NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	8/10/2024 4:38:37 PM AEDT
Date Accepted for Filing:	8/10/2024 4:38:43 PM AEDT
File Number:	NSD349/2023
File Title:	ANTHONY LEITH ROSE & ORS v THE SECRETARY OF THE DEPARTMENT OF HEALTH AGED CARE, BRENDAN MURPHY & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

NSD 349 of 2023

ANTHONY LEITH ROSE AND OTHERS

Applicants

THE SECRETARY OF THE DEPARTMENT OF HEALTH AND AGED CARE, BRENDAN MURPHY AND OTHERS

Respondents

RESPONDENTS' OUTLINE OF SUBMISSIONS ON INTERLOCUTORY APPLICATION DATED 17 JUNE 2024

Filed on behalf of	Respondents
Prepared by	Emma Gill
Law firm	Australian Government Solicitor
Tel 02 6253 7105	Fax (02) 6169 3054
Email	emma.gill@ags.gov.au
Address for service (include state and postcode)	Level 5, 4 National Circuit, BARTON ACT 2600

A. INTRODUCTION AND OVERVIEW

1. On 26 April 2023, the three applicants (Mr Rose, Mr Derose and Mr O'Gradie) commenced this representative proceeding on behalf of people who have suffered personal injuries as a result of receiving COVID-19 vaccines sponsored by Pfizer, Moderna or AstraZeneca.[1] They allege that the five respondents[2] were negligent or in the alternate, engaged in misfeasance in public office by provisionally approving each of the vaccines for use. The relief sought is purely for damages.[3]

2. Between 5 July 2023 and 8 April 2024, the respondents' solicitor notified the applicants' solicitor of deficiencies in their pleadings and draft pleadings.[4] On 7 May 2024, the applicants filed the Third Further Amended Statement of Claim (**3FASOC**). The 3FASOC comprises 189 pages accompanied by, and making extensive reference to, seven schedules (629 pages).[5] The 3FASOC is in many respects ambiguous, prolix and difficult to understand. The applicants also filed a Concise Statement. While it is considerably shorter, it suffers from much the same defects as the 3FASOC.

3. The 3FASOC relies on two causes of action: the "Negligence Claim" (Part I); and the "Misfeasance Claim" (Part J). This is the focus of this application.[6]

4. Parts G and H of the 3FASOC allege "Misleading Statements" and "Relevant Conduct" by the respondents. Those allegations do not appear to be advanced as standalone causes of action, but as factual allegations in support of the negligence and misfeasance claims. The Concise Statement, refers to the so-called "Respondents' Misleading Statements" (at [11]) but does not identify a cause of action or make any claim for damages for those alleged statements. Likewise, the negligence claim (at [13]) and the misfeasance claim (at [15]) refer to the "impugned conduct" upon which those pleas are based as including the conduct at Concise Statement [5]-[11] (thus including the "Misleading Statements").

5. The applicants identify 29 "common questions of law and fact" (with numerous sub-questions) at 3FASOC [5] (pp 8-14). For this application, it is unnecessary to address each

---

1 The claim is brought on behalf of persons defined in 3FASOC [1] (p 5) as "Group Members". The definition extends over three pages, but the key elements appear to be natural persons who received one of certain specified COVID-19 vaccines by specified dates, and "suffered a serious adverse event either partly or wholly by reason of injection" with the Vaccine.

2 There are five respondents named and described over some eight pages at 3FASOC [10]-[14] (pp 16-23).

3 3FASOC [3] (p 7), [117]-[118] (p 189).

4 Affidavit of Emma Scotia Gill affirmed 17 June 2024 (**Gill Affidavit**) at [14]-[19], [25].

5 The 3FASOC purports to add the Group Members and Sub-Group Members as fourth applicants, though the applicants' solicitors since confirmed that they would not press for this addition: Gill Affidavit at [31].

6 See ***Plaintiff M83A/2019 v Morrison (No 2)*** [2020] FCA 1198 at [49]-[53] per Mortimer J.

question individually. The proposed common questions assume the existence and viability of the underlying causes of action. It is those underlying causes of action that are the primary focus of this application.

B. RELEVANT PRINCIPLES FOR THIS APPLICATION

6. The respondents seek orders for summary judgment in respect of the whole, or alternatively part, of the proceeding because the applicants have no reasonable prospect of successfully prosecuting the proceeding: *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), s 31A(2); *Federal Court Rules 2011* (Cth) (**FC Rules**), r 26.01(1). Alternatively, the respondents seek an order for the 3FASOC to be struck out, without leave to replead, pursuant to r 16.21 of the FC Rules.

7. It is open to the Court to determine a summary judgment or strike out application prior to the class members opting out of the proceeding.[7] The respondents acknowledge the Court's exercise of its powers to summarily terminate proceedings must always be attended with caution[8] and not exercised lightly.[9]

Summary judgment

8. For the purpose of s 31A(2) of the FCA Act (which prescribes a test which relevantly does not differ from that in r 26.01(1)(a) of the FC Rules),[10] the Court may dismiss a proceeding in whole or in part if it is satisfied that the applicants have no reasonable prospect of successfully prosecuting the proceeding, or that part of the proceeding. The inquiry is concerned with matters of substance, not form, and involves the making of "a practical judgment having regard to the circumstances of the particular case".[11]

9. An instance where the Court will exercise the summary dismissal power in s 31A is where "a party completely fails to identify any valid claim or cause of action, to the court or fails to provide any factual material that could amount to a valid claim … having been given a reasonable opportunity to do so".[12] Where matters of law are raised in the summary

---

7 *Reilly v Australia and New Zealand Banking Group Ltd* (No 2) [2020] FCA 1502 at [23] per O'Bryan J.

8 ***Spencer*** *v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28 at [24] per French CJ and Gummow J.

9 *Spencer* [60] per Hayne, Crennan, Kiefel and Bell JJ; see also *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2017] FCAFC 50 at [44] per Greenwood, Flick and Rangiah JJ.

10 *Przybylowski v Australian Human Rights Commission* (No 2) [2018] FCA 473 at [6] per Perry J, citing *Shammas v Canberra Institute of Technology* [2014] FCA 71 at [51] per Foster J.

11 *Matson v Attorney-General (Cth)* [2021] FCA 161 at [52(d)] per White J.

12 *Dowling v Commonwealth Bank of Australia* [2008] FCA 59 at [30] per Reeves J; *Batterham v Nauer, in the matter of Peter James Batterham* [2019] FCA 485 at [67] per Gleeson J.

dismissal application, the Court may resolve them, but the object of the inquiry "is not simply to determine whether the argument is hopeless, but whether the argument is sufficiently strong to warrant the matter going to trial".[13]

10. In dealing with a similar application in ***Knowles*** *v Commonwealth of Australia* [2022] FCA 741, Mortimer J (as her Honour then was) observed that where summary dismissal is sought, "the greater the size and complexity of a proceeding, the more persuaded a Court may need to be about its prospects before forcing respondents to defend a proceeding to trial, and before allocating to such a trial the finite public resources of the Court": at [29]. Her Honour's observation applies with force in this matter, given the extraordinary scope of the allegations in the 3FASOC. Her Honour also acknowledged that in light of the importance of the subject matter (being a public health crisis affecting many lives and livelihoods), the Court should be "firmly persuaded that the allegations do not justify a trial" before granting the relief: at [30].

Strike-out

11. The powers under r 16.21 of the FC Rules focus on the pleadings.[14] "A reasonable cause of action may be available on the facts alleged, but the pleadings may fail to disclose it. The question will then be whether a party has been given a sufficient opportunity to attempt to articulate the cause of action."[15]

12. Because r 16.21 is concerned with the adequacy of pleadings, it is to be read with r 16.02, which sets out the general requirements for the content of pleadings.[16] A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the

---

[13] *Bradken Resources Pty Ltd v Lynx Engineering Consultants Pty Ltd* (2008) 78 IPR 586 at [28] per Emmett J (quoted with approval in *SZSRR v Minister for Immigration and Border Protection* [2017] FCA 328 at [52] per Gleeson J).

[14] *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920 at [4]; (2008) 252 ALR 41 at 43 per Finkelstein J.

[15] *Plaintiff M83A* at [47] per Mortimer J.

[16] *Australian Competition and Consumer Commission v NQCranes Pty Ltd* [2021] FCA 1270 at [6] per Abraham J.

pleading is evasive or ambiguous; [17] likely to cause prejudice, embarrassment[18] or delay in the proceeding; or fails to disclose a reasonable cause of action.[19]

13. The Court should not grant leave to amend a pleading under r 16.53 of the FC Rules if the amendment would be futile in the sense that it discloses no reasonable cause of action and is liable to be struck out if it had appeared in the original pleading. [20] Where a pleading is struck-out, an award of further leave to replead should not be granted where the Court is satisfied that it would be futile.[21]

C. NEGLIGENCE CLAIM

14. The negligence claim is founded on a novel duty alleged to be owed by each respondent to the group members "to exercise reasonable care and skill and to avoid or minimise the risk of harm when undertaking acts and omissions which would cause the Vaccines to become [and/or remain] lawfully available": Concise Statement [12]; 3FASOC [73] (p 76). The applicants allege by their "impugned conduct" the respondents breached this duty of care, and further that their conduct was "in bad faith and so unreasonable that no reasonable person could have so acted or failed to act": Concise Statement [13]; 3FASOC [75] (p 86), [76] (p 86-87), [78] and [79] (p 99), [81] and [82] (p 111).

15. The applicants have no reasonable prospect of successfully establishing the existence of this broad and ill-defined duty of care. On that basis, the Court should summarily dismiss the negligence claim.[22]

No duty of care

16. The alleged duty of care is novel. Where such a duty is alleged, the Court's task is to engage in a "multifactorial assessment" of a number of "salient features" relevant to the

---

17 *Banque Commerciale S.A., en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286 per Mason CJ and Gaudron J, 296 per Dawson J, 302-3 per Toohey J.

18 *Fuller v Toms* (2012) 247 FCR 440 at [80], [83] per Barker J; See *Dunstan v Orr (No 2)* [2023] FCA 1536 at [92]ff per Wigney J; *Shelton v National Roads and Motorists Association Ltd* [2004] FCA 1393 at [18] per Tamberlin J.

19 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129 per Barwick CJ. See also ***KTC*** *v David* [2022] FCAFC 60 at [119], [123] per Wigney J.

20 *Allstate Life Insurance Company v Australia and New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 36 per Lindgren J; *Weddall v Rasier Pacific Pty Ltd* [2023] FCA 59 at [33] per Snaden J.

21 See *Kowalski v Mitsubishi Motors Australia Ltd* [2010] FCAFC 73 at [51] per Spender, Emmett and Jacobson JJ.

22 The non-existence of the duty of care relied on was the basis for summary dismissal in, for example, *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* (2012) 203 FCR 325 and *Knowles*.

appropriateness of imputing a legal duty upon the putative tortfeasor.[23] Seventeen such factors were identified by Allsop P (as his Honour was) in *Caltex Refineries (Qld) Pty Ltd v Stavar* at [103]. Those factors are non-exhaustive and it is not necessary to make findings in relation to each factor in every case (at [104]). A consideration of relevant salient features in the present case tends decisively against imposition of the proposed duty.

17. **First**, the class of persons to whom the duty would be owed could not be confined within reasonable limits. It would amount to an indeterminate duty to the whole Australian population. It is well established that "difficulty of confining the class of persons to whom a duty may be owed within reasonable limits" is a reason against imposing a duty of care.[24] The spectre of "liability in an indeterminate amount for an indeterminate time to an indeterminate class" should be avoided.[25] In the personal injury context, indeterminacy is "an important control mechanism or salient feature".[26]

18. The applicants have purported to limit the duty to one owed only to "Group Members", as defined: 3FASOC [73] (p 76). That definition is limited by the requirement that the person have suffered a "serious adverse event": 3FASOC [1(b)(ii)] (p 7). But it is circular to identify the persons owed the duty by reference to the persons alleged to have suffered harm; the duty inquiry is a prospective one that cannot depend on whether a person has in fact been injured.[27] In reality, the duty alleged would be one owed to every potential vaccine recipient, and thus potentially to the entire Australian population. That is tacitly acknowledged at 3FASOC [41] (p 43), where the applicants state that wherever in the 3FASOC reference is made to the "Australian public" or "Australian population", this includes all of the Group Members.

19. References to the "Australian public" and "Australian population" permeate the 3FASOC, as the basis for imposing the alleged duty. For example, the 3FASOC refers to the "Known Vulnerability of the Australian Public" in a number of places (eg [5(o)(xiii)] (p 11), [70]

---

[23] See ***Crimmins*** *v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [93]-[94] per McHugh J (Gleeson CJ at [3], [5] agreeing); ***Caltex Refineries (Qld) Pty Ltd v Stavar*** (2009) 75 NSWLR 649 [103]-[104], [138] per Allsop P (Simpson J at [241] agreeing).

[24] ***Sullivan v Moody*** (2001) 207 CLR 562 at [50] (see also [61]) per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ, citing *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

[25] *Minister for Environment v* ***Sharma*** (2022) 291 FCR 311; [2022] FCAFC 35 at [706] per Beach J, quoting *Ultramares Corp v Touche*, 255 NY 170 at 179 (1931) per Cardozo CJ.

[26] *Sharma* at [741] per Beach J.

[27] See *Sharma* at [285] per Allsop CJ. See also ***Electro Optic Systems*** *Pty Ltd v State of New South Wales* (2014) 10 ACTLR 1; [2014] ACTCA 45 at [352]-[353] per Jagot J (Murrell CJ at [2] and Katzmann J at [740] agreeing); ***Roo Roofing*** *Pty Ltd v Commonwealth* [2019] VSC 331 at [465] per John Dixon J.

(pp 74-75)). It also refers to and relies upon an "imminent risk of death, serious illness or serious injury to the Australian population" (at [55(d)(v)(3)] (p 58)). It alleges the respondents were in control of the distribution of Vaccines to "the general Australian public" (3FASOC [61(d)-(e)] (p 70)). In sum, as a matter of logic and substance, it is inescapable that the duty alleged would be one owed to "the general Australian public", without any sensible limitation or control mechanism.[28]

20. This is a reason against recognising the alleged duty of care. In *Crimmins*, McHugh J said a court, in considering novel duties, must ask whether defendants in exercising their powers "have the power to protect a specific class including the plaintiff (rather than the public at large)", and if they do not, "then there is no duty": at [93(2)]. Courts have rejected on indeterminacy grounds attempts to impose far more modest duties of care.[29]

21. Justice Mortimer's reasoning in *Knowles* is instructive. The duty in *Knowles* was alleged to be one to "take all reasonable steps to ensure that the steps undertaken by them to compel injections and for the purposes of the National Plan against the Australian population, would cause or do no harm in particular to the Applicants": at [218]. That formulation of duty is similar to that posited in the present case. Her Honour observed that the exercises of power said to give rise to the duty "applied to a large proportion of the Australian population, if not all of it": at [232]. Her Honour said one of the "fatal flaws" of the duty alleged was the "breadth of the persons to whom the alleged duty of care is said to be owed, without any attempt to identify or delineate the material facts relating to their circumstances": at [233]. The same fatal flaw exists in the present case.

22. **Second**, the posited duty of care would create incoherence in the law. Where a novel duty is alleged in respect of a statutory decision-maker, the statutory context is critical.[30] More broadly, "coherence pertains to the consistency and harmony (logically and normatively)

---

[28] The Concise Statement also asserts the duty of care as one owed to the Australian "public" or "population" five times, in relation to salient features.

[29] See, for example, in *Agar v Hyde* (2000) 201 CLR 552 (at [67]), four Justices said the proposition that the appellants owed a duty of care to "perhaps hundreds of thousands" of people who play rugby union throughout the world as "so unreal as to border on the absurd." In *Electro Optic Systems*, the indeterminacy of a duty allegedly owed to property owners sufficiently near to a source of fire to have their property threatened by it "weigh[ed] heavily against the existence of the posited duty of care": at [352]-[353] per Jagot J (Murrell CJ and Katzmann J agreeing at [2], [740]).

[30] ***Graham Barclay Oysters*** *Pty Ltd & Anor v Ryan & Ors* (2002) 211 CLR 540 at [78] per McHugh J, [145]-[146] per Gummow and Hayne JJ, [213] per Kirby J; *Sullivan v Moody* at [62] per Gleeson CJ, Gaudron McHugh, Hayne and Callinan JJ; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [20]-[22] per the Court.

of the legal system as a whole", such that both the relevant statute and "the legal context in which the statute sits" must be considered.[31]

23. In considering this issue, it is necessary to identify the relevant powers allegedly exercised by the respondents upon which the claims in the present case are based. The clearest guide to this in the 3FASOC is Part H, which identifies the "Relevant Conduct" of the first to fourth respondents. That conduct appears to fall into two categories.[32] The first category concerns "Approvals" and "Continuing Approvals" (by which seems to be meant a failure to suspend, cancel or revoke approval) in which each of the first to third respondents is alleged to have participated.[33] These approvals are references to decisions made under powers prescribed by the *Therapeutic Goods Act 1989* (Cth) (**TG Act**), read with the *Therapeutic Goods Regulations 1990* (Cth) (**TG Regulations**). The second category concerns alleged "Misleading Statements" made by each of the first to fourth respondents.[34]

24. Dealing first with the conduct in relation to approvals granted and not subsequently revoked under the TG Act, the relevant conduct lies at the heart of the exercise of statutory powers conferred by Parliament. The content and operation of this approval regime was comprehensively described in *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320 at [49]-[63].[35] The following principles are relevant to the present case:

    (a) the TG Act provides that it is not concerned only with the quality, safety and efficacy of therapeutic goods, but also with their timely availability: at [49];

    (b) the effect of registration or provisional registration of therapeutic goods is not to mandate their use, but rather to permit the lawful importation, manufacture and supply of those goods in Australia: [51];

---

31 *Sharma* at [244]-[245] per Allsop CJ.

32 See also 3FASOC [73] (p 76), which frames the duty as one concerning, first, the making available of therapeutic goods to the public ((a)-(c)), and, second, public statements as to the safety, efficacy and necessity of a therapeutic good" ((d)).

33 3FASOC [51]-[52] (pp 50-54), [54]-[55] (pp 55-59), [57]-[58] (pp 61-65).

34 3FASOC [53] (p 54), [56] (p 59), [59]-[60] (pp 65-67).

35 An appeal from her Honour's decision was dismissed as incompetent: *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* (2002) 292 FCR 1; [2022] FCAFC 135 at [52] per Rares J (Katzmann J at [53] and Wigney J at [55] agreeing).

(c) where an application for provisional determination is made, the Secretary (i.e. the first respondent) has a discretion under s 22D to make the determination if satisfied that the criteria prescribed by the TG Regulations are met: at [52];

(d) relatedly, in considering an application for provisional registration the Secretary is required by s 25(1)(d) to have regard among other things to (at [53]):

> (i) whether, based on preliminary clinical data, the safety and efficacy of the medicine for the purposes for which it is to be used have been satisfactorily established; and
>
> (ii) whether the quality of the medicine for the purposes for which it is to be used has been satisfactorily established;

(e) it is a criminal offence under s 29A of the TG Act for a person in relation to whom therapeutic goods are registered or listed to fail to advise the Secretary of information indicating that the use of the goods in accordance with the recommendations for their use may have an unintended harmful effect or that the quality, safety or efficacy of the goods is unacceptable: at [60]; and

(f) once a decision has been made to register the goods, the Secretary has discretionary powers to suspend the registration pursuant to s 29D or cancel the registration pursuant to s 30, albeit no express duty is imposed on the Secretary to exercise, or consider exercising, those powers: at [61].

25. The exercise of all of these powers involves balancing the benefits and risks associated with medicines, including vaccines, and, in the present case, within the context of a public health emergency of global concern. In particular, by providing that the objects of the TG Act include the "timely availability of therapeutic goods" (s 4(1)(a)), Parliament acknowledged that decision makers may need to balance considerations in tension with one another and attempt to reconcile competing imperatives. At this stage of the analysis, Mortimer J's observations in *Knowles* at [242] are pertinent.

26. This is a clear instance where the overlay of a common law duty of care on top of the statutory powers in the TG Act would "be inconsistent with or undermine the effectiveness of the duties imposed by the statute".[36] When considering coherence between the posited duty of care and the relevant statutory regime, the question is not one of direct inconsistency. It will be enough where the effect of imposing civil liability is to "distort

[36] *Graham Barclay Oysters* at [78] per McHugh J.

[the] focus" of the statutory decision-making process.[37] Here, that distortion would occur through detracting from the closely worked out legislative regime for therapeutic goods approvals designed for the public good by imposing a tortious duty of care, with an inherently "private or individual focus".[38] Similarly to the duty of care rejected in *Sharma*, the duty alleged here would "create a form of mandatory consideration beyond the considerations in respect of the decision in question provided for by" the applicable legislation.[39]

27. As to the alleged "Misleading Statements", the position is slightly different because the statements relied upon were not expressly provided for by statute, but the result is the same. As pleaded at 3FASOC [73(d)] (p 76), the alleged statements are only within the alleged duty because they concern "the safety, efficacy and necessity of a therapeutic good". In large part, for those respondents holding statutory offices and exercising statutory functions, the alleged statements are clearly made in the course and in furtherance of their statutory functions. The first to third respondents are also subject to the duties set out in the Australian Public Service Values, identified in s 10 of the *Public Service Act 1999* (Cth), which duties give rise to the same issues of incoherence.[40] Further, to the extent that the statements were not expressly or directly tied to statutory functions or decision-making, this aspect more squarely falls under the next salient feature, which concerns core policy functions.

28. **Third**, the posited duty, at the point of breach, raises core policy questions unsuitable for judicial determination through the tort of negligence. As Allsop CJ observed in *Sharma* at [233], this factor is "inter-related" and "inter-twined" with the preceding factor concerning incoherence in the law, albeit they can still be viewed as separate considerations. The reason why the discharge of core policy functions is not amenable to imposing a duty of care in negligence is because it involves competing public interests where "there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another".[41]

---

37 *Crimmins* at [292] per Hayne J.
38 See *Crimmins* at [292] per Hayne J.
39 *Sharma* at [268] per Allsop CJ.
40 *Roo Roofing* at [505] per John Dixon J.
41 *Graham Barclay Oysters* at [13] per Gleeson CJ, quoting *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1067 per Diplock LJ.

29. The approval of therapeutic goods, and public statements by statutory and executive office holders about those goods, is within the realm of core policy functions that are not amenable to the tort of negligence. Parliament has conferred those functions on the respondents through the TG Act. Such functions require balancing between competing considerations, such as the risk to public health posed by the disease, the benefits and potential risks of vaccination, the risks to the community arising from a failure to approve the vaccines, and the timing of approvals. The applicants' claim would require the Court to assess the exercise of powers, and the making of statements, of officials "exercising independent, multifactorial policy-based discretions" under their statutory and executive functions.[42]

30. Further, in *Knowles* Mortimer J acknowledged the posited duty would require the Court "to pass judgment on the reasonableness of what was fundamentally a complex, multi-dimensional and necessarily changeable government policy response to a world-wide pandemic": at [235]. At [237], her Honour followed the approach taken in *5 Boroughs NY* (at [43]) that "[t]he reasonableness of both the decision to implement National Cabinet's policy through hotel quarantine, and the exercise of statutory power to impose the relevant lock-down restrictions, are not justiciable in negligence." By analogy, the reasonableness of approvals granted under the TG Act, and statements made by public officials as to the "safety, efficacy and necessity" of goods so approved, are not justiciable in negligence. Those statements were part of a multifactorial, government-wide response to a global health emergency.[43]

31. These considerations apply to each of the respondents, but with especial force to the fourth respondent, who is a Minister of the Crown. The notion that a Minister is under a personal duty of care in negligence to the entire Australian population when making statements in public about matters is so heterodox that it need only be stated to be rejected. Imposing a common law duty of care upon a Minister invites "the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government" in a manner that will frequently raise "issues that are inappropriate for

---

[42] ***5 Boroughs NY*** *Pty Ltd v State of Victoria* [2021] VSC 785 at [106] per John Dixon J. See also *Roo Roofing* at [498]-[499] and [503]-[505].

[43] See *Knowles* at [242]-[243] per Mortimer J.

judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process".[44]

32. **Fourth**, there is an absence of other salient features which support the imposition of a duty of care. In summary, there is no relevant pre-existing relationship between the applicants (class members) and the respondents; no known reliance; no physical propinquity and no relevant assumption of responsibility (beyond the assertion that these features exist generically in relation to "the Australian public"). There is no "vulnerability" in the relevant sense, being a "*special* vulnerability and dependence".[45] Where the posited duty would be owed to the Australian population as a whole, that class of persons could not be said to have a special vulnerability. That absence of vulnerability is amplified by the fact that nothing alleged against the respondents goes as far as saying that the applicants were forced to take up vaccines against their will (nor could it).

Other impediments to the applicants' negligence claim

33. One impediment is the immunity from civil actions prescribed by s 61A of the TG Act. It bars suits against the Commonwealth (the fifth respondent) and "protected persons" (which, it is submitted, would include the first to fourth respondents). The only way for the applicants to overcome this immunity would be to prove that the relevant act or omission was "in bad faith": s 61A(2). While the applicants have alleged bad faith,[46] they have not adequately pleaded the factual matters said to give rise to bad faith, nor provided adequate particulars of this allegation (see below). In the absence of proper pleading, one can only infer there is no arguable basis for such a serious allegation. An analogous defence to that in TG Act s 61A was accepted as a standalone basis for summary dismissal in *Knowles* (at [245]).

34. The allegations of breach and causation are also defective. With respect to breach, the 3FASOC makes vague and general allegations of breach traversing over hundreds of pages (when parts incorporated by reference are included). The pleading is plainly embarrassing and inappropriate.[47] It is, like the pleading in *Knowles* (at [241]), fairly characterised as "a jumble of general allegations against all the respondents, lumped together".

---

44 *Graham Barclay Oysters* at [6] per Gleeson CJ (see also [15]).
45 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ (emphasis added).
46 3FASOC [75(b)] (p 86), [78(b)] (p 99), [81(b)] (p 111); Concise Statement [13].
47 See *Fuller v Toms* (2012) 247 FCR 440 at [80], [83] per Barker J.

35. The pleading with respect to causation makes no attempt to link the alleged breaches to harm allegedly suffered by the applicants. Rather, causation is simply asserted at 3FASOC [83]-[84] (p 111). At a minimum, there is no rational link between the alleged "Misleading Statements" and any of the applicants' decisions to take the vaccine.[48]

D. MISFEASANCE IN PUBLIC OFFICE

36. The essential elements for a cause of action for misfeasance in public office were conveniently stated by Wigney J, by reference to authority, in ***Farah Custodians*** *Pty Limited v Commissioner of Taxation* [2018] FCA 1185 at [97]-[106]. It is an intentional tort, the essence of which is a dishonest abuse of power or bad faith in the exercise of public power.[49]

37. Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not to be made or upheld lightly.[50] Where bad faith, dishonesty or improper purpose are pleaded, they "must be distinctly alleged and just as distinctly proved", including through sufficient particulars.[51] Hence, any misfeasance claim must be precisely pleaded, especially in respect of the "facts, matters or circumstances" which would need to be proven to support the existence of the "bad faith" element.[52] Misfeasance claims have been struck out at the pleading stage on this basis, including where the allegations relied upon speculation and assumptions.[53] These features of the tort explain why successful misfeasance claims are exceedingly rare.[54]

38. The misfeasance in public office claim is pleaded over some 74 pages (not including other parts incorporated by reference) "in the alternative to the negligence claim": 3FASOC [84A] (p 112). In the Concise Statement, it is an allegation made against each respondent. The Concise Statement summarises the claim at [14]-[15]. The 3FASOC and the Concise

---

48 See *Knowles* at [225] per Mortimer J on an analogous flaw in the pleading in that case.

49 *Farah Custodians* at [104] per Wigney J. See also *Obeid v Lockley* (2018) NSWLR 258; [2018] NSWCA 71 at [153]-[154] per Bathurst CJ.

50 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146; [2008] HCA 32 at [60] per Gummow, Hayne, Heydon and Crennan JJ.

51 ***Danthanarayana*** *v Commonwealth* [2014] FCA 552 at [97] per Foster J citing *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [184]-[189] per Millett LJ; r 16.43 of the FC Rules.

52 *Danthanarayana* at [97] per Foster J; *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* (2011) 203 FCR 293; [2011] FCA 1126 at [109]-[111] per Kenny J, and the cases cited therein.

53 See, for example, *Plaintiff M83A* at [115] per Mortimer J; *Danthanarayana* at [105]-[106] per Foster J.

54 In a recent empirical study, it was found that of 179 claims since 1950 in which a final outcome was recorded, only nine (5%) ultimately succeeded: K Barker and K Lamont, *Misfeasance in Public Office: Raw Statistics from the Australian Front Line* (2021) 43(3) *Sydney Law Review* 315 at 324.

Statement fail to articulate even a barely arguable basis for the claim of misfeasance in public office.

39. The **first** fatal flaw with the misfeasance claim is that the applicants have no reasonable prospect of proving the second element, that the respondents committed acts or omissions which were exercises of a public power that were invalid, unauthorised or beyond power. Alleged against the first to third respondents is so-called "Approvals Misfeasance" and "Continuing Approvals Misfeasance". The "Approvals" and "Continuing Approvals" are defined at 3FASOC [20] and [21] respectively (pp 29-31). The specific conduct of each of the respondents said to constitute this alleged misfeasance is pleaded in a hopelessly vague manner which is ambiguous and likely to cause embarrassment. To take the first respondent as an example, it is alleged that he "granted, caused or materially contributed" to each of the Approvals, with entirely speculative and non-specific allegations as to his actual role: 3FASOC [51] (pp 50-52). It is impossible to discern from this pleading what exactly he is alleged to have done that was invalid, unauthorised or beyond power. The position is no better in respect of the other respondents.

40. The other aspect of the alleged misfeasance concerns the "Misleading Statements Misfeasance" alleged against each of the first to fourth respondents. The applicants cannot show that in making the alleged "Misleading Statements", the respondents were exercising a public power, let alone that they had somehow exceeded the limits of any such power. The mere allegation that a public statement is inaccurate cannot support a conclusion that the statement was *beyond power*.

41. The **second** fatal flaw is that the applicants have no reasonable prospect of establishing the necessary mental element in their pleading. The requirements for proving the mental element are summarised at [36] above. There is no allegation of "targeted malice" in the 3FASOC (nor could there be), so it is presumed that the applicants rely on the reckless indifference limb. Reckless indifference requires *subjective* recklessness, where the respondent believed or suspected that the conduct was invalid and likely to cause injury, yet dishonestly proceeded anyway.[55] Such a finding of intentional wrongdoing cannot be inferred from facts, matters or circumstances that could be equally consistent with the absence of intentional wrongdoing, including where they are consistent with inadvertence,

[55] *Farah Custodians* at [105] per Wigney J.

negligence or even incompetence.[56] The standard has been equated to one of "wilful blindness".[57] There must be wilful blindness both as to the lack of power, and the likelihood of injury to the applicants.[58] The pleading as to the mental element is manifestly deficient in its lack of particularity; but for present purposes, it is well to focus on the substance of the underlying allegations.

42. The applicants have no reasonable prospect of proving that the respondents were recklessly indifferent towards an absence of lawful authority. Proof of that matter requires more than knowledge that an action was legally contentious and potentially subject to challenge.[59] The level of knowledge required is usefully illustrated by Mortimer J's reasoning in *Plaintiff M83A* at [112]-[113]. That claim alleged misfeasance in relation to Australia's regional processing arrangements with Nauru. Her Honour observed that in the context of "legally complicated propositions about unlawfulness", what would generally be necessary to prove that the respondents had the requisite knowledge was the provision to them personally of legal advice to that effect, accompanied by knowledge "that there was no reasonable and rational legal view to the contrary of that advice". The allegations in the 3FASOC manifestly fail to meet that bar. The pleading on this point is evasive and unclear. As best as can be discerned, the 3FASOC suggests the recklessness will be sought to be proved through evidence as to available information concerning the risks of vaccines: that is a manifestly inadequate source of an inference of bad faith for the purposes of this tort.

43. As to recklessness concerning the likelihood of injury to the applicants, the applicants' prospects are no better. It is necessary to stress that this element requires knowledge or reckless indifference of the "*likelihood* of harm"[60] or that the conduct will "*probably* injure the plaintiff".[61] The relevant decision-makers, of course, did not have the individual applicants in mind when exercising powers under the TG Act or the TG Regulations; nor did the respondents have in mind the individual applicants when making the so-called "Misleading Statements" – the approvals and statements were not directed to anyone in particular but rather to the Australian public in general. That means that the applicants would need to show that the respondents knew that it was *probable* that the Australian

---

56 *Plaintiff M83A* at [57]-[60], [115] per Mortimer J; *Farah Custodians* at [105] per Wigney J.
57 *Plaintiff M83A* at [96], [99] per Mortimer J.
58 *Farah Custodians* at [103] per Wigney J.
59 See *Minister for Fisheries v Pranfield Holdings Ltd* [2008] 3 NZLR 649; [2008] NZCA 216 at [114]-[121] per O'Regan, Ellen France and Baragwanath JJ.
60 *Plaintiff M83A* at [45] per Mortimer J (emphasis added).
61 *Farah Custodians* at [103] and [105] per Wigney J (emphasis added).

public would be harmed by their conduct, yet proceeded anyway; it would not be enough to show that they knew that there was some risk (however remote) for some people in relation to vaccines, which is a notorious fact. There is manifestly nothing in the 3FASOC capable of establishing this. At most, the applicants' real complaint appears to be that the respondents did not share the applicants' assessment of the level of risk attending the Vaccines, or their efficacy: see, for example, Concise Statement [14]. The facts alleged are equally consistent with honest conduct (even if negligent or incompetent, which it was not), and therefore cannot amount to bad faith for the purposes of this tort.[62]

8 October 2024

Kate Eastman SC
Hilbert Chiu SC
Henry Cooper
Counsel for the respondents

[62] See, for example, *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* (2011) 203 FCR 293; [2011] FCA 1126 at [116]-[117] per Kenny J.