



Rules 5.02(2)

FORM 5C

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Case: S ECI 2020 03946
Filed on: 01/05/2021 10:34 AM

S ECI 2020 03946

BETWEEN:

KERRY COTTERILL and others according to the schedule

Plaintiffs

TONY PECORA

Second Plaintiff

- and -

FINN ROMANES (in his capacity as the Deputy Public Health Commander)

First Defendant

BRETT SUTTON (in his capacity as Chief Health Officer)

Second Defendant



PROPOSED FURTHER AMENDED ORIGINATING MOTION OF THE FIRST PLAINTIFF

(filed pursuant to the order of Justice Niall dated 30 April 2021)

Date of Document: 29 March 2021
Filed on behalf of: the First
Plaintiff
Prepared by:
Smith & Tapper Criminal Lawyers
Level 40, 140 William Street Melbourne
VIC 3000

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Attention: Madeleine Smith
Email: msmith@smithtapper.com.au

TO THE DEFENDANTS

TAKE NOTICE that this proceeding by originating motion has been brought against you by the plaintiff for the relief or remedy set out below.

IF YOU INTEND TO DEFEND the proceeding you must attend before the Court at the time and place named in the summons served with this originating motion.

FILED

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Prothonotary

THIS ORIGINATING MOTION is to be served within one year from the date it is filed or within such further period as the Court orders.

THE FIRST PLAINTIFF SEEKS THE FOLLOWING ORDERS:

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the plaintiff has leave to proceed by originating motion in Form 5C.
3. A declaration that each of:

a. clauses 5(1) and/or 10 of the Stay at Home Directions (Restricted Areas) (No 14);
and

b. ~~clauses 5(1) and/or 10 of the Stay at Home Directions (Restricted Areas) (No 17
19)~~;

is ultra vires the *Public Health and Wellbeing Act 2008* (Vic) (the Act) by failing to provide any lawful means for a person residing in the Restricted Area (as defined in the Act) to leave the premises where that person ordinarily resides to engage in political communication, ~~thus impermissibly burdening the freedom of political communication implied in the Commonwealth Constitution (the implied freedom)~~.

4. Further or alternatively to 3, a declaration that each of:

a. clauses 5(1) and/or 10 of the Stay at Home Directions (Restricted Areas) (No 14);
and

b. ~~clauses 5(1) and/or 10 of the Stay at Home Directions (Restricted Areas) (No 17
19)~~;

is ultra vires the Act by failing to provide that a person residing in the Restricted Area (as defined in the Act) may lawfully leave the premises where the person ordinarily resides for the reason of engaging in political communication, if the person is also leaving for a reason otherwise permitted by the relevant Direction and is otherwise complying with the relevant Direction.

~~5. Alternatively to paragraphs 3 and 4, a declaration that clauses 5(1) and 10 of the Stay at Home Directions (Restricted Areas) No 14 and No 19 have no lawful operation to the extent they: (a) purport to apply to a person residing in the Restricted Area (as defined in the Act) who leaves the premises where that person ordinarily resides to engage in political communication; or (b) purport to apply to a person residing in the Restricted Area (as defined in the Act) who leaves the premises where that person ordinarily resides to engage in political communication as well as to engage in another permitted activity under s 5(1).~~

~~5. A declaration that each of:~~

~~a. clause 11(3) of the Stay at Home Directions (Restricted Areas) (No 14); and~~

~~b. clause 11(3) of the Stay at Home Directions (Restricted Areas) (No 19).~~

~~is ultra vires the Act by failing to provide any lawful means for a person residing in the Restricted Area (as defined in the Act) to arrange to meet, or organise or intentionally attend a gathering with, any other person at a public place for the purpose of engaging in political communication.~~

~~7. Alternatively to paragraph 6, a declaration that clause 11(3) of each of the Stay at Home Directions (Restricted Areas) No 14 and No 19 has no lawful operation to the extent it purports to apply to a person residing in the Restricted Area (as defined in the Act) who arranges to meet, or organises or intentionally attends a gathering with, any other person at a public place for the purpose of engaging in political communication.~~

~~8. 6. A declaration that clause 5(1) of the Stay Safe Directions (Melbourne) (No 2) is ultra vires the Act to the extent it imposes restrictions in the form of subclauses (2), and (2A) and (2B) on a person residing in the Restricted Area (as defined in the Act) who leaves the premises where that person ordinarily resides to engage in political communication.~~

~~9. 7. A declaration that clause 11(5) of the Stay Safe Directions (Melbourne) (No 2) is ultra vires the Act by failing to provide any lawful means for a person residing in the Restricted Area (as defined in the Act) to arrange to meet, or organise or intentionally~~

attend a gathering with, more than nine other persons at a public place for the purpose of engaging in political communication.

~~10 Alternatively to paragraph 9, a declaration that clause 11(5) of the Stay Safe Directions (Melbourne) (No 2) has no lawful operation to the extent it purports to apply to a person residing in the Restricted Area (as defined in the Act) who arranges to meet, or organises or intentionally attends a gathering with, more than nine other persons at a public place for the purpose of engaging in political communication.~~

~~11~~ 8. Costs.

~~12~~ 9. Any other order the Court deems fit.

GROUND ON WHICH RELIEF IS SOUGHT

The first plaintiff seeks relief on the following grounds:

- (a) The first plaintiff was issued with an infringement, ~~and the second and third plaintiffs charged with offences,~~ under s 203 of the Act for allegedly failing to comply with a direction given by a person under an authorisation given under s 199 of the Act. In relation to ~~each the first and second~~ the first plaintiff, the relevant direction is the Stay at Home Directions (Restricted Areas) (No 14). ~~In relation to the third plaintiff, the relevant direction is the Stay at Home Directions (Restricted Areas) (No 19).~~
- ~~(b)~~ In relation to the first ~~each~~ plaintiff, the conduct giving rise to the infringement ~~charges~~ involved political communication. The first plaintiff was issued with an infringement notice while carrying a sign displaying a political message. She was otherwise complying with the public health directions; she was walking on her own in public, within 5 km of her ordinary place of residence and was wearing a face mask. ~~The charges against the second plaintiff arise from his use of social media to organise protest activities. The charges against the third plaintiff arise from his attendance at a protest attended by more than 10 members of the public.~~

- (e) ~~The first~~ Each plaintiff ~~wishes to continue~~ has had and continues to have a desire to engage in political communication in public while otherwise complying with the lawful public health directives, but in doing so has risked further penalties, including (at the time of filing the amended originating motion) they risk further penalties for breaching the Stay Safe Directions (Melbourne) (No 2). Stay at Home Directions (Restricted Areas) (No 17)(the current directions). The second plaintiff ~~wishes to meet others to engage in political communication in public while complying with the lawful public health directions, but in doing so risks further penalties for breaching the current directions and would breach his bail conditions.~~
- (d) ~~Neither~~ The Stay at Home Directions (Restricted Areas) (No 14) nor the Stay at Home Directions (Restricted Areas) (No 19) current directions do not provide for any lawful means for a person residing within the Restricted Area (as defined in the Act) to leave the premises where that person ordinarily resides to engage in political communication. The Directions do not even provide that it is lawful for a person residing within the Restricted Area to leave the premises where that person ordinarily resides for the reason of engaging in political communication, if that person is also leaving for a reason permitted under the Direction and is otherwise complying with the Direction.
- (e) ~~Section 111(a) of the Act provides that the spread of an infectious disease should be prevented or minimised with the minimum restriction on the rights of any person. Further, s 200(1)(b) and (d) of the Act, in conferring powers on authorised officers (as defined in the Act), cannot validly confer powers that will be exercised (including in the making of directions) in a way that impermissibly burdens the implied freedom. Further or alternatively, s 200(1)(b) and (d) of the Act do not extend to authorising directions by authorised officers that impermissibly burden the implied freedom. The Directions in the present proceeding were made pursuant to an exercise of the emergency powers found in ss 200(1)(b) and (d) of the Act. Those powers can only be exercised by authorised officers or the Chief Health Officer in circumstances where they had been validly authorised to do so under the Act. Section 199(1)(b) of the Act introduces an open-textured statutory condition to that authorisation such that, in order for the power under s 199(2) of the Act to be validly exercised, the Chief Health Officer must believe that it is reasonably necessary to grant the authorisation. The Chief Health Officer's power under s 199(2)(a), properly construed, only extends to authorising authorised officers to exercise emergency powers under s 200(1) that are compliant with the implied freedom of political~~

communication. In this way, the statutory question and the constitutional question converge.

- (f) The first plaintiff says that if the Stay at Home Directions (Restricted Areas) (No 14) and/or the Stay at Home Directions (Restricted Areas) (No 19) had been enacted as legislation, the legislation's failure to provide for any lawful means for a person to leave their ordinary place of residence to engage in political communication would impermissibly burden the implied freedom of political communication (the implied freedom). Accordingly, In so doing, the first plaintiff says the defendants have exceeded the Act's statutory limits. Directions are beyond power because they fail to provide for any lawful means for a person to leave their ordinary place of residence to engage in political communication.
- (g) The defendants could have achieved the purpose of If the Stay at Home Directions (Restricted Areas) (No 14) and the Stay at Home Directions (Restricted Areas) (No 19) were enacted as legislation, the purpose of the Directions (in each case) could have been achieved in a way that would not have impermissibly burdened the implied freedom by:
1. Creating a standalone exception to the "stay at home" requirement to enable a person to leave the premises where that person ordinarily resides to engage in political communication (with no geographic or duration restriction operating in relation to this exception);
 2. Alternatively to (1), extending the exceptions to the "stay at home" requirement in s 5(1) to include a further category, namely where a person leaves the premises where that person ordinarily resides to engage in political communication;
 3. Alternatively to (1) and (2), by extending the exceptions to the "stay at home" requirement in s 5(1) to include a further category, namely where a person leaves the premises where that person ordinarily resides to engage in political communication, but only if the person is also leaving for a reason otherwise permitted and is otherwise complying with the relevant Direction;
 4. Creating a stand-alone exception to the restriction on public gatherings in clause 11(3) in circumstances where a person wishes to arrange to meet, or organise or intentionally attend a gathering of more than one other person at a public place for the purpose of engaging in political communication (with conditions such as

requiring attendees to socially distance, wear face coverings and adhere to a pre-approved COVID safety plan).

- (h) ~~The defendants could have achieved the purpose of~~ If the Stay Safe Directions (Melbourne) No (2) were enacted as legislation, the purpose of the Directions could have been achieved in a way that would not have impermissibly burdened the implied freedom by: (i) not imposing restrictions in the form of subclauses (2), ~~and~~ (2A) and (2B) of clause 5(1) on a person residing in the Restricted Area (as defined in the Act) who leaves the premises where that person ordinarily resides to engage in political communication; (ii) by creating a stand-alone exception to the restriction on public gatherings in clause 11(5) that would apply where a person wishes to arrange to meet, or organise or intentionally attend a gathering of more than nine other persons at a public place for the purpose of engaging in political communication (with conditions such as requiring attendees to socially distance, wear face coverings and adhere to a pre-approved COVID safety plan)).

DATE 29 March 2021



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SMITH & TAPPER CRIMINAL LAWYERS
 Solicitor for the First Plaintiff

1. Place of trial – Melbourne
2. This further amended originating motion was filed for the first plaintiff by Smith & Tapper Criminal Lawyers, Level 40, 140 William Street Melbourne VIC 3000.
3. The address of the first plaintiff is
4. The address of the second plaintiff is
3206.
5. The address of the third plaintiff is
6. The address for service of the plaintiffs is at the office of Smith & Tapper Criminal Lawyers, Level 40, 140 William Street, Melbourne VIC 3000.
7. The address of the first defendant is C/O Department of Health and Human Services, 50 Lonsdale Street, Melbourne VIC 3000.
8. The address of the second defendant is C/O Department of Health and Human Services, 50 Lonsdale Street, Melbourne VIC 3000.

SCHEDULE OF PARTIES

KERRY COTTERILL

First Plaintiff

TONY PECORA

Second Plaintiff

DAVID WEISINGER

Third Plaintiff

- and -

FINN ROMANES (in his capacity as the Deputy Public Health Commander)

First Defendant

BRETT SUTTON (in his capacity as Chief Health Officer)

Second Defendant