FEDERAL COURT OF AUSTRALIA

Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health (No 2) [2022] FCA 706

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| File number(s): |  |
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| Judgment of: | **PERRY J** |
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| Date of judgment: | 20 June 2022 |
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| Catchwords: | **COSTS –** circumstances in which the Court may depart from the ordinary rule as to costs in the exercise of discretion under s 43(2) of the *Federal Court of Australia Act 1976* (Cth) – applicant wholly unsuccessful in invoking the Court’s jurisdiction in its application for mandamus, declaratory relief and judicial review and its application for joinder of second applicant – whether public interest considerations warrant departure from the ordinary rule as to costs – where proceeding alleged to raise novel and significant issues – where no special circumstances justifying departure from ordinary rule as to costs – where no merit in the applicant’s claim of disentitling conduct by the respondent contrary to Commonwealth model litigant principles or otherwise – applicant to pay respondent’s costs  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43(2)*Legal Services Directions 2017* app B |
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| Cases cited: | *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320*Booth v Bosworth* [2001] FCA 1718*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534*Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164*Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72*Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229 |
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| Solicitor for the Respondent  | Australian Government Solicitor  |
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ORDERS

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|  | NSD 52 of 2022 |
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| BETWEEN: | AUSTRALIAN VACCINATION-RISKS NETWORK INCORPORATEDApplicant |
| AND: | SECRETARY, DEPARTMENT OF HEALTHRespondent |

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| order made by: | PERRY J |
| DATE OF ORDER: | 20 June 2022 |

THE COURT ORDERS THAT:

1. The applicant is to pay the respondent’s costs, including the costs of and incidental to the interlocutory application to join Mr Neugebauer and of the dispute as to costs.

**THE COURT NOTES, FOR CLARITY, THAT:**

2. Mr Neugebauer is not liable to pay any of the respondent’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRY J:

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| 1 INTRODUCTION | [1] |
| 2 DISPOSITION | [5] |
| 2.1 Principles | [5] |
| 2.2 Do the public interest considerations relied upon by AVN warrant a departure from the ordinary rule as to costs? | [13] |
| 2.3 Alleged disentitling conduct by the respondent | [21] |
| 3 CONCLUSION | [43] |

##### 1. INTRODUCTION

1 By its amended originating application filed on 8 March 2022 (the **Application**), the applicant, Australian Vaccination-Risks Network Incorporated (**AVN**), sought relief with respect to a number of decisions made or omitted to be made by the respondent, the Secretary of the Department of Health, Dr Brendan Murphy (the **Secretary**), under the *Therapeutic Goods Act 1989* (Cth) (**TG Act**). As I explained in *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320 (***AVN (No. 1)***) at [3]-[4] (and adopting the definitions set out in those paragraphs):

First, AVN seeks orders requiring the Secretary to consider whether to exercise his powers or discharge his alleged duty to cancel or suspend the provisional registration of three COVID-19 vaccines under the TG Act, commonly known as the Pfizer, AstraZeneca, and Moderna COVID-19 vaccines (collectively, the **Three Vaccines**). Further or alternatively, declaratory relief is sought to similar effect. This is described in the Application as the **Mandamus Case**.

Secondly, AVN seeks orders quashing or setting aside the decision by the Secretary to grant provisional approval with respect to the Comirnaty (tozinameran) COVID-19 vaccine sponsored by Pfizer Australia Pty Ltd (**Pfizer**), for use among children aged 5 to 11 years from 10 January 2022 (the **Children Decision**), and any determination made by the Secretary pursuant to s 22D of the TG Act to the effect that an indication of “*the proposed Pfizer vaccine*” was the treatment, prevention or diagnosis of a life-threatening or seriously debilitating condition for children between 5 to 11 years of age (**s 22D Determination**). These aspects of the proceeding are described in the Application as the **Judicial Review Case**.

2 By orders made on 31 March 2022, I upheld the notice of objection to competency filed by the Secretary in respect of the Mandamus Case and the Judicial Review Case on the following grounds. First, AVN lacked standing and therefore there was no “*matter*” in a constitutional sense such that the Court lacked jurisdiction insofar as the application was made under s 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). Secondly, I found that AVN was not a “person aggrieved” for the purposes of ss 5 and 7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and that the proceedings were therefore not competent insofar as those provisions were relied upon to engage the jurisdiction of the Court. In addition, I dismissed AVN’s application to join Mr Mark Neugebauer as the second applicant to the proceedings in an endeavour to “cure” any potential lack of jurisdiction in each of the Mandamus Case and Judicial Review Case on the grounds that he also lacked standing and was not a “*person aggrieved*” in the statutory sense. Accordingly, I dismissed the application for relief on 31 March 2022, with my reasons published subsequently on 11 May 2022 in *AVN (No. 1)*.

3 As requested by the applicant and Mr Neugebauer, I made orders affording the parties the opportunity to make submissions on the question of costs. Submissions were filed by the Secretary on 24 May 2022 (**RS**) seeking costs against AVN, including the costs of and incidental to AVN’s interlocutory application to join Mr Neugebauer and of the costs dispute itself. Submissions were also filed on behalf of AVN (and Mr Neugebauer) dated 13 May 2022 (**AS**) and in reply dated 25 May 2022 (**AR**) resisting any order as to costs on the grounds that the proceeding was said to involve matters of significant public interest and novel issues amounting to a test case, and on the basis of the Secretary’s conduct in the proceeding. In the alternative, AVN submitted that the Court might consider ordering the applicant to pay no more than 20% of the respondent’s costs in respect of the Judicial Review Case but no orders as to costs in respect of the Mandamus Case. While AVN’s submissions also sought to resist any costs order against Mr Neugebauer, it was unnecessary to consider the submissions to that extent given that no costs orders were sought against Mr Neugebauer by the Secretary. I have therefore included a notation in the orders in the interests of clarity stating that Mr Neugebauer is not liable to pay any of the respondent’s costs.

4 For the reasons set out below, AVN should pay the Secretary’s costs, including in relation to the joinder application and on the question of costs. In this regard, it should be said at the outset that there was no merit in AVN’s suggestion that the Secretary may have breached model litigant principles, or otherwise in the criticisms made by AVN in its costs submissions of the Secretary’s conduct in these proceedings.

##### 2. DISPOSITION

###### 2.1 Principles

5 While the Court has a broad discretion under s 43(2) of the *Federal Court of Australia Act 1976* (Cth) when determining appropriate costs orders, the discretion must be exercised judicially: *Hughes v Western Australian Cricket Association* *(Inc)* [1986] FCA 511 at 5; (1986) ATPR ¶40-748 at 48,136 (Toohey J).

6 Ordinarily costs follow the event, with the successful litigant being compensated in the sense of being indemnified against the expense to which she or he has been put in prosecuting or defending the action, as the case may be (often referred to as “*the usual order as to costs*” or “*the ordinary rule*”): see *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229 (***Ruddock (No. 2)***) at [11]-[12] (Black CJ and French J). However, the ordinary rule may be departed from where special circumstances connected with the case justify a different order: *Ruddock (No 2)* at [15] (Black CJ and French J). As the High Court recently explained in *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164 (***Sangare***):

24 It is well established that the power to award costs is a discretionary power, but that it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation [citing, among other authorities, *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96 [65], 120-121 [134]]. While the width of the discretion “cannot be narrowed by a legal rule devised by the court to control its exercise”, the formulation of principles according to which the discretion should be exercised does not “constitute a fetter upon the discretion not intended by the legislature”. Rather, the formulation of principles to guide the exercise of the discretion avoids arbitrariness and serves the need for consistency that is an essential aspect of the exercise of judicial power.

25 A guiding principle by reference to which the discretion is to be exercised – indeed, “one of the most, if not the most, important” principle – is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party. The application of that principle may be modified or displaced ***where there is conduct on the part of the successful party in relation to the conduct of the litigation that would justify a different outcome****.* For example, a successful defendant may be refused its costs on the ground that its conduct induced the plaintiff to believe that he or she had a good cause of action.

(Emphasis added; some citations omitted.)

7 Thus in *Sangare*, the High Court held that the impecuniosity of a party, without more, is not a sufficient reason for depriving a successful party of its costs, as is the fact that the successful party is a public authority. The High Court’s reasons for so holding are relevant insofar as they emphasise the importance of the ordinary rule as to costs, even though it is not suggested here that either impecuniosity or the fact that the Secretary is a public officer are reasons for departing from the ordinary rule as to costs. As the High Court explained in that case:

27 … In point of principle, it is basic justice that a successful party should be compensated for expenses it has incurred because it has been obliged to litigate by the unsuccessful party. That consideration of basic justice does not lose its compelling force simply because the successful party happens to be wealthy: the successful party, whether rich or poor, did not ask to be subjected to the expense of unmeritorious litigation. The statutory power to order costs affords the successful party necessary protection against unmeritorious litigation; and unmeritorious litigation is no less unmeritorious because it is pursued by a person who is poor or who is a litigant‑in‑person.

28. The circumstance that the appellant is a public authority is likewise irrelevant. As McHugh J said in *Oshlack v Richmond River Council* [(1998) 193 CLR 72 at 107 [92]]:

“The law judges persons by their conduct not their identity. In the exercise of the costs discretion, all persons are entitled to be treated equally and in accordance with traditional principle. The fact that a successful [party] is a public authority should not make a court less inclined to award costs in its favour. Gone are the days when one could sensibly speak of a public authority having ‘available to them almost unlimited public funds.’”

[(Footnote omitted).]

29. McHugh J dissented in the result in *Oshlack*, but those observations were not contrary to the reasoning of the majority in that case.

8 Generally speaking, as Black CJ and French J observed in *Ruddock (No 2)* at [15], “*the circumstances in which a successful party is denied all or part of its costs have to do with its conduct of the proceedings*”, such as circumstances where a party’s conduct at trial unreasonably prolonged the proceedings: see also *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 544 (Mason CJ). However that is not invariably the case. In some cases such as *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 (***Oshlack***) and *Ruddock (No. 2)* on which AVN relies, the Court has declined to award costs to the successful litigant in the particular circumstances of those cases, having regard, among other things, to public interest factors.

9 Importantly, there is no general rule established by *Oshlack* and the other authorities to which AVN refers that those who institute proceedings involving a matter of “public interest” are exempted from the usual order as to costs. Rather as Black CJ and French J held in *Ruddock (No. 2)*:

14 … it must be recognised that the concept of the “public interest” is a very broad one. For that reason it may be difficult in the realm of civil litigation, without further identification of particular circumstances, to essay any useful general proposition about how the fact that the pursuit of proceedings was in the public interest can be a relevant consideration in the discretion to award costs. The term may best be seen as an envelope or class description for a range of circumstances which, upon examination, ***may*** be found to be relevant to the question whether there should be a departure from the ordinary rule that costs follow the event.

(Emphasis added.)

10 In common with a line of authority postdating *Oshlack*, their Honours then unequivocally rejected the proposition that any such general rule could be derived from the decision in *Oshlack* in the following passage:

21 In *Oshlack* the trial judge had given content to the public interest considerations by listing the various factors and propositions which he took into account. The true issue was whether the subject matter, scope and purpose of the statute conferring the power to award costs was such that the considerations to which the trial judge had regard were extraneous to any object the legislature had in view in enacting it. The Full Court of the Federal Court in *Friends of Hinchinbrook Society Inc v Minister for the Environment (No 5)* (1998) 84 FCR 186 put it another way when it identified the entitlement of the Court of Appeal of New South Wales to disturb the discretionary decision of the trial judge as the issue decided in *Oshlack*: The decision of the High Court, it was said, "does not lay down a rule for application in other cases in the making of costs orders" (at 188) … the general conclusion of the Court is consistent with the observation of Kirby J made a few weeks later in *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411 at 412 that nothing in *Oshlack* requires that every time an individual or body brings proceedings asserting a defence of the public interest and protection of the environment, a new costs regime is to apply exempting that individual or body from the conventional rule. In that case the court ordered the unsuccessful applicants for special leave to pay the costs of their application notwithstanding the argument that the proceedings were in the public interest. The applicant sought to enforce environment laws said to be for the benefit of the general public and for the benefit of endangered species of flora and fauna in certain forest areas of Western Australia. As another Full Court put it, there is no general principle emerging from *Oshlack* that the usual order as to costs should not apply if the subject matter of the litigation is a matter of "public interest": *Hollier v Australian Maritime Safety Authority (No 2)* [1998] FCA 975; see also *Edgley v Federal Capital Press of Australia Pty Ltd* (2001) 108 FCR 1 at 25 (Beaumont ACJ, Higgins and Gyles JJ agreeing).

22 Importantly, however, although *Oshlack* was dealing with the particular provisions and subject matter of the *Land and Environment Court Act* [*1979* (NSW)] reference was made in the joint judgment to the practices and guidelines which have developed in the administration of the discretion of courts of general jurisdiction. In that context observations of Brennan J in *Norbis v Norbis* (1986) 161 CLR 515 at 537 were approved:

"It is one thing to say that principles may be expressed to guide the exercise of a discretion; it is another thing to say that the principles may harden into legal rules which would confine the discretion more narrowly than the Parliament intended. The width of a statutory discretion is determined by the statute; it cannot be narrowed by a legal rule devised by the court to control its exercise."

It was in that sense, their Honours said, that the existence of "a general rule that a wholly successful defendant should receive his costs unless good reason is shown" should be understood: Gaudron and Gummow JJ at 86, citing *Milne v Attorney‑General (Tas)* (1956) 95 CLR 460 at 477; see also Kirby J at 121.

11 In *Ruddock (No. 2*) the majority held that particular features in that case “*together point powerfully*” against the usual order as to costs (at [28]):

4. The proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the Executive power of the Commonwealth, the operation of the *Migration Act* and Australia's obligations under international law.

5. There was divided judicial opinion on these important issues, illustrating their difficulty.

6. The Commonwealth Parliament has subsequently passed laws purporting to exclude the rights of [the Victorian Council for Civil Liberties (**VCCL**)] and Vadarlis or any other person to pursue the matter further, albeit special leave to appeal in the High Court was refused on other grounds going to utility and jurisdiction.

7. The Commonwealth Parliament has also legislated to establish, as a proposition of statute law, in accordance with the view of the majority in the Full Court, that the *Migration Act* does not prevent the exercise of the Executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.

8. There was no financial gain to either VCCL or Vadarlis in bringing their claims.

9. The legal representation for VCCL and Vadarlis was provided free of charge. The quality of the representation (on all sides) ensured that the proceedings, and the important questions to which they gave rise, were pursued and resolved with expedition and efficiency.

12 Their Honours therefore concluded in that case that:

29 This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist. The case is quite different in character from the predominantly environmental litigation in which ma[n]y of the previous decisions concerning the impact of public interest considerations on costs awards have been made. Having regard to its character and circumstances the appropriate disposition is that there be no order as to the costs of the appeal or the application before North J.

###### 2.2 Do the public interest considerations relied upon by AVN warrant a departure from the ordinary rule as to costs?

13 As earlier indicated, AVN places weight on decisions such as *Oshlack* and *Ruddock (No. 2)* in support of its contention that the proceeding should be characterised as “*public interest litigation*”. AVN relies in particular upon the following factors:

(1) the applicant’s “*prime motivation… in instigating the proceeding was to uphold the public interest and the rule of law in order to protect Australians (particularly children) from the adversity reportedly associated with the Three Vaccines*” (AS [17]);

(2) the proceeding sought to enforce public law obligations;

(3) the application raised “*novel issues in relation to who may sue regarding the registration and maintenance of therapeutic goods and medicines supplied to Australians*” in the “*novel and grave context of the [Three] Vaccines*” and was “*plainly a test case*” as the “*first challenge of its kind to the registration of the [Three] Vaccines*” (AS [21]; AR [7]);

(4) the application “*raised novel issues and an arguable case which needed to be resolved particularly because of the ‘imminent risk of death, serious illness or serious injury’*” (quoting from s 30(1)(a) of the TG Act) (AS [22]);

(5) there was a public interest in the outcome of the litigation;

(6) the applicant “*stood to gain no financial benefit*” from the proceeding (AS [18]; AR [5]); and

(7) the decision in *AVN (No 1)* “*will now have a direct bearing on shielding the Commonwealth from many (if not most) future challenges as to the regulation of medicines, particularly with respect to the Vaccines and any future decisions to supply to children younger than 5 years. Only the large pharmaceutical companies or the companies holding the provisional registrations will likely have standing*” (AS [23]).

14 I accept that:

(1) the proceedings were instituted by AVN because of a genuinely held desire by its founder, Ms Dorey, and in all likelihood other members of AVN, to protect Australians against what they believed was the unacceptably high number of adverse effects suffered by persons to whom the Three Vaccines were administered, including children;

(2) AVN held a genuine desire to test the validity of the Children Decision and to enforce alleged public law obligations with respect to the Secretary’s alleged failure to consider cancelling or suspending the provisional registration of the Three Vaccines; and

(3) AVN did not stand to gain any financial benefit from the proceeding.

15 However, in my view, these considerations, whether considered separately or cumulatively, do not warrant a departure from the ordinary rule as to costs in the exercise of the court’s discretion, given the strength of the countervailing considerations.

16 ***First***, the Secretary was wholly successful in resisting the joinder application and on its notice of objection to competency, resulting in the dismissal of the Application on the ground that the Court lacked jurisdiction. Conversely, AVN was wholly unsuccessful in the proceeding.

17 ***Secondly***, the decision in *AVN (No. 1)* applied well-established principles as to standing and whether a person is a “*person aggrieved*” for the purposes of the ADJR Act. The fact that those principles fell to be considered in the context of the TG Act and raised issues of statutory construction does not mean that the proceeding raised novel questions of law or matters of high public importance, or that the proceeding should be regarded as a test case. As the Secretary submitted, almost all administrative law cases give rise to issues of statutory construction. In any event, the fact that a proceeding might be characterised as a test case does not of itself suffice to justify depriving the successful party of the usual order for costs: *Booth v Bosworth* [2001] FCA 1718 at [26] (Branson J).

18 ***Thirdly***, as the proceeding was incompetent, none of the substantive issues which AVN sought to litigate in furtherance of its view that public law obligations had not been, or were not being, discharged as required by law were reached. For the same reason, the Court was not required to form any concluded view on whether any of the grounds for relief were arguable in fact or in law (RS [8], [11]). The bare assertion by AVN in its submissions that the grounds were arguable therefore takes the matter no further.

19 ***Fourthly***, contrary to AVN's submission, the decision in *AVN (No. 1)* does not stand for the proposition put by AVN that only “*large pharmaceutical companies or the companies holding the provisional registrations will likely have standing*”. It decided ***only*** that AVN and Mr Neugebauer had each failed to establish a sufficient interest in the relief sought as a consequence of which they lacked standing and were not a “*person aggrieved*” in the statutory sense.

20 ***Finally***, as the Secretary submitted, the fact that the AVN stood to gain no financial benefit from the proceeding does not suffice to displace the usual order as to costs: *Ruddock (No 2)* at [18] (Black CJ and French J).

###### 2.3 Alleged disentitling conduct by the respondent

21 As earlier foreshadowed, AVN also contended that the Secretary’s conduct in failing to respond to its correspondence and the demands contained therein did not meet the Commonwealth’s model litigant obligations and was “*disentitling conduct*” warranting a departure from the usual order as to costs (see AS [24]-[28]; AR [8]-[11]). The model litigant obligations in the case of the Commonwealth and its agencies are spelt out in a series of obligations contained in Appendix B to the *Legal Services Directions 2017* issued by the Attorney-General pursuant to s  55ZF of the Judiciary Act (the **Model Litigant Guidelines**). It is trite that an allegation of such seriousness should not be lightly made and should be properly particularised.

22 There are two grounds on which this allegation is apparently made.

(1) First, AVN alleged that the Secretary “*ignored the repeated clear warnings contained in the AVN’s letters to the effect that AVN would instigate the proceeding if he did not respond adequately, which he did not (see letters dated 18 June 2021, 26 November 2021, 16 December 2021 and 5 January 2022)*.”

(2) Secondly, in respect of the mandamus case, AVN contended that “*once the proceeding commenced … the respondent failed, persistently and without reasonable explanation, to respond to the AVN’s requests that he ‘cause to be maintained’ the Register*”, being requests which were said to be “*substantiated by ample unchallenged evidence of adverse events*” (AS [25], emphasis in the original). AVN alleges that the respondent’s (alleged) silence in failing to reveal his position (or to explain the alleged failure) in response to those requests caused costs to be incurred in the Mandamus Case which could otherwise have been avoided as it left the applicants and the Court unaware of whether the Secretary would do anything in light of the occurrence of adverse events in AVN’s view (see AS [26]-[27]; AR [9]). In turn, AVN alleges that that silence “*falls below a reasonable standard of a government department responsible for administering the TG Act and the standard imposed by the model litigant guidelines because there was an unexplained lack of transparency*” (AS [28]), referring for example to clauses 1 and 2 of the Model Litigant Guidelines.

23 The contention that the Secretary should be deprived of an order for costs in his favour on either ground is, with respect, without merit.

24 ***First***, no proper particulars of the alleged non-compliance with the Model Litigant Guidelines were given. Among other deficiencies in AVN’s submissions on this issue, it is not sufficient merely to refer, “*for example*”, to clauses 1 and 2 of the Model Litigant Guidelines, which respectively impose the obligation on the Commonwealth and Commonwealth agencies to behave as model litigants in the conduct of litigation and describe what is entailed by that obligation (cf AS [28]).

25 ***Secondly***, AVN contended that the Secretary ignored repeated clear warnings in its letters that it would commence proceedings “*if he did not respond adequately, which he did not*” (AS [24]). In its reply submissions, AVN effectively contended that through its series of letters to the respondent, it sought an explanation by the Secretary of his position, namely “*whether he had taken, or was taking, or would take* ***any*** *step to discharge his* ***duty*** *to maintain the register*” (AR [9], emphasis in the original). It is said that the Secretary’s failure to respond is not “*the proper conduct of an Australian statutory agency charged with administering objectives such as health and safety*” (AR [11]).

26 That submission does not however reflect what was in fact being asked of the Secretary and the then Minister for Health and Aged Care (the **Minister**) in the correspondence on which AVN seeks to rely.

27 The course of correspondence commences with a letter from Ms Dorey on behalf of AVN on 27 May 2021 to the Minister about its concerns around the COVID-19 vaccination rollout “*demand[ing], based on the precautionary principle, that the current mRNA and viral vector vaccination experimental trial be* ***immediately halted*** *until independent scientific safety and efficacy evaluations can be unequivocally established*” (MCB1167) (emphasis added). By letter dated 8 June 2021 on behalf of the Minister, the Director of the Department of Health (the **Director**) responded in detail to the various allegations made by Ms Dorey by outlining the kinds of steps being taken by the Government to monitor and communicate with the public about COVID-19 vaccine safety and effectiveness, and the non-mandatory nature of the Government’s COVID-19 vaccination program (MCB1171).

28 Reference was made to litigation being instituted absent compliance with AVN’s demands for the first time in the letter dated 18 June 2021 from Ms Dorey to the Minister, which complained that the Director’s response had not addressed the issues in her earlier letter and made various demands:

Our demands are as follows:

1- An immediate cessation of the experimental COVID shots until such time as they have been independently and scientifically tested for the long-term efficacy, safety and ability to prevent transmission …

…

3- These trials should be designed, conducted and overseen by independent scientists who have no ties - financial or otherwise - with any sector of the pharmaceutical industry.

(MCB1174.)

29 That letter further asked for a response within seven days of receipt of the letter, absent which AVN would consider legal action against the Minister, and stated that in the absence of a response addressing AVN’s concerns “*we would feel that we have no option but to consider legal action against you yourself, Minister Hunt, in the form of a private prosecution and against the Government to seek injunctive relief to immediately stop this current experiment on the Australian population*” (MCB1175).

30 With respect to this letter, the following points can be made.

(1) It is not directed to the Secretary.

(2) The proceedings foreshadowed against the Minister are of a different nature from those in fact instituted subsequently against the Secretary.

(3) The demand is not for an explanation of the Minister’s position (or that of the Secretary) with respect to matters raised by AVN, but for the administration of the vaccines to cease and a differently designed “*trial*” implemented.

31 Again, that letter was responded to in a detailed letter dated 1 August 2021 from the Acting Assistant Secretary of the COVID-19 Vaccine Taskforce on behalf of the Minister. That letter advised of the Government’s “*evidence-based approach to COVID‑19*” and the steps being taken by the Therapeutic Goods Administration (**TGA**) to monitor the safety of vaccines following registration (see further *AVN (No. 1)* at [37]-[38]). The Secretary cannot be criticised for not responding as the letter was not addressed to him.

32 Ms Dorey wrote on behalf of AVN for the first time to the Secretary on 26 November 2021 (MCB1179) repeating her concerns about the COVID-19 vaccines and made the following demands (at MCB1182):

(1) an immediate cancellation of the “*experimental COVID shots… until such time as these jabs have been independently and scientifically tested for their long-term efficacy, safety and ability to prevent transmission”;* and

(2) the conduct of scientific studies using animals first, before “*moving on to small groups of humans who are made aware that they are part of a clinical trial, prior to larger Phase III studies which use an inert placebo*”, with the trials being designed, conducted and overseen by independent scientists who are not associated with the pharmaceutical industry.

33 Ms Dorey advised the Secretary that *“[i]f you do not respond or your response once again does not address our concerns, we would feel that we have no option but to consider legal action against the Government*" (MCB1183). Again, AVN’s requests are not for an explanation of the Government’s/Secretary’s position, but are a series of demands centring on an immediate cessation of the administration of the COVID-19 vaccines.

34 Similarly, in Ms Dorey’s letter on behalf of AVN dated 16 December 2021, Ms Dorey stated that (MCB1189):

The AVN requires that you respond to this correspondence confirming that you will:

a) expressly consider suspending or cancelling the Registrations;

b) that you will suspend the provisional approval of the Pfizer Registration insofar as it relates to persons under the age of eleven (11) pending further investigation; and

c) that you will provide, publicly into our office, reasons for your decisions relating to the above.

Absent a response to this correspondence by no later than 3:00pm on Friday, 24 December 2021, the AVN will have no choice other than to seek the Court’s intervention.

35 Finally, in the letter dated 5 January 2022 from Mr Fam, solicitor for the AVN at that time, to the Secretary (Supplementary Court Book (**SuppCB**) at p. 28, tab 2), Mr Fam sought confirmation within 14 days of the date of that letter that the Children Decision would be revoked and advised that, in the absence of such confirmation or notice that the Secretary had commenced re‑considering the Children Decision, AVN would seek judicial review remedies in the nature of mandamus, certiorari, and urgent injunctive relief from the Federal Court (SuppCB at p.33).

36 None of the pre-litigation correspondence on behalf of AVN to the Minister and the Secretary therefore can simply be characterised as seeking an explanation of the Secretary’s or the Government’s position in response to AVN’s concerns. In each case, that correspondence set out a series of demands requiring immediate action by the Minister and subsequently by the Secretary based on the erroneous assumption that AVN had the right to seek relief from the Court if those demands were not complied with.

37 Furthermore, the correspondence in response from or on behalf of the Minister to AVN set out the Government’s position that in its view, the safety and efficacy of the vaccines had been properly and lawfully assessed under the TG Act and that the TGA continues to monitor the safety of the vaccines. The fact that AVN did not regard the responses received from the Minister as “*adequate*” to address its concerns based on its own research and that the Secretary did not respond to AVN’s further demands does not mean that the Secretary behaved unreasonably contrary to the Model Litigant Guidelines; nor that he should otherwise be deprived of his costs (cf AS [24]).

38 ***Thirdly***, the Secretary was required to comply with the TG Act. He was not under a duty to act on the representations made, and research presented, by a non-expert and private body such as AVN in making decisions concerning the registration of the Three Vaccines. In this regard, as I held in *AVN (No. 1)* at [89]:

… there is no evidence that AVN is a body representing the views of persons recognised as experts in the field of immunology and vaccines. To the contrary, membership is open to any natural person who supports AVN’s objectives and whose application has been approved by the committee.

39 Conversely, AVN has no right under the scheme established by the TG Act to demand that the Secretary consider suspending or cancelling registration of the Three Vaccines.

40 ***Fourthly***, the nature of AVN’s submissions criticising the Secretary’s alleged silence in respect of the Mandamus Case after the proceedings were instituted is such that it assumes that the Secretary was under a legal obligation to respond to AVN’s requests for him to cause the Australian Register of Therapeutic Goods to be maintained in the manner contended for by AVN. However, the subject of that request was among the legal issues contested by the Secretary in defending the proceedings.

41 Furthermore in the Secretary’s Concise Statement filed in the Mandamus Case, which explained why the Secretary contended that the application should be dismissed, the Secretary not only put in issue AVN’s standing to seek relief, but also contested the underlying claims raised by AVN. Thus the Secretary’s Concise Statement on the Mandamus Case gave detailed reasons as to why he contended that the claims for mandamus and declaratory relief were misconceived even if the proceedings were competent, including that the discretionary powers in ss 29D and 30 of the TG Act were not coupled with duties to consider their exercise.

42 The Secretary was entitled to put these matters in dispute. In so doing, there is no evidence to suggest that his conduct departed from that required by the Model Litigant Guidelines. Specifically, note 4 to paragraph 2 of the Model Litigant Guidelines states that:

The obligation does not prevent the Commonwealth and Commonwealth agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and Commonwealth agencies and testing or defending claims against them.

##### 3. CONCLUSION

43 For these reasons, AVN has not established any special circumstances for departing from the ordinary rule as to costs that, having been wholly unsuccessful, it should pay the Secretary’s costs. Those costs include the costs of the interlocutory application to join Mr Neugebauer and of the dispute as to costs.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perry. |

Associate:

Dated: 20 June 2022