.
