

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST**



No S ECI 2021 00826

Case: S ECI 2021 00826

Filed on: 22/03/2022 09:15 AM

BETWEEN

IDRIS HASSAN and HAWA WARSAME

Plaintiffs

STATE OF VICTORIA

Defendant

DEFENDANT'S REJOINDER TO PLAINTIFFS' REPLY

Date of document:	21 March 2022	
Filed on behalf of:	The Defendant	
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Preliminary

- A. Headings used in this rejoinder are for convenience only. They do not form part of the rejoinder of the State of Victoria (**State**).
- B. Unless otherwise defined in the rejoinder, the State adopts the defined terms in the defence dated 17 December 2021. Unless the context otherwise requires, the State also adopts the defined terms in the amended statement of claim dated 24 September 2021 and the reply dated 27 January 2022 (but does not admit any factual assertions contained in, or in any way implied by, any defined term used in the amended statement of claim or the reply).
- C. In accordance with principle and usual practice, the State has not pleaded to the particulars in the reply. Nothing in this rejoinder should be taken to be an admission of any fact alleged in the particulars to the reply.

The State says as follows by way of rejoinder to the reply and otherwise joins issues with the allegations in the reply:

A. FIRST PERIOD

1. In response to paragraph 1, in which the Plaintiffs reply to paragraph 8(b) of the defence, the State:

(a) notes the admission in paragraph 1(a);

(b) denies paragraph 1(b);

(c) in relation to paragraph 1(c):

(i) save that it admits that clause 5(2)(a) of the Detention Directions did not expressly specify who could grant permission to leave, denies paragraph 1(c)(i) and says further that the power in clause 5(2)(a) of the Detention Directions was exercisable by an “authorised officer” pursuant to sections 199(2)(a) and 200(1) of the PHW Act, with assistance provided by any person, including a police officer, under section 202 of the PHW Act;

(ii) denies paragraph 1(c)(ii) and says that clause 5(2)(a) of the Detention Directions did not delegate the authority to exercise any of the emergency powers in section 200(1) of the PHW Act;

(iii) save that it admits that clause 5(2)(a) of the Detention Directions did not expressly specify who could grant permission to leave, denies paragraph 1(c)(iii) and refers to and repeats paragraph 1(c)(i) above;

(iv) does not admit whether the Plaintiffs and Group Members were informed of the matters alleged in paragraph 1(c)(iv);

(v) does not admit whether the Plaintiffs and Group Members were informed of the matters alleged in paragraph 1(c)(v);

(vi) says further that:

A. between about 5 and 6 July 2020, residents of the Estate Towers were provided with copies of the Detention Directions;

B. from about 5 July 2020, authorised officers and personnel engaged by the State made telephone calls to residents of the Estate Tower at 159 Melrose Street, North Melbourne (**Melrose Street Estate Tower**) and 9 Pampas Street, North Melbourne (**Pampas Street Estate Tower**) to inform them of the content and effect of the Detention Directions;

- C. from about 6 July 2020, authorised officers made telephone calls to residents of each of the Estate Towers to inform them of the content and effect of the Detention Directions;
 - D. from about 8 July 2020, authorised officers and personnel engaged by the State distributed letters to residents of the Estate Towers in English, Vietnamese, Arabic, Dinka, Cantonese, Mandarin, Turkish and Amharic languages, which letters informed residents, among other things, of their entitlement to leave their premises if granted permission to do so for the purposes of attending a medical facility to receive medical care, where it was reasonably necessary for physical or mental health or on compassionate grounds, and of their entitlement to leave their premises in an emergency situation;
- (d) says, in the alternative to paragraph 1(c) above, that any failure to inform the Plaintiffs and the Group Members at the beginning of the First Period, or at all, of their entitlement to apply for permission to leave their premises (which failure is denied) did not invalidate the Detention Directions (or any of them).
2. In response to paragraph 2, in which the Plaintiffs reply to paragraph 9(a)(i) of the defence, the State:
- (a) in relation to paragraph 2(a):
 - (i) says that, while section 202(2) of the PHW Act required a request for assistance by a police officer to be made to the Chief Commissioner of Police or a delegate of the Chief Commissioner of Police, section 202(2):
 - A. authorised an authorised officer to make a general request to the Chief Commissioner of Police or a delegate of the Chief Commissioner of Police that police officers assist authorised officers in the exercise, including any future exercise, of emergency powers under section 200 of the PHW Act in respect of a state of emergency declared under section 198 of the PHW Act;
 - B. did not require the request for assistance to be made by the specific authorised officer exercising emergency powers under section 200 of the PHW Act, or to be made in relation to a specific exercise of those emergency powers;
 - C. authorised a request for assistance involving the deployment of police officers and the reasonable use of force by police officers to enforce compliance with directions made under section 200(1) of the PHW Act; and
 - (ii) otherwise denies paragraph 2(a);

(b) in relation to paragraph 2(b):

- (i) admits that the Chief Health Officer made the request for assistance dated 29 March 2020 (the **29 March 2020 Request**);
- (ii) refers to and relies on the full terms and effect of the 29 March 2020 Request;
- (iii) says that the 29 March 2020 Request was a valid request for assistance pursuant to section 202(2) of the PHW Act in relation to the deployment of police officers to the Estate Towers and the use of reasonable force by police officers to enforce compliance with the Detention Directions; and
- (iv) otherwise denies paragraph 2(b);

(c) in relation to paragraph 2(c):

- (i) admits that the 29 March 2020 Request was not made by the authorised officer who made the Detention Directions;
- (ii) admits that the 29 March 2020 Request was made before a decision was made to make the Detention Directions; and
- (iii) otherwise denies paragraph 2(c) and refers to and repeats paragraphs 2(a) and 2(b) above.

B. SECOND PERIOD

3. In response to paragraph 3, in which the Plaintiffs reply to paragraph 12(a) of the defence, the State:

- (a) notes the admission in paragraph 3(a);
- (b) denies paragraph 3(b);
- (c) denies paragraph 3(c) and says that:
 - (i) the requirement in the DPCC Directions to self-isolate or self-quarantine applied to the Second Plaintiff and the 33 Alfred Street Group Members during the Second Period on the basis that they were each either a “diagnosed person” or a “close contact” within the meaning of the DPCC Directions; and
 - (ii) it was determined on or about 8 July 2020 that residents of the 33 Alfred Street Estate Tower were “close contacts” within the meaning of the Diagnosed Persons and Close Contacts Direction No 4 (**DPCCD 4**) on the basis of there being a high number of diagnosed cases of COVID-19 throughout the 33 Alfred Street Estate Tower;
- (d) does not admit paragraph 3(d);

(e) denies paragraph 3(e) and:

- (i) refers to and repeats paragraph 3(c) above; and
- (ii) says further that, on or about 9 July 2020, the Second Plaintiff and the 33 Alfred Street Group Members were notified that residents of the 33 Alfred Street Estate Tower were “close contacts”.

Particulars

The State refers to the document entitled “Stage 3 Restrictions North Melbourne and Flemington” and to the document entitled “Update for Residents at 33 Alfred Street”, which latter document was also translated into several languages other than English, including Somali.

- (f) in relation to paragraph 3(f), refers to and repeats paragraph 2 above;
- (g) denies paragraph 3(g) and refers to and repeats paragraphs 12 and 21A of the defence;
- (h) denies paragraph 3(h) and refers to and repeats paragraphs 2(a) and 2(b) above;
- (i) in relation to paragraph 3(i), refers to and repeats paragraph 6 below and otherwise does not admit whether police officers did not permit the Second Plaintiff or any particular 33 Alfred Street Group Member to leave their premises as alleged in paragraph 3(i);
- (j) denies paragraph 3(j) and:
 - (i) says further that the Second Plaintiff and the 33 Alfred Street Group Members were not detained during the Second Period; and
 - (ii) refers to and repeats paragraph 12(b) of the defence.

4. In response to paragraph 4, in which the Plaintiffs reply to paragraph 13(a)(i) of the defence, the State:

- (a) in relation to paragraph 4(a), refers to and repeats paragraphs 2(a), 2(b) and 3 above and otherwise denies paragraph 4(a);
- (b) in relation to paragraph 4(b):
 - (i) admits paragraph 4(b)(i);
 - (ii) admits paragraph 4(b)(ii);
 - (iii) denies paragraph 4(b)(iii); and
 - (iv) denies paragraph 4(b)(iv);

- (c) in relation to paragraph 4(c):
 - (i) does not admit paragraph 4(c)(i); and
 - (ii) refers to and repeats paragraph 6 below and otherwise does not admit whether police officers did not permit the Second Plaintiff or any particular 33 Alfred Street Group Member to leave their premises as alleged in paragraph 4(c)(ii).
- 5. In response to paragraph 5, in which the Plaintiffs reply to paragraph 14(a) of the defence, the State:
 - (a) in relation to paragraph 5(a), refers to and repeats paragraph 4 above;
 - (b) notes the admission in paragraph 5(b);
 - (c) notes the admission in paragraph 5(c);
 - (d) in relation to paragraph 5(d), refers to and repeats paragraph 6 below and otherwise does not admit whether police officers restrained or prevented the Second Plaintiff or any particular 33 Alfred Street Group Member from leaving their premises as alleged in paragraph 5(d);
 - (e) notes the admission in paragraph 5(e);
 - (f) in relation to paragraph 5(f), admits that the Chief Health Officer or the Deputy Chief Health Officer was empowered by clause 9(2) of the DPCC Directions to exempt a person or a group of persons from any or all requirements contained in those directions, if satisfied that an exemption was appropriate having regard to the need to protect public health and the principles in sections 5 to 10 of the PHW Act, as appropriate, and otherwise denies paragraph 5(f);
 - (g) in relation to paragraph 5(g):
 - (i) says that where, under section 199(2) of the PHW Act, the Chief Health Officer authorises an authorised officer to exercise emergency powers, then under section 202 of the PHW Act that authorised officer may be assisted by any person to exercise that power, including by a police officer pursuant to a request to the Chief Commissioner of Police or a delegate of the Chief Commissioner of Police; and
 - (ii) otherwise denies paragraph 5(g);
 - (h) denies paragraph 5(h).
- 6. In response to paragraph 6, in which the Plaintiffs reply to paragraph 19(c)(ii) of the defence, the State:
 - (a) in relation to paragraph 6(a), refers to and repeats paragraph 4 above;

- (b) in relation to paragraph 6(b):
 - (i) objects to the paragraph because the words “was never offered an opportunity to leave her residence for fresh air and exercise” are vague and embarrassing;
 - (ii) under cover of that objection, says that residents of 33 Alfred Street Estate Tower were notified on or about 9 July 2020 that they would be able to exercise outside under supervision;

Particulars

The State refers to and repeats the particulars to paragraph 3(e) above.

- (iii) otherwise does not admit paragraph 6(b);
- (c) in relation to paragraph 6(c), says that, during the Second Period, residents of the 33 Alfred Street Estate Tower were permitted to leave their homes for exercise outside the building from the evening of 11 July 2020, and:
 - (i) in relation to paragraph 6(c)(i), admits that rosters were used for the purposes of giving residents access to exercise outside the building but does not admit whether the Second Plaintiff or any particular 33 Alfred Street Group Member was restricted to exercise times of 20 minutes or 30 minutes;
 - (ii) in relation to paragraph 6(c)(ii):
 - A. does not admit whether, during the Second Period, the Second Plaintiff or any particular 33 Alfred Street Group Member was escorted from their premises to exercise outside the building by police officers or servants or agents of the State;
 - B. says further that, from around 14 July 2020 to the end of the Second Period, exercise support workers engaged by the State accompanied a number of residents of the 33 Alfred Street Estate Tower to exercise outside the building;
 - (iii) does not admit paragraph 6(c)(iii);
 - (iv) in relation to paragraph 6(c)(iv), does not admit whether, during the Second Period, police officers or servants or agents of the State surrounded any exercise area while the Second Plaintiff or any particular 33 Alfred Street Group Member was exercising outside; and
 - (v) in relation to paragraph 6(c)(v), does not admit whether, during the Second Period, the Second Plaintiff or any particular 33 Alfred Street Group Member was prohibited from leaving the building grounds while accessing fresh air or exercising;

(d) says further that:

(i) the State's ability to give the residents of the 33 Alfred Street Estate Tower safe access to exercise outside the building during the Second Period was substantially constrained in circumstances where:

A. there was a high number of COVID-19 cases in the 33 Alfred Street Estate Tower;

B. the 33 Alfred Street Estate Tower was densely populated, had two small elevators and narrow corridors, and had small and limited means of ingress and egress; and

C. there were various employees and contractors of the State delivering services to the residents of the 33 Alfred Street Estate Tower in and around the building; and

(ii) in the circumstances set out at paragraph 6(d)(i) above:

A. it was necessary and reasonable for the State to take some time following the start of the Second Period to develop and implement an exercise policy for the residents of the 33 Alfred Street Estate Tower to ensure that exercise could be done without increasing the risk of transmission of COVID-19; and

B. the exercise policy developed and implemented by the State for the residents of the 33 Alfred Street Estate Tower was reasonable and proportionate to the need to protect against the significant public health risk posed by COVID-19, including the risk of serious illness and death.

7. In response to paragraph 7, in which the Plaintiffs reply to paragraph 19(c)(iii) of the defence, the State:

(a) in relation to paragraph 7(a), refers to and repeats paragraph 24 of the defence;

(b) in relation to paragraph 7(b):

(i) denies that the Second Plaintiff or the 33 Alfred Street Group Members had inadequate fresh air or inadequate room to exercise within their premises in circumstances:

A. which involved a short-term confinement to protect public health in an emergency situation;

B. where the apartments in which the Second Plaintiff and members of the 33 Alfred Street Group Members were located during the First and Second Periods had windows that opened and were reasonably well ventilated; and

C. where the corridors in the common areas in the 33 Alfred Street Estate Tower were ventilated with fresh air; and

- (ii) further and in the alternative, denies that it was within the State's knowledge that the Second Plaintiff or the 33 Alfred Street Group Members had inadequate fresh air or inadequate room to exercise.

8. The State denies paragraph 8, in which the Plaintiffs reply to paragraphs 20A and 20B of the defence, and refers to and repeats paragraphs 9 to 54 below.

C. ALLEGED FALSE IMPRISONMENT

9. In response to paragraph 9, the State:

- (a) admits paragraph 9(a) and says further that, at all material times, Dr van Diemen was an authorised officer for the purpose of the exercise of the emergency powers in section 200(1) of the PHW Act;
- (b) save that it says that, at all material times, Dr van Diemen held the role of Deputy Chief Health Officer (Communicable Disease), admits paragraph 9(b) and says further that, at all material times, Dr van Diemen was authorised to exercise emergency powers by the Chief Health Officer under section 199(2)(a) of the PHW Act;
- (c) admits paragraph 9(c);
- (d) admits paragraph 9(d).

10. In response to paragraph 10, the State:

- (a) says that, on 1 July 2020, Dr van Diemen made DPCCD 4 in the exercise of emergency powers pursuant to section 200(1) of the PHW Act;
- (b) says that, on 4 July 2020, Dr van Diemen made each of the Detention Directions referred to at paragraph 20A of the defence in the exercise of emergency powers pursuant to section 200(1) of the PHW Act;
- (c) otherwise denies paragraph 10.

11. The State denies paragraph 11 and says further that no decision to lock down the Estate Towers was made until Dr van Diemen made the Detention Directions at around 4pm on 4 July 2020.

12. The State denies paragraph 12 and says further that:

- (a) Dr van Diemen made the Detention Directions on 4 July 2020;
- (b) during 1, 2 and 3 July 2020, Dr van Diemen had become increasingly concerned about the risks to life and health facing the residents of public housing towers in

Flemington and North Melbourne and the broader community from the growing number of COVID-19 cases in the towers;

- (c) on 3 July 2020, Dr van Diemen said to senior colleagues words to the effect that urgent and drastic action was needed at public housing towers in Flemington and North Melbourne and that she was considering a *cordon sanitaire* or lockdown;

Particulars

The communications were by telephone and text and included:

- (i) text messages sent on the evening of 3 July 2020 from Dr van Diemen to Kym Peake stating:

"I'm really worried about the towers. I think we need to move hard and fast. Like tomorrow."

and

"We're going to need to lock down the postcodes. And maybe the towers even more.";

- (ii) telephone conversations with Ben Rimmer, Kym Peake and Sean Morrison on the evening of 3 July 2020.

- (d) on 4 July 2020, Dr van Diemen discussed with colleagues that urgent action was required at public housing towers in Flemington and North Melbourne;

Particulars

The communications were by telephone and text and included:

- (i) a text message sent on 4 July 2020 from Dr van Diemen to Professor Sutton stating:

"We're going in hard and fast on the towers. It's going to explode otherwise.";

- (ii) telephone conversations with Professor Sutton, Jacinda de Witts and Sean Morrison on 4 July 2020;

- (iii) an email from Dr van Diemen to Jacinda de Witts on 4 July 2020 noting that, as per phone conversation, and following consultation with Professor Sutton, she recommended including all towers in the detention orders in order to do a full sweep and find all cases.

- (e) following Dr van Diemen's advice on 4 July 2020 that an urgent lockdown of public housing towers in Flemington and North Melbourne was needed to protect public health, on the afternoon of 4 July 2020:

- (i) directions were drafted within the (then) Department of Health and Human Services of the State to implement a lockdown of public housing towers in Flemington and North Melbourne;

- (ii) Dr van Diemen received advice from within the (then) Department of Health and Human Services of the State that any lockdown should start simultaneously with the Premier's announcement of the lockdown in order to avoid a situation of public housing residents leaving in the time between the announcement and the implementation of the lockdown, and that the Estate Towers at 76 Canning Street, North Melbourne and 9 Pampas Street, North Melbourne should be included in the lockdown; and
 - (iii) Dr van Diemen considered the advice referred to in paragraph 12(e)(ii) above and then signed the Detention Directions, which were expressed to take effect immediately upon being made;
 - (f) assistance with enforcing the Detention Directions was given by police officers pursuant to the 29 March 2020 Request.
13. The State admits paragraph 13.
14. The State denies paragraph 14 and refers to and repeats paragraph 12 above.
15. In response to paragraph 15, the State:
- (a) admits paragraph 15(a);
 - (b) admits paragraph 15(b);
 - (c) denies paragraph 15(c) and says further that:
 - (i) Dr van Diemen signed the Detention Directions at around 4pm on 4 July 2020, having received them at around 3.35pm by email; and
 - (ii) Dr van Diemen was, in the time available, able to give proper consideration to the matters set out in the draft Detention Directions and the accompanying brief, including the human rights assessment, having regard to the fact that, in the course of making several other public health directions pursuant to section 200(1) of the PHW Act prior to 4 July 2020, Dr van Diemen had read and was familiar with documents in terms that were substantially similar to the accompanying brief, including the human rights assessment;
 - (d) admits paragraph 15(d).
16. The State admits paragraph 16.
17. The State denies paragraph 17 and refers to and repeats paragraph 12 above.
18. The State denies paragraph 18 and refers to and repeats paragraph 12 above.
19. The State denies paragraph 19 and refers to and repeats paragraph 12 above and says further that, even if the Detention Directions (or any of them) were invalid (which is denied),

then by no later than midnight on 4 July 2020, or alternatively midnight on 5 July 2020, Dr van Diemen or another authorised officer would have made lawful directions under section 200(1) of the PHW Act in the same or substantially in the same form as the Detention Directions, with the consequence that the Plaintiffs and the Group Members would have, in any event, been detained in accordance with those directions by no later than midnight on 4 July 2020 or alternatively midnight on 5 July 2020.

20. In response to paragraph 20, the State:
 - (a) refers to section 200(1)(a) of the PHW Act;
 - (b) says that the emergency power in section 200(1)(a) of the PHW Act includes a power to detain a person for a specified period of time where detention for that period is reasonably necessary to eliminate or reduce a serious risk to public health;
 - (c) otherwise denies paragraph 20.
21. In response to paragraph 21, the State:
 - (a) admits that the Detention Directions authorised the detention of the Plaintiffs and the Group Members at their premises for a period of 14 days in accordance with their terms;
 - (b) otherwise denies paragraph 21.
22. The State denies paragraph 22.
23. In response to paragraph 23, the State:
 - (a) admits that the Detention Directions authorised the detention of the Plaintiffs and the Group Members in the “Detention Location” (as defined in each of the Detention Directions) in accordance with their terms;
 - (b) otherwise denies paragraph 23.
24. In response to paragraph 24, the State:
 - (a) says that the emergency power in section 200(1)(a) of the PHW Act includes a power to detain a person in a part only of the emergency area;
 - (b) otherwise denies paragraph 24.
25. The State denies paragraph 25.
26. In response to paragraph 26, the State:
 - (a) refers to and repeats paragraph 8(b) of the defence and paragraph 1 above;

- (b) admits that the term “emergency situation” was not defined in the Detention Directions but says that no definition was required because the term bore its natural and ordinary meaning;
 - (c) otherwise denies paragraph 26.
- 27. In response to paragraph 27, the State:
 - (a) refers to and repeats paragraph 8(b) of the defence and paragraph 1 above;
 - (b) otherwise denies paragraph 27.
- 28. The State denies paragraph 28.
- 29. In response to paragraph 29, the State:
 - (a) in relation to paragraph 29(a):
 - (i) denies that, when Dr van Diemen made the Detention Directions, there were 23 confirmed cases of COVID-19 identified in the Estate Towers and says that there were at that time around 33 confirmed cases of COVID-19 identified in the Estate Towers; and
 - (ii) otherwise does not admit paragraph 29(a);
 - (b) admits paragraph 29(b) and says further that confirmed cases of COVID-19 had also been identified at 120 Racecourse Road, Flemington and a confirmed case of COVID-19 had been identified at each of 76 Canning Street, North Melbourne, 126 Racecourse Road, Flemington, and 12 Sutton Street, North Melbourne;
 - (c) save that it admits that no cases of COVID-19 had been identified at the Melrose Street Estate Tower or the Pampas Street Estate Tower, denies paragraph 29(c) and refers to and repeats paragraph 29(b) above.
- 30. The State denies paragraph 30 and says further that it was not legally unreasonable to make the Detention Directions (or any of them) in the circumstances, which included the following:
 - (a) cases of COVID-19 had been identified in all the Estate Towers save for the Melrose Street Estate Tower and the Pampas Street Estate Tower;
 - (b) the 33 Alfred Street Estate Tower had at least 14 confirmed COVID-19 cases;
 - (c) the 33 Alfred Street Estate Tower was located in close physical proximity to the Melrose Street Estate Tower;
 - (d) most of the residents of the Melrose Street Estate Tower were persons above the age of 55, and thus at a heightened risk of severe illness or death from COVID-19;

- (e) all or most of the residents of the Pampas Street Estate Tower were persons above the age of 55, and thus at a heightened risk of severe illness or death from COVID-19;
- (f) there were risks that those who contracted COVID-19 would become seriously ill and die;
- (g) there was no cure, effective treatment or vaccine for COVID-19;
- (h) there were substantial family, community, cultural and faith-based connections between residents of different Estate Towers, and thus a heightened risk of transmission of COVID-19 between the Estate Towers;
- (i) a substantial number of children living in the Estate Towers attended a number of the same schools, which increased the risk of transmission of COVID-19 from residents of the Estate Towers to those school communities;
- (j) a substantial number of residents in the Estate Towers had pre-existing health conditions and comorbidities, and low health literacy, which heightened their risk of severe illness or death from COVID-19;
- (k) a substantial number of residents in the Estate Towers were essential workers, which heightened the risk of transmission of COVID-19 to various essential workplaces and meant that a postcode lockdown would not effectively stop movement of Estate Towers residents;
- (l) a substantial number of residents in the Estate Towers worked in jobs that could not be done from home;
- (m) multiple cases of COVID-19 in the Estate Towers had been linked with known, and at the time current, workplace outbreaks;
- (n) a substantial number of residents in the Estate Towers used family day care in their homes, to an extent that was higher than the use by persons residing elsewhere in Victoria;
- (o) a person diagnosed with COVID-19 had been moving around the Estate Towers;
- (p) there was a significant risk of undiagnosed COVID-19 cases in the Estate Towers;
- (q) the risk of transmission of COVID-19 within each of the Estate Towers was heightened as a consequence of residents using common spaces such as lifts, shared laundry facilities, common area garbage chutes, entrances and exits, and playgrounds on the grounds of the Estate Towers;
- (r) the risk of transmission of COVID-19 within each of the Estate Towers was heightened because they were densely populated;

- (s) the risk of transmission from residents of the Estate Towers to the population outside the towers was high given the high number of COVID-19 cases in the Estate Towers relative to case numbers in the community at that time;
 - (t) in the absence of appropriate public health measures, the number of COVID-19 cases in the Estate Towers and the broader community had the capacity to grow exponentially in a short space of time, as demonstrated by the rapid growth of confirmed COVID-19 cases in public housing towers in Flemington and North Melbourne in the days before 4 July 2020; and
 - (u) in the absence of a cure, effective treatment or vaccine for COVID-19, there was, at the time, a significant risk of serious illness and death following infection with COVID-19, particularly in the case of vulnerable persons such as persons with comorbidities and older persons;
 - (v) the decision to make the Detention Directions was reasonable and proportionate to the urgent need to put in place public health measures to protect the right to life of the residents of the Estate Towers and the broader community.
31. In response to paragraph 31, the State:
- (a) admits that Dr van Diemen or another authorised officer did not, prior to making the Detention Directions:
 - (i) briefly explain to the Plaintiffs and Group Members the reason why it was necessary to detain them in accordance with the Detention Directions; or
 - (ii) warn the Plaintiffs and the Group Members that a refusal or failure to comply with the Detention Directions without a reasonable excuse was an offence;
 - (b) refers to and repeats paragraph 32 below.
32. The State denies paragraph 32 and says that, given the urgency of the circumstances and the large number of people residing at their premises in the Estate Towers, it was not practicable before Dr van Diemen made the Detention Directions for Dr van Diemen or another authorised officer to:
- (a) briefly explain the reason why it was necessary to detain the Plaintiff and Group Members; or
 - (b) warn the Plaintiffs and the Group Members that a refusal or failure to comply with the Detention Directions without a reasonable excuse was an offence.
33. The State refers to and repeats paragraph 1(c)(vi)(vi) above and otherwise denies paragraph 33.

34. The State refers to and repeats paragraph 1(c)(vi) above and otherwise denies paragraph 34.
35. In response to paragraph 35, the State:
- (a) refers to and repeats paragraphs 31 to 34 above;
 - (b) says further that:
 - (i) the Second Plaintiff and the 33 Alfred Street Group Members had their movement confined or restricted during the Second Period in accordance with the DPCC Directions, which were supported by sections 200(1)(b) and 200(1)(d) of the PHW Act, and were not detained pursuant to the emergency power to detain in section 200(1)(a) of the PHW Act; and
 - (ii) in the premises, the requirements in sections 200(2) and 200(3) of the PHW Act did not apply with respect to the Second Plaintiff and the 33 Alfred Street Group Members in the Second Period;
 - (c) says that, in any event, any failure to comply with section 200(2), section 200(3) or section 200(4) of the PHW Act (which is denied):
 - (i) did not render unlawful the detention of the Plaintiffs and the Group Members during the First Period; and
 - (ii) did not render unlawful the restriction of the Second Plaintiff's and the 33 Alfred Street Group Members' movement during the Second Period;
 - (d) otherwise denies paragraph 35.
36. In response to paragraph 36, the State:
- (a) says that Dr van Diemen, other authorised officers and the public health team at the (then) Department of Health and Human Services reviewed, on an ongoing basis, the number, location and spread of confirmed COVID-19 cases in each of the Estate Towers;
 - (b) otherwise does not admit paragraph 36.
37. In response to paragraph 37, the State:
- (a) says that, in any event, any failure to comply with section 200(6) of the PHW Act (which is denied) did not render unlawful the detention of the Plaintiffs and the Group Members during the First Period;
 - (b) otherwise denies paragraph 37.
38. The State denies paragraph 38.

39. In response to paragraph 39, the State:
- (a) admits that Dr van Diemen was the Acting Chief Health Officer on 4 July 2020;
 - (b) denies that Dr van Diemen “purported” to make the Detention Directions and refers to and repeats paragraph 12(a) above;
 - (c) says that Dr van Diemen was not the Acting Chief Health Officer on 5 July 2020 or thereafter during the First Period;
 - (d) says that s 200(10) of the PHW Act was not enacted at the relevant time;
 - (e) otherwise denies paragraph 39.
40. The State denies paragraph 40.
41. In response to paragraph 41, the State denies that it was reasonably practicable to give the written notice to the Chief Health Officer as alleged.
42. Save that the State refers to and repeats paragraph 41 above, it does not admit paragraph 42.
43. Save that the State refers to and repeats paragraph 39 above, it does not admit paragraph 43.
44. In response to paragraph 44, the State:
- (a) says that section 200(10) of the PHW Act was not enacted at the relevant time;
 - (b) says that any failure to comply with any of sections 200(7) to 200(9) of the PHW Act (which is denied) or any failure to comply with section 200(10) of the PHW Act (even if applicable, which is denied) did not render unlawful the detention of the Plaintiffs and the Group Members during the First Period;
 - (c) otherwise denies paragraph 44.
45. In respect of paragraph 45, the State:
- (a) admits that the 29 March 2020 Request was not authorised by section 229 of the PHW Act;
 - (b) refers to and repeats paragraph 2 above;
 - (c) otherwise denies paragraph 45.
46. The State denies paragraph 46.

D. FIRST PERIOD - ALLEGED BREACH OF CHARTER RIGHTS

47. In response to paragraph 47, the State:
- (a) says that each of the Detention Directions was a legislative instrument and therefore denies that section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) applied to the exercise of the power to make the Detention Directions (or any of them);
 - (b) in the alternative to paragraph 47(a) above, if each of the Detention Directions was not a legislative instrument, then the State:
 - (i) admits that, in making the Detention Directions, Dr van Diemen was required to act in a way that was not incompatible with relevant human rights;
 - (ii) admits that, in making the Detention Directions, Dr van Diemen was required to give proper consideration to relevant human rights; and
 - (iii) says further that relevant human rights could under law be limited as was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter.
48. The State denies paragraph 48, refers to and repeats paragraph 47 above, and says further that:
- (a) Dr van Diemen gave proper consideration to relevant human rights;
 - (b) Dr van Diemen acted in a way that was not incompatible with relevant human rights;
 - (c) alternatively, any limit placed upon any relevant human right was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter.
49. The State denies paragraph 49 and says further that, in any event, any failure to comply with section 38(1) of the Charter did not:
- (a) constitute jurisdictional error;
 - (b) invalidate the Detention Directions (or any of them); or
 - (c) render unlawful the detention of the Plaintiffs and the Group Members during the First Period.
50. In response to paragraph 50, the State:
- (a) says that Dr van Diemen exercised the power under s 200(1) of the PHW Act when she made each of the Detention Directions;

- (b) denies that, when she made each of the Detention Directions, Dr van Diemen was obliged to act in the manner alleged in paragraph 50(a) and (b) and refers to and repeats paragraph 47(a) above;
 - (c) alternatively to paragraph 50(b) above, if the Detention Directions were not legislative instruments:
 - (i) admits that Dr van Diemen was required, when making each of the Detention Directions:
 - A. to act in a way that was not incompatible with relevant human rights; and
 - B. to give proper consideration to relevant human rights; and
 - (ii) says further that relevant human rights could under law be limited as was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter.
51. In response to paragraph 51, the State:
- (a) denies paragraph 51(a) and says that “omitting” or “failing” to conduct any review as alleged was not a “decision” for the purposes of section 38(1) of the Charter and therefore was not subject to the requirement in section 38(1) of the Charter to give proper consideration to relevant human rights;
 - (b) denies paragraph 51(b);
 - (c) alternatively, says that any limit placed upon any relevant human right was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter.
52. The State denies paragraph 52 and says further that, in any event, any failure to comply with section 38(1) of the Charter did not:
- (a) constitute jurisdictional error; or
 - (b) render unlawful the detention of the Plaintiffs and the Group Members during the First Period.
53. In response to paragraph 53, the State:
- (a) admits that it was required to act in a way that was not incompatible with relevant human rights;
 - (b) says that each of:
 - (i) “deploying” police officers to the Estate Towers;
 - (ii) “effecting” the detention of the Plaintiff and Group Members; and
 - (iii) “maintaining” the deployment of police officers at the Estate Towers,

was not a “decision” for the purposes of section 38(1) of the Charter and therefore not subject to the requirement in section 38(1) of the Charter to give proper consideration to relevant human rights;

- (c) says further that relevant human rights could under law be limited as was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter.

54. The State:

- (a) refers to and repeats paragraph 53 above;
- (b) says further that any failure to comply with section 38(1) of the Charter did not:
 - (i) constitute jurisdictional error; or
 - (ii) render unlawful the detention of the Plaintiffs and the Group Members during the First Period;
- (c) otherwise denies paragraph 54.

E. SECOND PERIOD – DPCC DIRECTIONS

55. The State denies paragraph 55, in which the Plaintiffs reply to paragraphs 21A and 21B of the defence, and refers to and repeats paragraphs 56 to 77 below.

56. In response to paragraph 56, the State:

- (a) admits paragraph 56(a) and says further that, at all material times, Dr Finn Romanes (**Dr Romanes**) was an authorised officer for the purpose of the exercise of the emergency powers in section 200(1) of the PHW Act;
- (b) admits paragraph 56(b) and says further that, at all material times, Dr Romanes was authorised to exercise emergency powers by the Chief Health Officer under section 199(2)(a) of the PHW Act;
- (c) admits paragraph 56(c);
- (d) admits paragraph 56(d).

57. In response to paragraph 57, the State:

- (a) says that, on 15 July 2020, Dr Romanes made the Diagnosed Persons and Close Contacts Direction No 5 (**DPCCD 5**) in the exercise of emergency powers pursuant to section 200(1) of the PHW Act;
- (b) otherwise denies paragraph 57.

58. In response to paragraph 58, the State:

- (a) says that the DPCC Directions did not delegate to any person the exercise of any emergency powers in section 200(1) of the PHW Act;

- (b) refers to and relies on the full terms and effect of the DPCC Directions;
 - (c) otherwise denies paragraph 58.
59. In response to paragraph 59, the State:
- (a) says that each of the DPCC Directions was a legislative instrument;
 - (b) says that the purpose of each of the DPCC Directions was to require:
 - (i) persons diagnosed with COVID-19 to self-isolate; and
 - (ii) persons who were living with a diagnosed person, or who had been in close contact with a diagnosed person, to self-quarantine;in order to limit the spread of COVID-19, as set out in clause 1(1) of each of the DPCC Directions;
 - (c) says that each of the DPCC Directions stipulated a set of rules applicable to “diagnosed persons” or “close contacts”;
 - (d) otherwise denies paragraph 59.
60. In response to paragraph 60, the State:
- (a) says that, on a proper construction of each of the DPCC Directions, a person had been “informed” that the person had been diagnosed with “2019-nCoV” within the meaning of clause 4(1) of each of the DPCC Directions if that diagnosis had been communicated to the person by, among others:
 - (i) a COVID-19 testing facility after the person had undertaken a polymerase chain reaction test for COVID-19; or
 - (ii) an officer of the (then) Department of Health and Human Services;
 - (b) otherwise denies paragraph 60.
61. In response to paragraph 61, the State:
- (a) denies that Dr van Diemen “purported” to make DPCCD 4 and refers to and repeats paragraph 12(a) above;
 - (b) denies that, in making DPCCD 4, Dr van Diemen exceeded the powers and authority conferred upon her under section 199(2) of the PHW Act or at all;
 - (c) denies paragraph 61(a) and refers to and repeats paragraph 58 above;
 - (d) denies paragraph 61(b) and refers to and repeats paragraph 59 above;

- (e) denies paragraph 61(c) and says further that DPCCD 4 applied, on its terms, to “diagnosed persons” and “close contacts” and during the finite period of time stipulated in DPCCD 4;
 - (f) admits paragraph 61(d) and refers to and repeats paragraph 61(e) above;
 - (g) save that it says that DPCCD 4 was publicly available at all material times, does not admit paragraph 61(e);
 - (h) denies paragraph 61(f) and refers to and repeats paragraph 61(e) above.
62. The State denies paragraph 62 and refers to and repeats paragraphs 58 to 61 above.
63. In response to paragraph 63, the State:
- (a) denies that Dr Romanes “purported” to make DPCCD 5 and refers to and repeats paragraph 57(a) above;
 - (b) denies that, in making DPCCD 5, Dr Romanes exceeded the powers and authority conferred upon him under section 199(2) of the PHW Act or at all;
 - (c) denies paragraph 63(a) and refers to and repeats paragraph 58 above;
 - (d) denies paragraph 63(b) and refers to and repeats paragraph 59 above;
 - (e) denies paragraph 63(c) and says further that DPCCD 5 applied, on its terms, to “diagnosed persons” and “close contacts” and during the finite period of time stipulated in DPCCD 5;
 - (f) admits paragraph 63(d) and refers to and repeats paragraph 63(e) above;
 - (g) save that it says that DPCCD 5 was publicly available at all material times, does not admit paragraph 63(e);
 - (h) denies paragraph 63(f) and refers to and repeats paragraph 63(e) above.
64. The State denies paragraph 64 and refers to and repeats paragraphs 58 to 60 and 63 above.
65. The State denies paragraph 65.
66. In response to paragraph 66, the State:
- (a) refers to and repeats paragraphs 12 and 21A of the defence;
 - (b) says that during the Second Period some of the 33 Alfred Street Group Members were informed that they were a “diagnosed person” in accordance with clause 4 of each of the DPCC Directions;

- (c) says that, on a proper construction, clause 6 of each of the DPCC Directions provided that a “close contacts” determination could be made with respect to a person or persons;
 - (d) says that, at the start of the Second Period, a “close contacts” determination pursuant to clause 6 of DPCCD 4 had been made with respect to the Second Plaintiff and the 33 Alfred Street Group Members and refers to and repeats paragraph 3(c) above;
 - (e) otherwise denies paragraph 66.
67. In response to paragraph 67, the State:
- (a) does not admit paragraph 67(a) and says further that, in any event, there was no requirement to give attention to each individual person's circumstances for the purpose of determining lawfully that residents of the 33 Alfred Street Estate Tower were “close contacts” in circumstances where there were concentrated outbreaks of COVID-19 in the 33 Alfred Street Estate Tower at the time, and other matters referred to in paragraph 30 above;
 - (b) denies paragraph 67(b) and refers to and repeats paragraph 67(a) above;
 - (c) denies paragraph 67(c) and refers to and repeats paragraph 67(a) above;
 - (d) denies paragraph 67(d) and refers to and repeats paragraph 3(c)(ii) above;
 - (e) in relation to paragraph 67(e), admits that a notice under clause 5(1)(b) and clause 5(3) of the DPCC Directions was not provided to the Second Plaintiff and all the Group Members at the commencement of the Second Period but says that such a notice was only to be provided for the purpose of clearance of a “diagnosed person” from self-isolation;
 - (f) denies paragraph 67(f).
68. In response to paragraph 68, the State:
- (a) does not admit paragraph 68(a), refers to and repeats paragraph 67(a) above and says further that, in any event:
 - (i) any decision to designate the Second Plaintiff or a 33 Alfred Street Group Member as either a “diagnosed person” or a “close contact” for the purposes of the DPCC Directions was not required to be made on or about 15 July 2020 as a result of making DPCCD 5;
 - (ii) the residents of the 33 Alfred Street Estate Tower who had been informed that they were “diagnosed persons” pursuant to DPCCD 4 remained “diagnosed persons” under DPCCD 5 until they received clearance from isolation, and there

was no requirement that they be informed again, pursuant to DPCCD 5, that they were “diagnosed persons”; and

(iii) the residents of the 33 Alfred Street Estate Tower who had been determined to be “close contacts” pursuant to DPCCD 5 remained “close contacts” under DPCCD 5 until the end of their period of self-quarantine, and there was no requirement that a determination be made again, pursuant to DPCCD 5, that they were “close contacts”;

(b) does not admit paragraph 68(b) and refers to and repeats paragraphs 67(a) and 68(a)(i) to 68(a)(iii) above;

(c) denies paragraph 68(c) and refers to and repeats paragraphs 67(a) and 68(a)(i) to 68(a)(iii) above;

(d) does not admit paragraph 68(d) and refers to and repeats paragraphs 67(a) and 68(a)(i) to 68(a)(iii) above;

(e) in relation to paragraph 68(e), admits that a notice under clause 5(1)(b) and clause 5(3) of the DPCC Directions was not provided to the Second Plaintiff and all the Group Members at the commencement of DPCCD 5 but says that such a notice was only to be provided for the purpose of clearance of a “diagnosed person” from self-isolation;

(f) denies the second paragraph 68(e) (noting a typographical error in the paragraph numbering).

69. In response to paragraph 69, the State:

(a) does not admit paragraph 69(a);

(b) denies paragraph 69(b) and refers to and repeats paragraphs 3(c), 3(e), 3(j), 61 and 67 above;

(c) denies paragraph 69(c) and refers to and repeats paragraphs 3(c), 3(e), 3(j), 61, 63, 67 and 68 above;

(d) denies paragraph 69(d) and refers to and repeats paragraph 3(j) above.

70. Save that the State refers to and repeats paragraphs 3(i), 4(c)(ii), 5(d) and 6 above, the State denies paragraph 70 and says further that:

(a) police officers lawfully provided assistance under section 202 of the PHW Act; and

(b) it does not admit whether the Second Plaintiff and 33 Alfred Street Group Members:

(i) wanted to choose another premises in which to self-isolate or self-quarantine;
or

- (ii) sought permission to leave the 33 Alfred Street Estate Tower for the purposes of clause 8(2)(b) of the DPCC Directions.

71. In response to paragraph 71, the State:

- (a) refers to and repeats paragraphs 3(j) and 70 above;
- (b) otherwise denies paragraph 71.

F. SECOND PERIOD – ALLEGED BREACH OF CHARTER RIGHTS

72. In response to paragraph 72, the State:

- (a) refers to and repeats paragraph 3(j) above;
- (b) says that restraining the movement of the Second Plaintiff and the 33 Alfred Street Group Members during the Second Period by “continuing to deploy” police officers to the 33 Alfred Street Estate Tower was not a “decision” for the purposes of section 38(1) of the Charter and was therefore not subject to the requirement in section 38(1) of the Charter to give proper consideration to relevant human rights;
- (c) says further that, in any event, any limit placed upon relevant human rights was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter;
- (d) otherwise denies paragraph 72.

73. In response to paragraph 73, the State:

- (a) refers to and repeats paragraph 3(j) above;
- (b) says that restraining the movement of the Second Plaintiff and the 33 Alfred Street Group Members during the Second Period was not a “decision” for the purposes of section 38(1) of the Charter and was therefore not subject to the requirement in section 38(1) of the Charter to give proper consideration to relevant human rights;
- (c) says further that, in any event, any limit placed upon relevant human rights was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter;
- (d) otherwise denies paragraph 73.

74. In response to paragraph 74, the State:

- (a) refers to and repeats paragraph 3(j) above;
- (b) says that, in any event, any failure to comply with section 38(1) of the Charter did not:
 - (i) constitute jurisdictional error; or
 - (ii) render the restriction unlawful;
- (c) otherwise denies paragraph 74.

75. In response to paragraph 75, the State:
- (a) refers to and repeats paragraph 3(j) above;
 - (b) admits that it was required to act in a way that was not incompatible with relevant human rights;
 - (c) says that police officers continued to be deployed to the 33 Alfred Street Estate Tower during the start of the Second Period and there was no new or separate “decision” to deploy police officers to the 33 Alfred Street Estate Tower during that period;
 - (d) says that each of:
 - (i) continuing to deploy police officers to the 33 Alfred Street Estate Tower;
 - (ii) “effecting” the restriction of movement of the Second Plaintiff and the 33 Alfred Street Group Members; and
 - (iii) “maintaining” the deployment of police officers at the 33 Alfred Street Estate Tower,was not a “decision” for the purposes of section 38(1) of the Charter and was therefore not subject to the requirement in section 38(1) of the Charter to give proper consideration to relevant human rights;
 - (e) says further that relevant human rights could under law be limited as was reasonable and demonstrably justifiable within the meaning of s 7(2) of the Charter.
76. In response to paragraph 76, the State:
- (a) refers to and repeats paragraphs 3(j) and 75 above;
 - (b) otherwise denies paragraph 76.
77. In response to paragraph 77, the State:
- (a) refers to and repeats paragraph 3(j) above;
 - (b) says further that, in any event, any failure to comply with section 38(1) of the Charter did not:
 - (i) constitute jurisdictional error; or
 - (ii) render unlawful the restriction of movement of the Second Plaintiff and the 33 Alfred Street Group Members during the Second Period;
 - (c) otherwise denies paragraph 77.

G. APPLICATION OF THE WRONGS ACT

78. In response to paragraph 78, in which the Plaintiffs reply to paragraph 22 of the defence, the State:
- (a) admits that section 28LE of the *Wrongs Act 1958* (Vic) applies to recovery of damages for non-economic loss with respect to an “injury” as defined in section 28LB of that Act;
 - (b) admits that “injury” as defined in s 28LB of the *Wrongs Act 1958* (Vic) does not include “loss of reputation”;
 - (c) otherwise does not admit paragraph 78 prior to the service of the Plaintiffs’ and Group Members’ evidence with respect to their alleged loss and damage.
79. In response to paragraph 79, in which the Plaintiffs reply to paragraph 22 of the defence, the State:
- (a) admits paragraph 79(a);
 - (b) in relation to paragraph 79(b), repeats paragraph 3(j) above and says further that the State intended to protect public health by effecting the implementation of the Detention Directions and DPCC Directions and did not intend to injure the Plaintiffs or Group Members and otherwise denies paragraph 79(b);
 - (c) in relation to paragraph 79(c) does not admit prior to the service of the Plaintiffs’ and Group Members’ evidence with respect to their alleged loss and damage what the alleged “injury” is and otherwise denies paragraph 79(c);
 - (d) denies paragraph 79(d);
 - (e) denies paragraph 79(e);
 - (f) denies paragraph 79(f).

H. ALLEGED ASSAULT

80. In response to paragraph 80, in which the Plaintiffs reply to paragraph 28(a) of the defence, the State repeats paragraphs 1, 2, 3 and 4 above.
81. In response to paragraph 81, in which the Plaintiffs reply to paragraph 29(a) of the defence, the State repeats paragraphs 2 and 4(a) and 4(b) above.

I. ALLEGED DAMAGES

82. In response to paragraph 82, in which the Plaintiffs reply to paragraphs 35(b), 36(b), 37(b) and 39(b) of the defence, the State:
- (a) admits paragraph 82(a);

- (b) save that it refers to and repeats paragraph 79(b), denies paragraph 82(b);
- (c) denies paragraph 82(c);
- (d) denies paragraph 82(d);
- (e) denies paragraph 82(e);
- (f) denies paragraph 82(f).

Date: 21 March 2022



Signed by Daniel John Marquet
Lawyer for the defendant

This pleading was prepared by Peter Hanks QC, Georgina Costello QC, Eugenia Levine and Morgana Brady of Counsel.