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

Not Restricted

S ECI 2022 00427

INDEPENDENT CONTRACTORS OF AUSTRALIA INC (TRADING AS SELF-EMPLOYED AUSTRALIA) — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY (TRADING AS WORKSAFE VICTORIA) — Defendant

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JUDGE:	McDonald J
WHERE HELD:	Melbourne
DATE OF HEARING:	4 October 2022
DATE OF JUDGMENT:	2 December 2022
CASE MAY BE CITED AS:	Independent Contractors of Australia Inc v Victorian WorkCover Authority
MEDIUM NEUTRAL CITATION:	[2022] VSC 743

PRACTICE AND PROCEDURE – Whether originating motion filed outside of 60-day period prescribed by r 56.02(1) of the *Supreme Court (General Civil Procedure) Rules 2015* – Whether special circumstances warrant the grant of an extension of time – No special circumstances – Proceeding dismissed – *Occupational Health and Safety Act 2004* ss 131(1), (2), (2A), (3) – *Administrative Law Act 1978* s 8 – *Supreme Court (General Civil Procedure) Rules 2015* r 56.02(1), (3)

APPEARANCES:	Counsel	Solicitors
For the plaintiff	Mr M Rinaldi	Paul Horvath Solicitor
For the defendant	Ms G Costello KC with Mr C Hibbard	Corrs Chambers Westgarth

HIS HONOUR:

Introduction

1 Section 131(1) of the *Occupational Health and Safety Act 2004* ('the Act') provides that where a person considers that the occurrence of an act, matter or thing constitutes an offence against the Act, if no prosecution has been brought within six months of the occurrence of the act, matter or thing, the person may request the Victorian WorkCover Authority ('VWA') to bring a prosecution. On 29 September 2020 the plaintiff ('SEA') made a request pursuant to s 131(1) for VWA to investigate and prosecute 27 individuals and entities for alleged breaches of the Act. All of the alleged breaches were for offences in relation to the occurrences, acts or omissions 'in relation to the planning, development, control, operation and management of the Victorian Government Hotel Quarantine Containment Program, including but not limited to the decision to engage private security agencies to guard returned international travellers which commenced on 27 March 2020'.[1]

2 On 29 September 2021, VWA wrote to SEA. The letter referred to SEA's request dated 29 September 2020 for VWA to bring prosecutions against various individuals and entities associated with the initial iteration of the Hotel Quarantine Program. VWA advised SEA:

> Today I can advise you that WorkSafe's investigation into this matter is completed and a prosecution has been brought against the Victorian Department of Health, as the responsible agency of the Crown.[2]

3 On 14 February 2022, SEA commenced a proceeding under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* seeking orders in the nature of mandamus requiring VWA:

(i) to investigate the alleged breaches of the Act by 26 individuals and entities (other than the Department of Health) in accordance with its statutory duty under ss 131(2A) and (2C) of the Act;

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1 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2020 from Mr Kenneth Phillips to Mr Gordon Cooper, 15.

2 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 90.

(ii) to give reasons why it is not prosecuting the 26 individuals and entities in accordance with its statutory duty under s 131(2A)(a)(ii) of the Act;

(iii) to refer matters not yet the subject of prosecution, including providing its investigative materials to the Director of Public Prosecutions ('DPP') in accordance with its statutory duty under s 131(3) of the Act.

4 A proceeding under Order 56 must be commenced within 60 days after the date when the grounds for the relief or remedy claimed first arose. The 60-day period is not to be extended except in special circumstances. Absent an extension of time the Court has no power to grant relief.

5 For the reasons set out below I have concluded that the grounds for the relief claimed in the originating motion filed 14 February 2022 first arose on 29 September 2021. The 60-day period prescribed by r 56.02 expired on 28 November 2021. There are no special circumstances which justify an extension of time for the commencement of the proceeding to 14 February 2022. Consequently, the proceeding must be dismissed.

History of proceeding

6 The proceeding was commenced by originating motion filed 14 February 2022. On 23 March 2022 VWA filed a summons seeking an order for the separate trial of questions. The summons was listed for hearing on 21 June 2022. On that day VWA sought and was granted an adjournment to reformulate the questions to be the subject of the separate trial. In accordance with directions made on 21 June 2022 VWA filed further written submissions on 8 July 2022 and SEA filed submissions in reply on 15 July 2022.

7 On 2 August 2022 the Court wrote to the parties advising that, having considered the parties' further written submissions, the Court wished to receive submissions addressing two questions:

(i) whether the grounds for the grant of relief in paragraphs 1 to 3 of the originating motion first arose on 29 September 2021; and

(ii) if the Court concluded that the proceeding was commenced out of time, whether special circumstances justified an extension of time.

8 On 5 August 2022, the parties attended a directions hearing. Orders were made for the filing of written submissions and affidavits addressing the question of whether the proceeding had been commenced out of time. SEA filed submissions and an affidavit affirmed by its Executive Director, Mr Kenneth Phillips, on 12 August 2022. VWA filed submissions and an affidavit sworn by Mr Richard Leder, a partner of Corrs Chambers Westgarth, on 19 August 2022. The proceeding was listed for further hearing on 4 October 2022. On that day VWA was granted leave to cross-examine Mr Phillips.

Self Employed Australia

9 SEA is a not-for-profit association incorporated under the *Associations Incorporation Act 1981*. It is registered in Victoria. Mr Phillips affirmed an affidavit in support of the originating motion filed 14 February 2022. He deposed that SEA is open for membership to people who are self-employed or interested in being self-employed and companies which engage people who are self-employed.[3] No evidence before the court discloses the actual membership of SEA.

10 Mr Phillips is the co-founder of SEA and has held the position of Executive Director for 23 years.[4] There is no evidence whether SEA has any employees other than Mr Phillips. Mr Phillips is the author of all the correspondence between SEA and third parties which was tendered in evidence. This correspondence included letters to VWA, the Solicitor-General, the Ombudsman, the DPP, the Attorney-General, the Shadow Attorney-General, the Minister for Workplace Safety and the Shadow Minister for Workplace Safety. In addition, on 29 September 2021, Mr Phillips participated in media interviews with the ABC, Sky News, Herald Sun, and 3AW Radio.[5] He is also the author of various blogs posted by SEA which were tendered in

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3 Affidavit of Kenneth Norman Phillips dated 14 February 2022, 1 [4].

4 Ibid 1 [1].

5 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Blog post dated 30 September 2021, 1.

evidence. Mr Phillips has been the driving force behind, and the public face of, SEA's 'Not Above the Law' campaign.[6] This campaign, supported by television and radio advertisements which aired during October and November 2021, called for VWA to prosecute Victorian government agencies and individuals over the 2020 hotel quarantine program.[7] The television advertisement in support of the campaign featured images of the Premier, Daniel Andrews, Chief Health Officer, Brett Sutton, and former Health Minister, Jenny Mikakos.

11 Mr Phillips deposed:

> SEA first took an interest in the Victorian Hotel Quarantine program (Program), which commenced in March 2020, as a result of coverage in the media at the time that the Program commenced. This initial coverage caused SEA concern that the management and handling of the Program by persons involved constituted contraventions of the OHS Act. This led to me closely following the ongoing media coverage.[8]

I have no hesitation in concluding that SEA's interest in the Victorian hotel quarantine program was a manifestation of Mr Phillips' belief that the management of the program involved contraventions of the Act.

Hotel Quarantine and the Coate Inquiry

12 On 15 March 2020, the Commonwealth Government imposed self-isolation requirements on all international arrivals to Australia to slow the spread of COVID-19. On 27 March 2020, the National Cabinet agreed to further restrict the movement of international arrivals, requiring incoming travellers to undertake mandatory 14-day self-isolation at designated facilities. On 28 March 2020, the Victorian Government issued a direction and detention notice under s 200 of the *Public Health and Wellbeing Act 2008* requiring incoming travellers to undertake mandatory 14-day self-isolation at designated hotel quarantine facilities.

13 The COVID-19 Hotel Quarantine Inquiry ('Coate Inquiry') was established by an Order in Council dated 2 July 2020. The Coate Inquiry examined a range of matters

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6 Ibid.

7 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Blog post dated 7 October 2021, 19.

8 Affidavit of Kenneth Norman Phillips dated 14 February 2022, 2 [6].

related to the hotel quarantine program in Victoria, including the decisions and actions of Victorian government agencies, hotel operators and Private Service Providers. The Final Report of the Coate Inquiry was delivered on 21 December 2020 and contained findings and recommendations in respect of the decisions and actions taken in establishing and operating the hotel quarantine program.

Request under s 131 of the Act

14 Section 130 of the Act authorises VWA to bring proceedings for offences against the Act. In circumstances where a prosecution is not brought by VWA of its own motion, the Act allows any person to make a request to prosecute. Section 131 of the Act provides:

> (1) If—
>
> (a) a person considers that the occurrence of an act, matter or thing constitutes an offence against this Act or the regulations; and
>
> (b) no prosecution has been brought in respect of the occurrence of the act, matter or thing within 6 months of that occurrence—
>
> the person may request in writing that the Authority bring a prosecution.
>
> (2) If the offence the subject of a request under subsection (1) is a summary offence, within 3 months after the Authority receives a request it must—
>
> (a) investigate the matter; and
>
> (b) following the investigation, advise (in writing) the person whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought, unless the Authority considers that giving such advice or reasons will prejudice the current investigation of an indictable offence.
>
> (2A) If the offence the subject of a request under subsection (1) is an indictable offence, the Authority must, within 3 months after receiving the request, report in writing to the person who made the request, advising that—
>
> (a) the Authority's investigation of the matter is complete, and—
>
> (i) that a prosecution will be brought; or
>
> (ii) give reasons why a prosecution will not be brought; or
>
> (b) the Authority's investigation is still ongoing and that a further report will be given within 3 months after the date of the response, and after every subsequent 3-month period, until the investigation is completed.

> (2B) If subsection (2A)(b) applies, the Authority must, within each 3-month period, also report to the Minister as to the progress of the investigation.
>
> (2C) The Authority must commence and complete investigations under this section in as timely a manner as is reasonably practicable.
>
> (3) If the Authority advises the person that a prosecution will not be brought, or that it has not brought a prosecution within 9 months after receiving the request, the Authority must refer the matter to the Director of Public Prosecutions if the person requests (in writing) that the Authority do so.
>
> (4) The Director of Public Prosecutions must consider the matter and advise (in writing) the Authority whether or not the Director considers that a prosecution should be brought.
>
> (5) The Authority must ensure a copy of the advice is sent to the person who made the request and, if the Authority declines to follow advice from the Director of Public Prosecutions to bring proceedings, the Authority must give the person written reasons for its decision.

15 On 29 September 2020, the day after the Coate Inquiry hearings concluded, Mr Phillips wrote to VWA on behalf of SEA ('First Request'). Mr Phillips made a request on behalf of SEA pursuant to s 131 of the Act that VWA investigate and prosecute 27 individuals and entities for various breaches of the Act '… in relation to the occurrences, acts or omissions in relation to the planning, development, control, operation and management of the Victorian government Hotel Quarantine Containment Program, including but not limited to the decision to engage private security agencies to guard returned international travellers, which commenced operation on 27 March 2020'.[9] A list of the 27 individuals and entities and the provisions of the Act allegedly breached was annexed to the letter:

> List of entities, officers, persons and employees I request to be prosecuted, including the offences I consider to have been constituted by the occurrences, acts and omissions in relation to the Victoria government Hotel Quarantine Containment Program.
>
> State of Victoria: Contravened Sections 21(1), 21(2)(a), 21(2)(b), 21(2)(c), 21(2)d) [sic], 21(2)(e), 22(1)(a), 22(1)(b), 22(l)(c), 22(2)(a), 22(2)(b), 23, 26, 32, 38(5)
>
> Department of Health and Human Services: Contravened Sections 21(1), 21(2)(a), 21(2)(b), 21(2)(c), 21(2)(d), 21(2)(e), 22(1)(a), 22(1)(b), 22(l)c), 22(2)(a), 22(2)b), 23, 26, 32, 38(5)
>
> Department of Jobs, Precincts and Regions: Contravened Sections 21(1),

[9] Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2020 from Mr Kenneth Phillips to Mr Gordon Cooper, 15.

21(2)(a), 21(2)(b), 21(2)(c), 21(2)d), 21(2)(e), 22 (l)(a), 22(1)(b), 22(1)(c), 22(2)(a), 22(2)(b), 23, 26, 32, 38(5)

Emergency Management Victoria: Contravened Sections 21(1), 21(2)(a), 21(2)(b), 21(2)(c), 21(2)d) [sic], 21(2)(e), 22(1)(a), 22(1)(b), 22(l)(c), 22(2)(a), 22(2)b) [sic], 23, 26, 32, 38(5)

Victoria Police Force: Contravened Sections 21(1), 21(2)(a), 21(2)(b), 21(2)(c), 21(2)d) [sic], 21(2)(e), 22(1)(a), 22(1)(b), 22(1)(c), 22(2)(a), 22(2)b) [sic], 23, 26, 32

Victorian Trades Hall Council: Contravened Sections 21(1), 21(2)(a), 21(2)(b), 21(2)(c), 21(2)d) [sic], 21(2)(e), 22(1)(a), 22(1)(b), 22(1)(c), 22(2)(a), 22(2)(b), 23, 26, 32

Premier of the State of Victoria, Daniel Andrews: Contravened Sections 26, 32, 39G, 144

The former Minister for Health, Jenny Mikakos: Contravened Sections 26, 32, 39G, 144

Minister for Police Emergency Services, Lisa Neville: Contravened Sections 26, 32, 39G, 144

Minister for Jobs, Precincts and Regions, Martin Pakula: Contravened Sections 26, 32, 39G, 144

Chris Eccles, Secretary, Department of Premier and Cabinet: Contravened Sections 25, 26, 39G, 144

Kym Peake, Secretary for Health and Human Services: Contravened Sections 25, 26, 39G, 144

Melissa Skilbeck, DHHS, Deputy Secretary, Regulation, Health Protection and Emergency Management: Contravened Sections 25, 26, 39G, 144

Andrea Spiteri, DHHS, Executive Director, Emergency Management: Contravened Sections 25, 26, 39G, 144

Jason Helps, DHHS, Deputy Director, Emergency Management: Contravened Sections 25, 26, 39G, 144

Simon Phemister, Secretary for Jobs, Precincts and Regions: Contravened Sections 25, 26, 39G, 144

Brett Sutton, Chief Health Officer: Contravened Sections 25, 26, 32, 39G, 144

Annaliese van Dieman, Deputy Chief Health Officer: Contravened Sections 25, 26, 32, 39G, 144

Michelle Giles, Deputy Public Health Commander: Contravened Sections 25, 26, 32, 39G, 144

Simon Crouch, DHHS, Senior Medical Adviser, Acting Deputy Chief Health Officer: Contravened Sections 25, 26, 39G, 144

Shane Patton, Chief Commissioner of Victoria Police: Contravened Sections 25,

26, 39G, 144

Graham Ashton, Former Chief Commissioner of Victoria Police: Contravened Sections 25, 26,

Timothy Tully, Victoria Police Commander, Officer In Charge Operation Soteria: Contravened Sections 25, 26, 39G, 144

Andrew Crisp, Emergency Management Commissioner: Contravened Sections 25, 26, 39G, 144

Noel Cleaves, DHHS, Manager Environmental Health, Regulation and Compliance: Contravened Sections 25, 26, 39G, 144

Rachaele May, DJPR Executive Director, Emergency Coordination; DJPR Agency Commander of Operation Soteria: Contravened Sections 25, 26, 39G, 144

All members of the management team known as the State Control Centre: Contravened Sections 25, 26, 39G, 144[10]

16 The letter concluded by stating:

> I look forward to your advices after the investigations undertaken in relation to the Authority's (WorkSafe's) decisions to prosecute or to provide written reasons for why prosecutions will not be brought, in compliance with the Authority's (WorkSafe's) statutory obligations under section 131(2) of the *Occupational Health and Safety Act 2004* (Vic).[11]

The reference to s 131(2) was plainly a mistake, and should have been a reference to s 131(2A).

17 On 7 October 2020, Mr Gordon Cooper, the Director of VWA's Enforcement Group, wrote to Mr Phillips as follows:

> Thank you for your letter dated 29 September 2020.
>
> You have made a request under s 131(1) of the Act for WorkSafe to bring prosecutions against various individuals and entities involved with the Hotel Quarantine Program (the Program).
>
> …
>
> As you have been made aware, WorkSafe is currently conducting an investigation into the Program. WorkSafe is committed to carrying out its investigation in an efficient and timely manner but as you will appreciate, it will take some time for the investigation to be completed and then for decisions to be made in respect of bringing prosecutions.

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10 Ibid 16.

11 Ibid 15.

> In accordance with s 131(2A) of the Act, we will provide you with updates every three months as to the status of the investigation and decisions made about whether any prosecutions will be brought.[12]

18 Mr Cooper wrote to Mr Phillips again on 17 December 2020 to provide an update on VWA's investigation. Mr Cooper advised that the investigation was ongoing and that an update would be provided in a further three months.[13]

19 The following day, Mr Phillips wrote to Mr Cooper. His letter attached various guidelines and reports relating to the operation of hotel quarantine programs in Hong Kong. Mr Phillips intended for these materials to assist Mr Cooper's 'efforts to bring prosecutions against those who have contravened the Act'.[14]

20 Mr Phillips wrote to Mr Cooper again on 4 January 2021. In his letter, Mr Phillips expressed dissatisfaction with the lack of detail provided by Mr Cooper in his 17 December 2020 letter and sought further detail on the progress of the investigation to date.[15] Mr Phillips did not receive a response to this letter.

21 A further update was sent by Mr Cooper on 4 March 2021. The letter noted that the investigation was ongoing and that VWA would advise Mr Phillips of the outcome of the investigation upon its completion. Mr Phillips' response to this letter on 10 March 2021 included the following:

> As I have previously made clear, I do not accept that merely advising me that the WorkSafe investigations are still ongoing properly complies with the objects of WorkSafe's statutory obligations under sections 7 and 131 of the *Occupational Health and Safety Act 2004* (Vic). I note that I have not received a response to my request to receive a proper report as to the status of your investigations.
>
> I also draw your attention to the obligation at section 131(3) of the *Occupational Health and Safety Act 2004* (Vic) for WorkSafe, on my request, to refer the matters to the Director of Public Prosecutions should prosecutions not be brought within 9 months after receiving my request for the several

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12 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 7 October 2020 from Mr Gordon Cooper to Mr Kenneth Phillips, 22.

13 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 17 December 2020 from Mr Gordon Cooper to Mr Kenneth Phillips, 25.

14 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 18 December 2020 from Mr Kenneth Phillips to Mr Gordon Cooper, 27.

15 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 4 January 2021 from Mr Kenneth Phillips to Mr Gordon Cooper, 32–3.

prosecutions to be brought.

> I look forward to receiving a proper update report on your investigations including whether the matters have been referred to the Director of Public Prosecutions.[16]

22 Mr Cooper responded to the 10 March 2021 letter on 31 March 2021, stating that he was satisfied that VWA had met its reporting obligations under s 131(2A)(b) of the Act.

23 On 16 May 2021, Mr Phillips wrote to Mr Cooper. His letter attached a report Mr Phillips considered relevant to VWA's ongoing investigation. Mr Phillips concluded the letter with the following:

> I look forward to your next 3 monthly update on the WorkSafe investigations due by 29 June 2021 at which time if WorkSafe has decided not to prosecute or has not brought prosecutions by that date against all or any of the entities and persons detailed in my letter of 29 September 2020, the matters, including your advice that prosecutions will not or have not been brought, are to be referred to the DPP for her consideration and written advice.[17]

24 On 2 June 2021, Mr Phillips wrote to Mr Cooper and foreshadowed his intention to request the matter be referred to the DPP should the investigation not result in aprosecution:

> Please note that if the Authority (WorkSafe) advises me that any or all of the prosecutions requested in my letter of 29 September, 2020 will not be brought, or that they have not brought any or all of the prosecutions requested by the 29 June 2021 (9 months after receiving my request on 29 September 2020), I hereby formally request the Authority to refer the relevant matters to the Director of Public Prosecutions to consider the matters and advise (in writing) the Authority whether or not the Director of Public Prosecutions considers that prosecutions should be brought pursuant to sections 131(3) and (4) of the Act.[18]

25 On 29 June 2021, nine months after the First Request was made, Ms Julie Nielsen, Executive Director of Health and Safety at VWA, wrote to Mr Phillips and advised that VWA's investigation was ongoing and that no prosecutions had been brought in respect of any of the matters raised in the First Request. Ms Nielsen asked Mr Phillips

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16 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 10 March 2021 from Mr Kenneth Phillips to Mr Gordon Cooper, 37.

17 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 16 May 2021 from Mr Kenneth Phillips to Mr Gordon Cooper, 42.

18 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 2 June 2021 from Mr Kenneth Phillips to Mr Gordon Cooper, 44.

to confirm his previously foreshadowed request to refer the matter to the DPP.[19]

26 Mr Phillips confirmed his request in a letter addressed to Ms Nielsen dated 29 June 2021:

> Therefore, pursuant to s.131(3) of the Act, I again formally request that all the matters detailed in the letter referred to above, be referred immediately to the DPP for her consideration and advice to WorkSafe, such advice setting out whether or not the DPP considers that prosecutions should be brought and which WorkSafe must subsequently consider to decide whether or not prosecutions will be brought (see ss.131(4) and (5)).
>
> Once WorkSafe receives that advice from the DPP, it must be immediately provided to me (see s.131(5)).
>
> I look forward to receiving that advice noting that the statutory limitation period for prosecutions for indictable offences to be brought by WorkSafe under the *OHS Act* will expire no later than mid 2022.[20]

27 On 5 August 2021, Mr Phillips received a response from Mr Dmitry Rozkin, the Acting Director of Enforcement Legal at VWA. Mr Rozkin enclosed a copy of a letter from the DPP dated the previous day, in which the DPP stated that she was 'unable to make a determination in this matter until she has reviewed the investigative materials'.[21] Four days later, on 9 August 2021, Mr Phillips wrote to the DPP and expressed concern that VWA had not provided the DPP with all of its investigative materials in relation to his request.[22] Mr Phillips did not receive a response from the DPP.

28 Mr Phillips relayed his concerns to Mr Rozkin in a letter dated 22 August 2021:

> I am deeply concerned about the behaviour of WorkSafe Victoria in not providing the DPP with the investigative materials to enable her to review and advise WorkSafe in relation to my s.131 (1) *Occupational Health and Safety Act* request for WorkSafe to prosecute, dated 29 September, 2020.
>
> Notwithstanding that WorkSafe has a statutory obligation to refer the matters to the DPP to enable her to advise WorkSafe as to whether prosecutions should

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19 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 June 2021 from Ms Julie Nielsen to Mr Kenneth Phillips, 46–7.

20 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 June 2021 from Mr Kenneth Phillips to Ms Julie Nielsen, 52–3.

21 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 4 August 2021 from Ms Kerri Judd QC to Mr Dmitry Rozkin, 56; Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 5 August 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 55.

22 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 9 August 2021 from Mr Kenneth Phillips to Ms Kerri Judd QC, 59–60.

> be brought, she states in her letter to you of 4 August, 2021, that WorkSafe has not provided her with its investigative material.
>
> The DPP is therefore unable to comply with her statutory obligation to review the matters contained in my s.131(1) *Occupational Health and Safety Act* request for WorkSafe to prosecute dated 29 September, 2020, and to provide her written advice to WorkSafe as to whether prosecutions should be brought.
>
> WorkSafe's failure to provide its investigative materials to the DPP for review is a clear failure of its obligation under s.131(3) of the *OHSA*. Further, WorkSafe's failure to provide the investigative materials makes it impossible for the DPP to comply with her statutory obligations under s.131(4) of the *OHSA*.
>
> Please provide all relevant WorkSafe investigative materials to the DPP immediately and within 7 days from the date of this letter. Please confirm to me that WorkSafe has provided the investigative materials.
>
> …
>
> If WorkSafe does not provide the investigative materials to the DPP or fails to confirm that it has done so as requested, it will be taken as a refusal to provide the investigative materials and therefore a continuation of its failure by to comply with the *OHSA*.[23]

29 Mr Rozkin responded to Mr Phillips on 27 August 2021. In his letter, Mr Rozkin stated that VWA had complied with its obligations under the Act and noted that the investigation was ongoing. Mr Phillips wrote to Mr Rozkin on 19 September 2021 reiterating his view that VWA had not complied with its obligations under s 131 of the Act.

30 On 22 September 2021, Mr Phillips wrote to the Attorney-General of Victoria outlining his complaints against VWA. Similar letters were sent to the Shadow Attorney-General, and the Minister and Shadow Minister for Workplace Safety. The letters requested actions be taken to direct VWA to provide the DPP with the investigative materials relating to the First Request.

31 On 29 September 2021, VWA published a media release announcing its intention to prosecute the Department of Health in relation to 58 indictable offences under the Act:

> WorkSafe has charged the Victorian Department of Health with 58 breaches of the *Occupational Health and Safety Act* in relation to Victoria's initial hotel quarantine program. The Department of Health, formerly the Department of

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[23] Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 22 August 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 63–4.

> Health and Human Services, has been charged with 17 breaches of Section 21 (1) of the *OHS Act*, in that it failed to provide and maintain, as far as reasonably practicable, a working environment that was safe and without risks to health for its employees.
>
> The department has been charged with a further 41 breaches of section 23(1) of the *OHS Act*, in that it failed to ensure, so far as was reasonably practicable, that persons other than employees were not exposed to risks to their health and safety arising from conduct of its undertaking.
>
> …
>
> This complex investigation took 15 months to complete and involved reviewing tens of thousands of documents and multiple witness interviews.
>
> A review of the material from last year's COVID-19 Hotel Quarantine Inquiry provided relevant context and information that informed parts of the investigation.
>
> The decision to prosecute has been made in accordance with WorkSafe's General Prosecution Guidelines, which require WorkSafe to consider whether there is sufficient evidence to support a reasonable prospect of conviction and whether bringing a prosecution is in the public interest.
>
> Inquiries into other entities associated with this investigation including hotels, security firms and other Government departments and agencies have concluded.[24]

32 The same day, Mr Phillips wrote to Mr Rozkin, stating the following:

> I have become aware through a WorkSafe media release earlier today that WorkSafe has decided to commence prosecutions against the Department of Health and Human Services in relation to 58 indictable offences under the *Occupational Health and Safe Act 2004* (Vic).
>
> I also note in the WorkSafe press release that WorkSafe has decided not to prosecute the 26 other individuals and entities detailed in my request to prosecute made on 29 September 2020 under s.131 of the *Occupational Health and Safety Act 2004* (Vic).
>
> I again formally request that WorkSafe's investigative material in relation to all matters be immediately provided to the DPP in compliance with WorkSafe's statutory obligation under s 131(3) of the *Occupational Health and Safety Act 2004* (Vic).[25]

33 Mr Rozkin responded to Mr Phillips later that day ('29 September 2021 Letter'):

> I refer to your request, received on 29 September 2020, for the Victorian WorkCover Authority (trading as WorkSafe Victoria) to bring prosecutions

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24 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Media release of VWA dated 29 September 2021, 91–92.

25 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 87.

against various individuals and entities associated with the initial iteration of the Hotel Quarantine Program.

WorkSafe commenced its investigation into this matter in mid-2020, prior to your request, and has continued to provide you with progress reports every three months in accordance with section 131 (2A) of the *Occupational Health and Safety Act 2004* (the Act).

Today I can advise you that WorkSafe's investigation into this matter is completed and a prosecution has been brought against the Victorian Department of Health, as the responsible agency of the Crown.

…

WorkSafe has now brought a prosecution in respect of the occurrence of the act, matter or thing outlined in your request. Accordingly, WorkSafe has now fulfilled its obligations to you under Section 131 of the Act.[26]

34 Mr Phillips responded to Mr Rozkin later that day:

In response to your letter to me of 29 September 2021, I find your assertion that by bringing a prosecution against the Department of Health, WorkSafe have somehow complied with its statutory obligation under the *Occupational Health and Safety Act 2004* (Vic) is at best disingenuous.

In your letter you state:

> WorkSafe has now brought a prosecution in respect of the occurrence of the act, matter or thing outlined in your request. Accordingly, WorkSafe has now fulfilled its obligations to you under Section 131 of the Act.

For your assertion to be correct at law, I would have needed to make my requests to have the individuals and entities prosecuted, in 27 entire [sic] separate letters.

Such an assertion is palpable nonsense. The occurrence of the act, matter or thing to which you refer is clearly not just referable to just one of the entity's [sic] involved in the Hotel Quarantine Program. The occurrence of the act, matter or thing is clearly referring to the involvement of each of the individuals and entities involvement in the Hotel Quarantine Program.

I do not accept your assertion that the reason WorkSafe believes it has complied with its statutory obligations is that it has decided to prosecute one entity out of 27 individuals and entities.[27]

35 The following day, on 30 September 2021, Mr Phillips wrote to the Solicitor-General

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26 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 90–2.

27 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 95.

of Victoria. The letter included the following:

> In the early afternoon of 29 September WorkSafe Victoria announced that it had commenced prosecutions against the Department of Health-that is, only one of the 27 entities that I identified in my s.131 request of 29 September 2020. It also announced that its investigations into other individuals and entities had concluded.
>
> In a letter… from WorkSafe also dated the 29 September 2021 and received late that afternoon, it asserts that as it has now brought a prosecution against just one of the entities listed in my letter of 29 September 2020, it has somehow complied with its statutory obligations under s.131(3) of the *Occupational Health and Safety Act 2004* (Vic).[28]

36 Mr Rozkin responded to Mr Phillips on 6 October 2021. Mr Rozkin's letter attached a letter from the DPP to Mr Rozkin dated 4 October 2021 which stated:

> Thank you for your letter dated 29 September 2021.
>
> I note that WorkSafe Victoria has brought a prosecution in relation to alleged failures occurring in respect of the Hotel Quarantine Program.
>
> In such circumstances, there is no longer any requirement, or indeed power, for me to consider and advise pursuant to s.131(4) of the *Occupational Health and Safety Act*.
>
> This matter was initially referred to me following a s.131 request from Mr Phillips. I indicated that I would not require a brief at that stage as I was satisfied that the investigation was progressing appropriately and I would prefer to receive the complete investigation brief, if required, in due course.
>
> I note your offer to provide me with a full WorkSafe investigation brief, now that it is complete.
>
> Given the filing of charges in the Hotel Quarantine Program matter and the scope of s.131(4), there is no longer a requirement for the investigation brief to be provided to me.[29]

37 Mr Phillips responded to Mr Rozkin on 6 October 2021:

> There remain 139 alleged offences and 26 individuals and entities specifically identified in my letter of 29 September 2020 requesting WorkSafe to prosecute.
>
> Bringing a prosecution against one of the 27 individuals and entities identified in my letter does not absolve WorkSafe from its statutory obligation under s.131(3) of the *Occupational Health and Safety Act 2004* (Vic) or for that matter, the DPP under s.131(4).

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28 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 30 September 2021 from Mr Kenneth Phillips to Ms Rowena Orr QC, 82.

29 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 4 October 2021 from Ms Kerri Judd QC to Mr Dmitry Rozkin, 98.

> WorkSafe has a statutory obligation to refer the matters that it has decided not to prosecute to the DPP and, pursuant to s.131(4) of the *Occupational Health and Safety Act 2004* (Vic), the DPP has a statutory obligation to advise WorkSafe as to whether she believes that prosecutions should be brought in relation to all matters listed in my letter of 29 September 2020.
>
> The DPP has no power under s. 131 of the *Occupational Health and Safety Act 2004* (Vic) to advise WorkSafe whether it should or should not provide her with its investigative material, brief or investigative brief, as it has been variously referred to. Nor does the DPP have any role or power under s.131 to advise WorkSafe Victoria that it's [sic] investigation might or might not be progressing appropriately or otherwise.
>
> The DPP must consider the matter, that is in this case, the investigative materials gathered by WorkSafe Victoria as a result of my letter of 29 September 2020, and advise WorkSafe in writing whether or not the DPP considers that a prosecution, in this case prosecutions, should be brought.
>
> The same written advice provided by the DPP to WorkSafe Victoria must be then provided to me as the person who requested WorkSafe Victoria to prosecute more than 12 months ago.
>
> The DPP's and WorkSafe Victoria's statutory obligations under s.131 are clearly stated and must be respectfully complied with as has been the case on no less than 43 occasions over the past 5 years.
>
> Why is WorkSafe continuing to fail to provide its investigative materials into the Hotel Quarantine Program to the DPP? And why is the DPP writing to WorkSafe with advice outside its ambit under s.131 of the *Occupational Health and Safety Act 2004* (Vic)?[30]

38 The same day, Mr Phillips wrote to the Victorian Ombudsman. Mr Phillips had previously written to the Ombudsman on 29 September 2021, but had received no response. In his 6 October letter, Mr Phillips alleged that VWA had failed to comply with its statutory obligations under the Act:

> After making the announcement, WorkSafe forwarded me a letter advising me of the charges and also that it's [sic] investigations had completed. The letter goes on to say that as a result it believes that it had complied with its obligations under s.131 of the *Occupational Health and Safety Act 2004* (Vic). WorkSafe's letter to me states; [sic]
>
> > 'WorkSafe has now brought a prosecution in respect of the occurrence of the act, matter or thing outlined in your request. Accordingly, WorkSafe has now fulfilled its obligations to you under Section 131 of the Act.'
>
> This assertion is palpable nonsense and is clearly being used by WorkSafe in an attempt to justify its continuing failure to comply with its statutory

[30] Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 6 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 100–1.

> obligations. The occurrence of the act, matter or thing outlined in my request of 29 September 2020 was not the fact of the Hotel Quarantine Program as WorkSafe now wants to suggest but rather the failures in it's [sic] planning, development, control, operation and management by the people and agencies involved.[31]

39 The next day, on 7 October 2021, Mr Phillips received a response from Ms Peta McManus from the Victorian Ombudsman's office. In her letter, Ms McManus gave reasons supporting the Ombudsman's decision not to pursue his complaint:

> Information provided to this office shows that WorkSafe referred the matter to the DPP (after a written request was made of it when no prosecution had been brought within 9 months). We understand the DPP acknowledged receipt of the referral. Section 131 of the *OHS Act* does not specify the substance of what needs to be included in a referral to the DPP. Based on this, it is my view, WorkSafe's referral of the matter to the DPP appears consistent with its responsibilities under section 131 of the *OHS Act*.[32]

40 Mr Phillips wrote back to Ms McManus on 8 October 2021, disagreeing with the reasons provided in the 7 October letter. Ms McManus wrote back on 18 October reiterating the Ombudsman's position as expressed in the 7 October letter.

41 Mr Phillips wrote to Mr Rozkin again on 8 October 2021:

> In light of WorkSafe Victoria's constant prevarication and obfuscation in relation to its statutory obligation under s.131 (3) of the *Occupational Health and Safety Act 2004* (Vic) and the DPP's recent confirmation that she has not actually seen WorkSafe Victoria's investigative materials relevant to my letter to WorkSafe Victoria dated 29 September 2020, I now ask for written confirmation from you on behalf of WorkSafe Victoria, that WorkSafe Victoria did in fact comply with its statutory obligation under s.131(2A) of the *Occupational Health and Safety Act 2004* (Vic) and conduct full, proper and comprehensive investigations into each and all of the individuals and entities identified in my letter of 29 September 2020 containing my detailed request for WorkSafe Victoria to prosecute those individuals and entities.
>
> This is not a difficult question and should be able to be answered without delay. Did or did not WorkSafe Victoria conduct a full, proper and comprehensive investigation into each of the allegations of contraventions of the *Occupational Health and Safety Act 2004* (Vic) identified and detailed in my letter of 29 September 2020 as accepted by WorkSafe Victoria as meeting the requirements of s.131 of the *Occupational Health and Safety Act 2004* (Vic)?[33]

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31 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 6 October 2021 from Mr Kenneth Phillips to Ms Deborah Glass, 105.

32 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 7 October 2021 from Ms Peta McManus to Mr Kenneth Phillips, 107–8.

33 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 8 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 104.

42 SEA received no response to its 8 October 2021 letter. On 29 October 2021, SEA forwarded a letter to VWA entitled: 'Section 8 Administrative Law Act 1978 (Vic) OCCUPATIONAL HEALTH AND SAFETY ACT 2004 (Vic) - SECT 131 NOTICE TO FURNISH REASONS'. The notice requested VWA to provide reasons within 14 days pursuant to s 8 of the *Administrative Law Act 1978* addressing:

> (a) why charges have not been brought against each of the other 26 individuals and entities referred to in the 29 September 2020 request; and
>
> (b) why the matters pertaining to each of the other 26 individuals and entities referred to in the 29 September 2020 request have not been referred to the DPP.[34]

43 On 5 November 2021 VWA wrote to SEA advising that it did not consider it was required to provide reasons under the *Administrative Law Act 1978* in the manner and form outlined in SEA's letter of 29 October 2021.[35]

44 On 12 November 2021 SEA forwarded a further notice under s 8 of the *Administrative Law Act 1978*.[36] VWA responded to this notice on 17 November 2021, again refusing to furnish the reasons requested.[37] There was no further correspondence from SEA to VWA following the 12 November 2021 notice until 21 December 2021.

45 Mr Phillips wrote to Mr Rozkin on 21 December 2021 ('Second Request'):

> I refer to your letter dated 29 September 2021 in response (Response) to my letter dated 29 September 2020 (First Request) (copy attached for ease of reference) requesting WorkSafe to bring prosecutions against some 27 individuals and entities in relation to occurrences, acts and omissions constituting 172 offences against the *OHS Act*, as referred to on page 2 of the First Request.
>
> Your Response informed me that a prosecution has been brought against one of the entities mentioned in my First Request, namely the Department of Health, with 58 charges being filed.
>
> However, contrary to what you assert in the penultimate paragraph of your

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34 Exhibit KNP-2 to the Affidavit of Kenneth Norman Phillips dated 12 August 2022, Letter dated 29 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 15–20.

35 Exhibit KNP-2 to the Affidavit of Kenneth Norman Phillips dated 12 August 2022, Letter dated 5 November 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 22.

36 Exhibit KNP-2 to the Affidavit of Kenneth Norman Phillips dated 12 August 2022, Letter dated 12 November 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 23–25.

37 Exhibit KNP-2 to the Affidavit of Kenneth Norman Phillips dated 12 August 2022, Email dated 17 November 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 26.

> Response, WorkSafe did not thereby 'fulfil ... its obligations .. . under Section 131 of the Act.' It did not prosecute the remaining 26 individuals and entities referred to in my First Request in relation to the offences there referred to.
>
> I now request that, in accordance with s 131(3) of the *OHS Act*, WorkSafe advises me whether prosecutions will be brought against those remaining individuals and entities, and/or provides written reasons for any decision not to prosecute any particular individuals or entities in respect of any particular alleged offences as identified in my First Request.[38]

The reference to s 131(3) in the final paragraph was plainly a mistake, and should have been a reference to s 131(2A).

46 Mr Rozkin responded to Mr Phillips on 10 January 2022:

> The Victorian WorkCover Authority (trading as WorkSafe Victoria) has brought a prosecution in respect of the occurrence of the act, matter or thing outlined in your request dated 29 September 2020 and advised you of this outcome in a letter dated 29 September 2021.
>
> Accordingly, WorkSafe has fulfilled its obligations to you under section 131 of the *Occupational Health and Safety Act 2004* and will not be taking any further action in response to your request.[39]

47 Mr Phillips responded to Mr Rozkin on 24 January 2022:

> Your Response informed me that a prosecution has been brought 'in respect of the occurrence of the act, matter or thing outlined in' my First Request. However, that prosecution is against only one of the 27 individuals and entities mentioned in my First Request, namely the Department of Health, with 58 charges being filed. That prosecution is not in respect of the occurrences of the acts, matters or things outlined in my First Request relating to the other 26 individuals and entities there identified.
>
> Your response confirms that WorkSafe will not prosecute those other 26 individuals and entities.
>
> Thus, again, contrary to what you assert in the penultimate paragraph of your Response, WorkSafe has not 'fulfilled its obligations ... under Section 131 of the [Act].'
>
> I now request that, in accordance withs 131(3) of the *OHS Act*, WorkSafe refers the occurrences of the acts, matters or things detailed in my First Request, relating to the other 26 individuals and entities as identified in my First

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38 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 21 December 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 116.

39 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 10 January 2022 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 119.

Request, to the Director of Public Prosecutions.[40]

48 Mr Rozkin wrote back to Mr Phillips on 31 January 2022 and noted that VWA's position remained unchanged. Mr Phillips responded on 2 February 2022:

> I refer to my letters of 29 September 2020 (First Request) and 8 October 2021 (Investigation Query letter) and your letters of 29 September 2021 (Response to Request letter), 10 January 2022 (No prosecution confirmation letter) and 31 January 2022 (Non-referral confirmation letter).
>
> In the First Request, I identified 27 individuals and entities whom I considered may have engaged in conduct that constituted offences under the *OHS Act* in relation to the Hotel Quarantine Containment Program.
>
> Sub-section 131(2A) of the *OHS Act* requires WorkSafe Victoria to report on its investigation into any indictable offences where a person requested that it bring a prosecution in relation to the occurrence of acts, matters or things under section 131 of the *OHS Act*. Sub-section 131(2) states that WorkSafe must commence and complete investigations under this section in as timely a manner as is reasonably practicable.
>
> Therefore, WorkSafe is obligated under section 131 to investigate the occurrences of acts, matters or things that I considered constituted offences in relation to all 27 individuals and entities identified in the First Request, and to do so in as timely a manner as is reasonably practicable.
>
> In the Response to Request letter, WorkSafe advised me that it had completed its investigation into the matters identified in my First Request, and was bringing prosecution against the Victorian Department of Health. You have since indicated by the responses in the No prosecution confirmation letter and the Nonreferral confirmation letter that you are not proposing to bring prosecutions against any of the other 26 individuals or entities identified in the First Request, and that you are not referring the occurrences of the acts, matters or things I raised concerning those other 26 individuals or entities to the Director of Public Prosecutions (DPP). This suggests that you have not completed an investigation into each of these 26 other individuals or entities, as otherwise the *OHS Act* would require you to either bring a prosecution or refer these matters to the DPP.
>
> In the Investigation Query letter, I requested written confirmation from you that WorkSafe Victoria did in fact comply with its statutory obligation under s 131(2A) of the *OHS Act* by conducting a full, proper and comprehensive investigation into each and all of the 27 individuals and entities identified in the First Request. As noted in the Investigation Query Letter, WorkSafe accepted that the First Request met the requirements of section 131 of the *OHS Act*. It was therefore obligated under the *OHS Act* to investigate these matters. However, nearly four months have now passed and I have not received a response to that letter. Accordingly, I take it that WorkSafe has not in fact conducted investigations into the occurrences of the acts, matters or things I raised concerning the remaining 26 individuals and entities identified in the

[40] Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 24 January 2022 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 122.

First Request.[41]

When did the relief claimed in the originating motion first arise?

49 Mandamus may be granted to an applicant who proves that a respondent has actually or constructively failed to perform a duty of a public nature.[42] The relief claimed in paragraphs 1 to 3 of the originating motion filed 14 February 2022 seeks orders in the nature of mandamus to enforce statutory duties:

(i) under s 131(2A) and (2C) requiring VWA to investigate the alleged breaches of the Act by 26 individuals and entities;

(ii) under s 131(2A)(ii) requiring VWA to give reasons for not prosecuting the 26 individuals and entities; and

(iii) under s 131(3) requiring VWA to refer the alleged breaches of the Act by the 26 individuals and entities, including providing VWA's investigative materials, to the DPP.

50 Section 131 distinguishes between requests to prosecute summary and indictable offences. Section 131(2) relates to requests to prosecute summary offences and s 131(2A) relates to requests to prosecute indictable offences. Section 131(2)(a) imposes an express mandatory obligation upon VWA to investigate 'the matter' within three months of receiving a request to prosecute. Section 131(2A) does not impose an express mandatory obligation upon VWA to investigate a request made under s 131(1) to prosecute an indictable offence. Nevertheless, s 131(2A) is premised upon VWA having an obligation to investigate to prosecute an indictable offence. Section 131(2A)(a) provides that within three months after receiving a request to prosecute VWA must report in writing to the person who made the request advising that the Authority's investigation of the matter is complete and that a prosecution will be brought, or give reasons why a prosecution will not be brought. Section 131(2A)(b) provides that if VWA's investigation is ongoing VWA is required to provide a further

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41 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 2 February 2022 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 126–7.

42 *R v War Pensions Entitlement Appeals Tribunal; ex parte Bott* (1933) 50 CLR 228, 242 (Rich, Dixon and McTiernan JJ).

report within three months after the date of the response, and after every subsequent three month period, until the investigation is completed. It is implicit in the terms of s 131(2A) that upon receiving a request under s 131 to bring a prosecution of an indictable offence VWA is obliged to conduct an investigation.

51 Paragraph 1 of the originating motion seeks an order in the nature of mandamus requiring VWA to investigate 'in accordance with its statutory duty under ss 131(2A) and 131(2C).' SEA's First Request alleged that six entities had breached ss 22(1)(a), (b), (c) and 22(2)(a) and (b). These are summary offences. No relief is sought in the originating motion for an order to enforce the duty under s 131(2)(a) to investigate a summary offence.

52 Consideration of when the grounds for the relief in paragraph 1 of the originating motion first arose is premised upon SEA being able to establish that it does in fact have grounds for the relief claimed, namely, an order in the nature of mandamus requiring VWA to investigate the indictable offence allegations made against the 26 individuals and entities other than the Department of Health ('the remaining individuals and entities'). For reasons set out later in this judgment, SEA's contention that VWA failed to investigate the remaining individuals and entities is weak. Even if SEA's originating motion was clearly within the 60-day time limit under r 56.02, there is a significant question as to whether SEA is entitled to the relief claimed in paragraph 1 of the originating motion. Assuming in SEA's favour that there are grounds for an order in the nature of mandamus as set out in paragraph 1, the grounds for that relief first arose on 29 September 2021, or alternatively, 5 November 2021.

53 SEA's Second Request underpins its contention that the 60-day period did not commence running until 2 February 2022. The Second Request asked VWA the following question:

> I now request that, in accordance withs 131(3) of the *OHS Act*, WorkSafe advises me whether prosecutions will be brought against those remaining individuals and entities, and/or provides written reasons for any decision not to prosecute any particular individuals or entities in respect of any particular

alleged offences as identified in my First Request.[43]

This question had already been unequivocally answered by VWA's letter of 29 September 2021. Further, Mr Phillips understood VWA's press release of 29 September 2021 to be publishing a decision not to prosecute the 26 remaining individuals and entities. In a letter to VWA on 29 September 2021, Mr Phillips stated:

> I also note in the WorkSafe press release that WorkSafe has decided not to prosecute the 26 other individuals and entities detailed in my request to prosecute made on 29 September 2020 under s.131 of the *Occupational Health and Safety Act 2004* (Vic).
>
> I again formally request that WorkSafe's investigative material in relation to all matters be immediately provided to the DPP in compliance with WorkSafe's statutory obligation under s 131(3) of the *Occupational Health and Safety Act 2004* (Vic).[44]

54 Following publication of its media release, SEA was advised by the 29 September 2021 letter that the remaining 26 individuals and entities would not be prosecuted. This advice was acknowledged in Mr Phillips' letter to the Solicitor-General on 30 September 2021:

> WorkSafe has decided not to prosecute these people and agencies as I requested and therefore must immediately provide its investigative materials to the DPP in accordance with s.131(3) of the *Occupational Health and Safety Act 2004* (Vic).[45]

55 In a letter to the Victorian Ombudsman on 6 October 2021, Mr Phillips stated:

> WorkSafe has decided not to prosecute these people and agencies as I requested and therefore must now provide its investigative material to the DPP in accordance with s.131(3) of the *Occupational Health and Safety Act 2004* (Vic).[46]

56 On 8 October 2021, Mr Phillips wrote to VWA seeking 'written confirmation from you on behalf of WorkSafe Victoria, that WorkSafe Victoria did in fact comply with its statutory obligation under s.131(2A) of the *Occupational Health and Safety Act 2004* (Vic)

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43 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 21 December 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 116.

44 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 87.

45 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 30 September 2021 from Mr Kenneth Phillips to Ms Rowena Orr QC, 82.

46 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 6 October 2021 from Mr Kenneth Phillips to Ms Deborah Glass, 105.

and conduct full, proper and comprehensive investigations into each and all of the individuals and entities identified in my letter of 29 September 2020 containing my detailed request for WorkSafe Victoria to prosecute those individuals and entities'.[47]

57 SEA received no response to its letter of 8 October 2021 prior to the Second Request. The Second Request did not refer to the letter of 8 October 2021. Nor did it allege a failure to investigate the allegations in the First Request. Rather, it repeated the request for advice as to whether prosecutions would be brought against the 26 remaining individuals and entities and/or whether VWA would provide written reasons for any decision not to prosecute any particular individual or entity.

58 In VWA's 10 January 2022 response to the Second Request it repeated the advice set out in its letter of 29 September 2021 and stated it 'will not taking any further action in response to your request. You may wish to seek independent legal advice to address any further queries you may have in relation to your correspondence'.[48] This was a clear statement that VWA did not wish to engage in further correspondence with SEA. Nevertheless, SEA again wrote to VWA on 24 January 2022. Once again it did not contend that there had been a failure to investigate. Rather, it requested VWA to refer 'the occurrences of the acts, matters or things detailed in my First Request, relating to the other 26 individuals and entities as identified in my First Request, to the Director of Public Prosecutions'.[49] VWA's response of 31 January 2022 reiterated that SEA may wish to seek independent legal advice.

59 SEA contends that 'the matter' which VWA was required to investigate was the occurrence of acts, matters or things that constitute an offence specified in respect of each individual or entity identified in the First Request.[50] VWA contends that the 'matter' which was the subject of SEA's request was the conduct of the Victorian

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47 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 6 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 104.

48 Exhibit KNP-2 to the Affidavit of Kenneth Norman Phillips dated 12 August 2022, Letter dated 29 October 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 119.

49 Exhibit KNP-2 to the Affidavit of Kenneth Norman Phillips dated 12 August 2022, Letter dated 24 January 2022 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 122.

50 Plaintiff's Further Submissions in Reply dated 15 July 2022, 3 [9].

Government Hotel Quarantine Containment Program.[51] It is not necessary to express a concluded view as to the meaning of 'matter' in s 131(2A). Assuming in SEA's favour that its construction of 'matter' is correct, the grounds for the relief claimed in paragraph 1 of the originating motion first arose on 29 September 2021, or alternatively, on 5 November 2021.

60 SEA submits that the grounds for the relief claimed in paragraph 1 did not arise until 2 February 2022. It submits that prior to this date a reasonable person in the position of SEA would not have concluded that there had been no investigation of the 26 individuals and entities referred to in SEA's First Request of 29 September 2020. SEA submits that neither VWA's 29 September 2021 letter nor the accompanying media release gave it any information as to whether VWA had investigated the remaining 26 individuals and entities.[52] Mr Rinaldi submitted that the grounds for the relief claimed in paragraph 1 first arose on 2 February 2022. He submitted that as at that date SEA was entitled to infer that VWA had not investigated the alleged breaches of the Act by the 26 remaining individuals and entities. He submitted that the basis for such an inference was twofold. First, VWA's failure to bring a prosecution of any of the remaining 26 individuals and entities. Second, VWA's failure to respond to SEA's letter of 8 October 2021 in which it sought an assurance that VWA had conducted a full and proper investigation of the alleged breaches of the Act by each of the remaining 26 individuals and entities.

61 SEA bears the onus of establishing that VWA failed to conduct an investigation of the alleged breaches of the Act committed by the 26 remaining individuals and entities.[53] Insofar as SEA submits it should be inferred that VWA did not comply with its duty to investigate the alleged breaches of the Act as set out in the First Request, SEA bears the onus of establishing the basis for the inference.[54] Where a plaintiff bears the onus of proving a negative proposition, once the plaintiff establishes sufficient evidence

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51 Defendant's Further Written Submissions dated 8 July 2022, 1–2 [3].

52 Plaintiff's Written Submissions in Reply on Time Limit for Proceeding dated 25 August 2022, 3 [10].

53 *Ellis v Central Land Council* (2019) 267 FCR 339 ('*Ellis*'), 381 [121] (Barker, Griffiths and White JJ).

54 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 616 [67] (Gummow J, Heydon and Crennan JJ agreeing at 623 [91]–[92]); see also *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 45–6 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

from which, if that evidence is accepted, the negative proposition may be inferred, an onus shifts to the defendant to adduce evidence that tends to show that the negative proposition is incorrect.[55] VWA is not subject to an evidentiary onus to prove that it conducted an investigation of the remaining individuals and entities until SEA establishes the basis for an inference that VWA did not conduct an investigation. It is therefore necessary to address the two matters upon which SEA relies in aid of its contention that it was only as of 2 February 2022 that a reasonable person in its position would have inferred that VWA had not investigated the allegations against the 26 remaining individuals and entities.

62 VWA advised SEA in unequivocal terms on 29 September 2021 that it had completed its investigation and would only be prosecuting the Department of Health. It is clear from Mr Phillips' correspondence with VWA on 29 September 2021, the Solicitor-General on 30 September 2021 and the Ombudsman on 6 October 2021 that he understood from VWA's media release and letter of 29 September 2021 that none of the remaining 26 individuals and entities would be prosecuted.

63 When giving evidence on 4 October 2022 Mr Phillips agreed that he knew on 29 September 2021 that the 26 remaining individuals and entities would not be prosecuted.[56] However, he denied that he understood that VWA had investigated any individual or entity other than the Department of Health:

> Ms Costello: So, you understood, when you read the media release on 29 September, that WorkSafe had investigated more than just the Department of Health, didn't you?
>
> Mr Phillips: No.
>
> Ms Costello: I suggest to you that you read this sentence, 'Enquiries into other entities associated with this investigation including hotels, security firms, and other government departments and agencies have concluded.' Meant that you understood that WorkSafe had investigated more than just the Department of Health, and I suggest that's what you understood, Mr Phillips?
>
> Mr Phillips: No.[57]

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55 *Ellis* 385 [126(f)].
56 Transcript of Proceedings, T 9 L 12–14 (4 October 2022).
57 Ibid T 7 L 25 – T 8 L 3.

I reject this evidence. It is inconsistent with the statement in his letter to the Solicitor-General on 30 September 2021 that on 29 September 2021 VWA 'also announced that its investigation into other individuals and entities had concluded'.

64 Insofar as SEA relies upon VWA's failure to prosecute as the basis for an inference that VWA had not investigated the offences alleged to have been committed by the 26 remaining individuals and entities, SEA knew on 29 September 2021 that the remaining individuals and entities would not be prosecuted. If SEA has grounds for the relief in paragraph 1 based on VWA's failure to prosecute the remaining individuals and entities, the grounds for that relief first arose on 29 September 2021.

65 VWA's failure to respond to SEA's letter of 8 October 2021 does not support a finding that it was reasonable for SEA to have inferred for the first time, as of 2 February 2022, that VWA had failed to investigate the remaining 26 individuals and entities. SEA made no reference to VWA's failure to respond to the 8 October 2021 letter prior to its letter to VWA of 2 February 2022. On 29 October 2021 and 12 November 2021 SEA forwarded two requests to VWA under s 8 of the *Administrative Law Act 1978* seeking the provision of reasons:

(i) why charges had not been brought against the remaining 26 individuals and entities; and

(ii) why the matters pertaining to the remaining 26 individuals and entities had not been referred to the Director of Public Prosecutions.

VWA refused to furnish the reasons requested. There was no further correspondence between SEA and VWA until the Second Request of 21 December 2021, which made no complaint about VWA's failure to investigate. Rather, the Second Request focused on VWA's failure to prosecute the remaining 26 individuals and entities. VWA's response to the Second Request on 10 January 2022 reiterated its previous advice that it considered it had fulfilled its obligations under s 131 of the Act by bringing a prosecution against the Department of Health. SEA replied to this letter on 24 January 2022 again making no complaint about any failure to investigate the alleged offences.

Rather, SEA complained about VWA's failure to prosecute the remaining 26 individuals and entities and to refer the matters relating to them to the Director of Public Prosecutions in accordance with s 131(3) of the Act.

66 SEA's letter of 2 February 2022 points to the absence of any response to the letter of 8 October 2021 as the basis for the statement:

> Accordingly, I take it that WorkSafe has not in fact conducted investigations into the occurrences of the acts, matters or things I raised concerning the remaining 26 individuals and entities identified in the First Request.[58]

The passage of four months without a reply to the letter of 8 October 2021 did not provide any legitimate basis for SEA to infer for the first time on 2 February 2022 that VWA had not conducted an investigation into the allegations relating to the 26 remaining individuals and entities.

67 SEA made requests on 29 October 2021 and 12 November 2021 under s 8 of the *Administrative Law Act 1978* for VWA to furnish reasons for its failure to prosecute the 26 remaining individuals and entities. Mr Rinaldi acknowledged that these requests were misconceived because the obligation to provide reasons under s 8 only arises in respect of a request furnished on a tribunal, and VWA is not a tribunal as defined by the *Administrative Law Act 1978*.[59] As VWA is not a tribunal it was under no obligation to comply with the requests. There was no further correspondence between SEA and VWA between 12 November 2021 and 21 December 2021 when SEA made its Second Request. That request made no mention of VWA's failure to respond to the query contained in the letter of 8 October 2021 as to whether VWA had conducted a full and proper investigation of the alleged offences committed by the 26 remaining individuals and entities. By 21 December 2021 more than 80 days had elapsed since VWA's letter of 29 September 2021 which advised SEA that VWA's investigation was complete and that no individual and entity would be prosecuted other than the Department of Health.

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58 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 2 February 2022 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 127.

59 Transcript of Proceedings, T 22 L 10 – 23 L 20 (4 October 2022).

68 I do not accept that VWA's failure to respond to the letter of 8 October 2021 provides any foundation for an inference that VWA did not investigate the alleged breaches of the act by the remaining 26 individuals and entities. Mr Phillips was a very enthusiastic correspondent. The extent of his correspondence with VWA demonstrates that he would not hesitate to be critical of VWA for what he perceived to be the deficiencies in its response to his requests. In circumstances where Mr Phillips did not follow up with a complaint about its failure to respond to his letter of 8 October 2021, I infer that VWA was content to refrain from engaging with Mr Phillips. Mr Phillips made no reference to VWA's failure to respond to the 8 October 2021 letter until his letter of 2 February 2022. By this time more than four months had lapsed since VWA's letter of 29 September 2021. During that period SEA embarked upon a misconceived attempt based on s 8 of the *Administrative Law Act 1978* to obtain reasons for VWA's decision not to prosecute. Further, it is common ground that during late November and December 2021 SEA was seeking to raise funds to fund legal proceedings against VWA. Evidence in respect of SEA's fundraising campaign is set out later in this judgment.

69 If I am wrong and VWA's failure to respond to the letter of 8 October 2021 did provide the basis for an inference that VWA had failed to investigate, that inference was capable of being drawn well before 2 February 2022. As the letter of 8 October 2021 pointed out, the question of whether VWA had conducted an investigation was 'not a difficult question and should be able to be answered without delay'.[60] An inference based on a failure to respond to the letter of 8 October 2021 could have been drawn after four weeks had lapsed without any response.[61] On this basis the 60-day period would have commenced on 5 November 2021 and expired on 4 January 2022.

70 SEA submits, correctly, that the grounds for relief in the present proceeding relate to a failure to perform statutory duties. SEA submits that it was only when it received

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60 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 8 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 104.

61 Cf *Royal Insurance Australia Ltd v Comptroller of Stamps (Vic)* (1992) 23 ATR 528, 549 (Hedigan J, Brooking J agreeing at 30) (this judgment was affirmed on appeal: *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1993) 182 CLR 51); *Wurth Australia Pty Ltd v Gallichio* [2010] VSC 630, [40] (Macaulay J).

VWA's letter of 10 January 2022 that VWA made clear that its position was 'final', by suggesting Mr Phillips obtain legal advice. In effect, SEA submits that the 60-day period did not commence until it was clear that its requests for information had been exhausted.[62] A decision, including a decision to refuse to perform a statutory duty, must be final in order to enliven grounds for relief under Order 56. VWA made a final decision in respect of SEA's s 131 request on 29 September 2021. The finality of that decision was not altered by the fact that VWA subsequently reiterated that decision on 10 January 2022 in response to the Second Request.

71 VWA's position did not alter in any way between its response to the First Request on 29 September 2021 and its response to the Second Request on 10 January 2022. Its consistent position throughout the period 29 September 2021 to 10 January 2022 was that its investigation was complete and it would not be prosecuting any of the 27 individuals and entities referred to in the First Request other than the Department of Health. The Second Request did no more than repeat the First Request. It elicited the same response from VWA as that provided to the First Request.

72 If there had been an ongoing dialogue between SEA and VWA which held out some prospect of VWA changing its position, the time period prescribed by Order 56 would not have commenced until VWA conveyed its final position to SEA. However, VWA's position was unambiguous from 29 September 2021. At no stage did it hold out to SEA the prospect of any change in its position. Further, Mr Phillips' letters to the Solicitor-General on 30 September 2021 and the Ombudsman on 6 October 2021 demonstrate that he understood clearly that VWA's investigation was complete and there would be no prosecution of any individual or entity referred to in the First Request other than the Department of Health.

73 The grounds for the relief claimed in paragraph 1 of the originating motion filed 14 February 2022 first arose on 29 September 2021. The 60-day period prescribed by Order 56 expired on 28 November 2021. Alternatively, the 60-day period commenced

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62 Plaintiff's Written Submissions in Reply on Time Limit for Proceeding dated 25 August 2022, 5–6 [21]–[22].

5 November 2021, four weeks after there had been no response by VWA to the letter of 8 October 2021.

Ground 2

74 Ground 2 claims:

> An order in the nature of mandamus requiring the Defendant to give reasons why it is not prosecuting the remaining 26 individuals and entities identified in the Second Request (by reference to the First Request) by the Plaintiff, but which are not currently being prosecuted in relation to offences under the OHS Act in respect to the Hotel Quarantine Program (Remaining Individuals and Entities), in accordance with its statutory duty under subsection 131(2A)(a)(ii).

75 The statutory duty under s 131(2A)(ii) to give reasons is enlivened by VWA's written advice to a person who has made a request under s 131:

(a) that its investigation is complete; and

(b) that it will not be bringing a prosecution.

In the present proceeding, VWA's duty to provide reasons was enlivened by VWA's written advice of 29 September 2021 that its investigation was complete and that the 26 remaining individuals and entities would not be prosecuted. Assuming in SEA's favour that 'the matter' which VWA was required to investigate was the allegation that 27 individuals and entities had breach the Act, the statutory duty to provide reasons was enlivened as soon as SEA was advised that no prosecutions would be brought other than in respect of the Department of Health.

76 Mr Rinaldi submitted that the statutory duty under s 131(2A)(ii) was only enlivened upon VWA completing an investigation into the alleged breaches of the Act by the remaining 26 individuals and entities. He submitted that it could be inferred that no such investigation had been conducted. As such, the grounds for the relief in paragraph 2 of the originating motion had not arisen. I reject this submission. The written advice that VWA's investigation was complete and that no prosecution would be brought against the remaining 26 individuals and entities enlivened the obligation to give reasons.

77 VWA's letter informed SEA that its investigation of the Hotel Quarantine Program

was complete and that a prosecution would be brought against the Department of Health. Mr Phillips understood the letter as also advising SEA that none of the remaining 26 individuals and entities would be prosecuted. If VWA's letter of 29 September 2021 did not comply with the duty under s 131(2A) to give reasons, the grounds for the relief claimed in paragraph 2 of the originating motion first arose on 29 September 2021.

Ground 3

78 Ground 3 claims:

> An order in the nature of mandamus requiring the Defendant to refer the remaining matters (involving occurrences of acts, matters or things which the Plaintiff considers constitute offences) identified in the Second Request (by reference to the First Request), which are not yet the subject of prosecution, to the Director of Public Prosecutions in accordance with its statutory duty under subsection 131(3) of the OHS Act and the Plaintiff's request that it do so, including providing its investigative materials.

79 The statutory duty under s 131(3) is enlivened upon:

(a) VWA advising a person who has made a request under s 131 that a prosecution will not be brought; and,

(b) the person who made the request under s 131 making a further written request for the matter to be referred to the DPP.

On 29 September 2021 Mr Phillips wrote to VWA noting that the VWA media release disclosed that VWA had decided not to prosecute the remaining 26 individuals and entities. Mr Phillips 'formally requested that Worksafe's investigative materials in relation to all matters be immediately provided to the DPP in compliance with Worksafe's statutory obligations under s 131(3) of the OH&S Act 2004 (Vic)'.[63]

80 On 6 October 2021 VWA provided Mr Phillips with a copy of a letter from the DPP to VWA dated 4 October 2021. The text of that letter is set out earlier in this judgment. The letter from VWA to the DPP dated 29 September 2021 is not in evidence.

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63 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 87.

However, it is clear that VWA acted on Mr Phillips' request and offered to provide the DPP with a full Worksafe investigation brief.

81 On 6 October 2021 Mr Phillips wrote to VWA responding to the DPP's letter. The text of that letter is set out earlier in this judgment. It is plain from the text of the letter that Mr Phillips considered that VWA had not complied with its obligation under s 131(3):

> Bringing a prosecution against one of the 27 individuals and entities identified in my letter does not absolve WorkSafe from its statutory obligation under s.131(3) of the Occupational Health and Safety Act 2004 (Vic) or for that matter, the DPP under s.131(4).
>
> WorkSafe has a statutory obligation to refer the matters that it has decided not to prosecute to the DPP and, pursuant to s.131(4) of the Occupational Health and Safety Act 2004 (Vic), the DPP has a statutory obligation to advise WorkSafe as to whether she believes that prosecutions should be brought in relation to all matters listed in my letter of 29 September 2020.[64]

82 On 29 September 2021 VWA advised Mr Phillips that a prosecution would not be brought against the remaining 26 individuals and entities. This advice triggered the obligation for VWA to refer the matter to the DPP. If VWA did fail to comply with its statutory duty under s 131(3) the grounds for the relief claimed in paragraph 3 first arose on 6 October 2021. On that date Mr Phillips knew that VWA had not referred to the DPP the question of whether the remaining 26 individuals and entities should be prosecuted. He was also aware that VWA's investigative brief had not been provided to the DPP.

Conclusion on when grounds for relief first arose

83 There is a well-recognised distinction between a proceeding and the relief claimed in the proceeding.[65] The present proceeding was commenced by originating motion filed 14 February 2022. There are three claims for relief in the nature of mandamus within that proceeding. Rule 56.02 provides that a proceeding shall be commenced within 60 days after the date when the grounds for the grant of relief or remedy first arose. Consequently, the 60-day period starts from the date that any of the relief in

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64 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 6 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 100–1.

65 *JCB v Bishop Paul Bird* (2019) 58 VR 426, 429 [8] (McDonald J).

paragraphs 1 to 3 of the originating motion first arose.[66] The grounds for the relief in paragraph 1 arose on 29 September 2021, or alternatively, 5 November 2021. The grounds for the relief in paragraph 2 first arose on 29 September 2021. The grounds for the relief in paragraph 3 first arose on 6 October 2021. Consequently, the 60-day period commenced on 29 September 2021 and expired on 28 November 2021. The proceeding was commenced out of time. It is necessary to consider whether SEA has established special circumstances which justify the grant of an extension of time.

Special Circumstances

84 An application for an extension of time is not to be granted except in special circumstances. In determining whether or not special circumstances exist, the Court can consider all of the circumstances of the case. Matters to be taken into account include the length of the delay, the reason for the delay, any prejudice to VWA and third parties, the merits of the case and the public interest in the finality of litigation.[67]

85 In *Mann v Medical Practitioners' Board of Victoria*,[68] Osborn J (as his Honour then was) stated:

> Whether special circumstances exist is a question to be determined by reference to the whole of the circumstances of a particular case. It is essentially a question of characterisation of the particular case.[69]

This statement of principle was expressly endorsed by the Court of Appeal in *Mann v Medical Practitioners' Board of Victoria*.[70]

Delay

86 The originating motion was filed on 14 February 2022, 75 days after the 28 November 2021 expiration of the 60-day prescribed by r 56.02(1). SEA submits that the reason for the delay was that SEA was seeking to confirm whether VWA had conducted any investigation of the alleged contraventions of the Act in respect of the remaining 26

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66 *Nida v BKA Practice Co Pty Ltd* [2020] VSC 158, [3]–[4] (Mukhtar AsJ) (upheld on appeal in *Nida v BKA Practice Co Pty Ltd (No 2)* [2020] VSC 770, [17], [26] (Ginnane J)).

67 *Madafferi v Chief Commissioner of Police* [2017] VSC 652, [40] (McDonald J); *Somerville Retail Services Pty Ltd v Petisi Vi* [2008] VSC 196, [65] (Kyrou J); *David Glass (a pseudonym) v Chief Examiner* (2015) 50 VR 577, 595–6 [71]–[72] (Santamaria, Ferguson and McLeish JJA).

68 [2002] VSC 256.

69 Ibid [19].

70 [2004] VSCA 148, [57], [72] (Hansen AJA, Chernov JA agreeing at [1], Nettle JA agreeing at [8]).

individuals and entities referred to in the First Request. VWA submits that the real reason for the delay was that SEA was attempting to raise funds for the proceeding commenced on 14 February 2022. In support of this submission, VWA filed an affidavit sworn by Mr Richard Leder on 19 August 2022. Mr Leder exhibited to his affidavit a number of blog posts from a web page operated by SEA. It is common ground that Mr Phillips is the author of each of the posts.[71]

87 On 30 September 2021, SEA posted a blog following the announcement by VWA the previous day that it would be prosecuting the Department of Health. The post included the following:

> Here's a key issue:
>
> Criminal law: Work safety breaches are indictable criminal offences. An 'organisation' cannot commit a criminal act. Only people do. A gun does not commit murder. The person who pulled the trigger commits murder. Common sense would suggest that the Department of Health cannot not [sic] commit criminal OHS breaches. The people who control, direct and run the Department commit the offences.
>
> Therefore this issue is not closed by WorkSafe's prosecuting the Health Department. We are continuing with our campaign. We are not stopping. We are just warming up.
>
> How will we succeed? I keep being asked, 'how will we get WorkSafe to undertake prosecution of individuals'? My reply is 'by doing what we have been doing'. This is a people movement. We must, and will keep delivering analysis and messaging about the need for the prosecution of Departments and individuals. We have confidence in the voice of the people![72]

88 On 7 October 2021, Mr Phillips posted a blog which included the following:

> You'll likely be aware that last Wednesday (29 September) WorkSafe Victoria announced that it is prosecuting the Victorian Health Department for work safety breaches over the hotel quarantine disaster of 2020. The only problem is it is not going to prosecute any individuals.
>
> It's like prosecuting a gun for murder but not prosecuting the person who pulled the trigger. It's plain dumb. But it's also an affront to the rule of law in a supposedly civilised society. It also exposes WorkSafe as being two-faced.
>
> On Monday, for example, after a WorkSafe prosecution, the operator of a skating rink was **personally** convicted and fined over unsafe levels of carbon

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71 Transcript of Proceedings, T 12 L 19 (4 October 2022).

72 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Blog post dated 30 September 2021, 2.

> monoxide. So where are the individuals responsible for the hotel quarantine disaster? Why isn't the same standard applied? No-one should be above the law.
>
> We think that the Health Department will likely plead guilty, pay a fine and there will be no trial. Individuals would walk away! This scenario could look like a legal 'checkmate' by WorkSafe. In other words, WorkSafe is looking to close down our campaign to prosecute 26 other government entities and individuals for the hotel quarantine mess that led to 801 deaths.[73]
>
> …
>
> WorkSafe is prosecuting small businesses for not having Covid plans. But when it comes to the Victorian government, WorkSafe's approach looks highly suspect. Why is it ignoring the plain, published evidence supporting the case for the prosecution? Remember the Coate Inquiry provided the evidence. We have analysed the evidence. The case to prosecute is starkly clear.

89 The statement 'we have analysed the evidence' in the 7 October 2021 blog hyperlinked to a 49 page document: 'THE CASE FOR THE PROSECUTION: Victorian Quarantine Hotel Work Safety Breaches. The evidence requiring prosecution of the Victorian Government' ('Case for the Prosecution').[74]

90 The introduction to Case for the Prosecution included the following:

> On 29 September 2020, Self Employed Australia wrote to WorkSafe triggering provisions under the laws that require WorkSafe to investigate with a view to prosecution. We allege breaches of the laws were made by the Victorian premier [sic], senior ministers, department heads and departments, amongst others. This paper put evidentiary 'meat on the bones' of our allegations.[75]

91 Under the heading 'Who was/is responsible?' the following appears:

> Under the Victorian work safety laws, employers and those who 'control' worksites are held liable and responsible both for what they do and fail to do.
>
> Coate blames "lack of proper leadership and oversight" for the infection outbreaks. That leadership must start with the Victorian Premier and work its way through Ministers, top bureaucrats and government departments. The evidence in the Coate Report of the lack of appropriate leadership when measured against Victoria's work safety laws requires prosecution.
>
> To start with the Premier, for example:

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73 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Blog post dated 7 October 2021, 8 (emphasis in original).

74 Undated document titled 'THE CASE FOR THE PROSECUTION', attached to the email of SEA's solicitor Ms Alexandria Anthony dated 30 September 2022. By an email of the Court dated 31 August 2022, the Court requested that SEA provide to the Court all of the additional materials which were forwarded to the defendant in support of SEA's First Request.

75 Ibid 2.

- On his own evidence he accepts that he was responsible for the Program.
- But he then seeks to walk away from responsibility for the Program's dysfunctionality, saying that 'operational' matters were not his concern.
- However the Premier was clearly in control of the Program.
- During the Program he had Health report directly to him.
- Health says it provided the Premier with regular reports.
- But the Premier remains silent as to whether he knew about the dysfunctionality or not.

We allege that, under work safety laws, any suggestion that the Premier did not know and didn't have control is not a defence. A failure to recognise the risk to safety of a dysfunctional Program and to fail to do something about it constitute a breach of the work safety laws.[76]

92 Under the heading 'The specific offences' the following appears:

> The duties under the OHS Act are enforceable by WorkSafe and WorkSafe Inspectors. Contraventions of the principal duties in the OHS Act are indictable criminal offences and carry serious penalties some including lengthy terms of imprisonment. The Victorian government, and Victorian government departments and senior bureaucrats involved in the Hotel Quarantine Program failed to provide systems of work that were safe and without risks to the health of their employees and to the health of the Victorian public.
>
> The Coate Inquiry into the 2020 Hotel Quarantine Program uncovered clear evidence that the people of Victoria and large numbers of employees involved in the Program were exposed to serious risks to their health and safety as a result of the failure of the Victorian government, several Victorian government departments and senior bureaucrats to plan, devise, organize, operate, manage and control safe hotel quarantine facilities.
>
> The Victorian government, and Victorian government departments and senior bureaucrats involved in the Hotel Quarantine Program failed to provide systems of work that were safe and without risks to the health of their employees and to the health and safety of the Victorian public.
>
> Private security guards, cleaners, health workers, police and hotel staff who worked in the Hotel Quarantine Program hotels were fundamentally ill-equipped, trained and instructed to undertake the tasks involved in detaining and generally caring for the people detained in the hotel quarantine facilities for entering Victoria from overseas potentially infected with COVID-19.
>
> As a direct result of the gross mismanagement by the Victorian government, Victorian government departments and senior bureaucrats, employees and the people of Victoria were all exposed to risks to their health and safety.
>
> Therefore, WorkSafe Victoria must prosecute the Victorian government, the Premier, Ministers, the responsible government departments and the senior

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76 Ibid 4.

bureaucrats.[77]

93 Under the heading 'The Coate Inquiry overview' the following appears:

> This paper draws from the Coate findings of fact and assesses those against the Victorian government's obligations under the OHS Act. This paper identifies the specific alleged breaches of the OHS Act by the government, government departments and individuals responsible for the quarantine program.
>
> Included in this paper is a close focus on Chapters 3 to 8 of the Coate Report as these are the chapters that are most precise in detailing the behaviours of the government. Attached to this paper (in the Addendum) is a 'grid' for each chapter that presents relevant quotations from the Coate Report which identify the relevant management issues, the government parties responsible and the provision under the OHS Act that can be said to have been breached.[78]

94 The 'Addendum' refers to 10 of the 20 individuals named in SEA's First Request as 'the government parties responsible': Brett Sutton, Chief Health Officer; Kym Peake, Secretary for Health and Human Services; Daniel Andrews, Premier of the State of Victoria; Andrew Crisp, Emergency Management Commissioner; Simon Phemister, Secretary for Jobs, Precincts and Regions; Chris Eccles, Secretary of the Department of Premier and Cabinet; Jason Helps, DHHS, Deputy Director, Emergency Management; Graham Ashton, former Chief Commissioner of Victoria Police; Jenny Mikakos, former Minister for Health; and Martin Pakula, Minister for Jobs, Precincts and Regions.[79] The remaining 10 individuals who were alleged in the First Request to have breached the Act are not referred to at all.

95 On 21 November 2021, SEA posted a blog under the heading:

> We are ready to go to Court. Now we need the money! 801 Deaths should not be ignored or forgotten![80]

The post included the following:

> We now have no option but to take WorkSafe to Court. We have organised a top legal team. The legal strategy is set but let's be clear. This will be a hard and expensive legal battle. The cost will be huge in legal fees. **Now we must**

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77 Ibid 5–6.
78 Ibid 8.
79 Ibid 21–44.
80 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Blog post dated 21 November 2021, 12.

raise the money.[81]

And:

> Our legal strategy and course of action has been carefully thought through. Here's a briefing on the legal strategy. It explains our specific legal options before the courts.[82]

96 During the hearing on 4 October 2022, Mr Phillips gave the following evidence when cross-examined regarding the 21 November post:

> Ms Costello: So on 21 November, when you wrote this blog, the thing that meant you couldn't go to court yet was that you didn't have the money yet. That's right, isn't it, Mr Phillips?
>
> Mr Phillips: Not necessarily.
>
> Ms Costello: I'll ask the question again. On 21 November 21, you had your legal strategy, but you couldn't go to court yet because you needed to raise the money. That's right, isn't it, Mr Phillips?
>
> Mr Phillips: Yes.
>
> Ms Costello: And so the next thing you did was to fundraise, through membership fees, for legal fees. That's right, isn't it, Mr Phillips?
>
> Mr Phillips: Yes.
>
> Mr Phillips: So the reason that you didn't take action on 21 November or before that time is because you needed to raise money for legal fees to do so. That's the reason, isn't it, Mr Phillips?
>
> Mr Phillips: Yes.
>
> Ms Costello: You could have taken the action within time, but you didn't have the money for the legal fees. That's right, isn't it?
>
> Mr Phillips: That was part of the reason.[83]

97 The 21 November 2021 post contained a link to a document headed 'Legal Strategy – funder/members requiring WorkSafe to prosecute over the hotel quarantine disaster briefing'.[84] Under the heading 'The Specific Legal Options', the following appears:

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81 Ibid 13 (emphasis in original).

82 Ibid.

83 Transcript of Proceedings, T 16 L 4–16 (4 October 2022).

84 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Document titled 'Legal Strategy – funder/members requiring WorkSafe to prosecute over the hotel quarantine disaster briefing' dated November 2021, 16.

SEA has engaged a legal team that has studied the legal options and recommends moving forward as follows.

1 Application to the Victorian Supreme Court under s 8 of the *Administrative Law Act 1978* (Vic) to require WorkSafe to provide the reasons for their decision.

Focus would be on the reasons why

(a) charges have not been brought against each of the other 26 individuals and entities referred to in the 29 September 2020 request.

(b) As to why the matters pertaining to each of the other 26 individuals and entities referred to in the 29 September 2020 request have not been referred to the DPP.

A letter of demand was sent to WorkSafe on 29 October 2021 on this.

2 Further, application can be made to the Victorian Supreme Court for a writ of mandamus (court order) requiring WorkSafe to comply with its statutory obligations.[85]

98 Under the heading 'Ultimate Outcomes Sought', the following appears:

First SEA is seeking to require WorkSafe to do its job as required by law, that is to:

- undertake the required investigations into each of the 26 entities so far not being prosecuted;
- supply to the DPP its investigations of those not being prosecuted so that the DPP can review and make recommendations back to WorkSafe and WorkSafe then supply those recommendations to SEA.

Ultimately SEA is seeking to see proper prosecutions of the 26 remaining entities we say should be prosecuted based on the evidence from the Coate Inquiry. For example, given that Health is now being prosecuted we say that the following individuals should also be prosecuted:

- *Daniel Andrews*, the Premier of Victoria;
- *Jenny Mikakos*, the former Health Minister;
- *Kym Peake*, Secretary for Health and Human Services;
- *Melissa Skilbeck*, DHHS, Deputy Secretary, Regulation, Health Protection and Emergency Management;
- *Andrea Spiteri*, DHHS, Executive Director, Emergency Management;
- *Jason Helps*, DHHS, Deputy Director, Emergency Management;

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85 Ibid 17.

- *Brett Sutton*, Chief Health Officer;
- *Annaliese van Dieman*, Deputy Chief Health Officer;
- *Michelle Giles*, Deputy Public Health Commander;
- *Simon Crouch*, DHHS, Senior Medical Advisor, Acting Deputy Chief Health Officer;
- *Noel Cleaves*, DHHS, Manager Environmental Health, Regulation and Compliance.[86]

99 On 7 December 2021, SEA posted a blog under the heading 'Should the Victorian Premier face prosecution? A key question'. Under this heading, the following appears:

> We're pleased to report that our fund-raising efforts to enable us to take WorkSafe Victoria to court is going really well. Again, our huge thanks to everyone who's put in. Last week, new contributions kept coming in, everything from $5 and up. We're well on track to raise the needed money. If you haven't read our legal strategy, here's the link to the summary …
>
> We can tell you that our legal team has now started working on the specifics of the required court papers. It's a big job so it will take some time. But we'll keep you up to date.[87]

100 SEA's legal strategy document linked to the 21 November 2021 post referred to an application being made under s 8 of the *Administrative Law Act 1978* to require VWA to provide the reasons for their decision not to prosecute the remaining 26 individuals and entities referred to in the First Request. The correspondence between the parties relating to this application is set out earlier in this judgment. The foreshadowed application was misconceived. VWA is not a Tribunal for the purposes of the *Administrative Law Act* and was under no obligation to furnish any reasons in response to the requests made by SEA on 29 October 2021 and 12 November 2021.

101 SEA submits that the reason for the delay in filing the originating motion was due to it taking steps to ascertain whether VWA had investigated the matters raised in the First Request. When cross-examined, Mr Phillips denied that he understood the 29 September 2021 letter to be advising SEA that VWA had completed its investigation

86 Ibid 18.
87 Ibid 25–26.

of entities and individuals other than the Department of Health.[88] He stated that he understood the 29 September 2021 letter to be advising SEA that only the investigation into the Department of Health had been completed.[89] I do not accept this evidence. It is inconsistent with Mr Phillips' letter to the Solicitor-General on 30 September 2021 which stated, in reference to VWA's media release of 29 September 2021: 'it also announced that its investigation into other entities and individuals had concluded'. Mr Phillips' evidence is also inconsistent with the statement in the blog posted 21 November 2021: 'We are ready to go to Court. Now we need the money!'[90]

102 On 8 October 2021, SEA wrote to VWA and asked whether it had conducted 'full, proper and comprehensive investigations'.[91] In that letter it observed that the request 'should be able to be answered without delay'.[92] VWA's failure to respond to this request was not referred to in SEA's subsequent letters to VWA on 21 December 2021 and 24 January 2022. It was not referred to until the letter of 2 February 2022 which SEA relies upon as providing the grounds for the relief in paragraph 1 of the originating motion. I reject the contention that the reason why the originating motion was not filed until 14 February 2022 was that SEA was taking further steps throughout late 2021 and early 2022 to establish whether VWA had concluded an investigation into the alleged offences by the remaining 26 individuals and entities. The reason for the delay in the filing of the originating motion was twofold. First, the passage of time associated with SEA's misconceived request for reasons under s 8 of the *Administrative Law Act 1978*. Second, the passage of time associated with its fundraising campaign.

103 SEA bears the onus of establishing special circumstances justifying the grant of an extension. SEA has not established that the reason for the delay in filing its originating motion was that it was seeking to establish whether there had been an investigation of the matters raised in the First Request relating to the remaining 26 individuals and

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88 Transcript of Proceedings, T 6 L 29–30 (4 October 2021).
89 Ibid T 7 L 4-5.
90 Exhibit RAL-2 to the Affidavit of Richard Leder dated 19 August 2022, Blog post dated 21 November 2021, 12.
91 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 8 October 2021 from Mr Kenneth Phillips to Mr Dmitry Rozkin, 104.
92 Ibid.

entities. The legal strategy document linked to the post-dated 21 November 2021 stated under the heading 'Ultimate Outcome Sought' that SEA was seeking orders which would require WorkSafe 'to undertake the required investigations into each of the 26 entities so far not been prosecuted'. This supports a finding that as at 21 November 2021 SEA had already concluded that VWA had not undertaken the investigations which it was required by law to undertake into each of the remaining 26 individuals and entities which had not been prosecuted. I infer that following VWA's rejection on 17 November 2021 of SEA's request for a statement of reasons under s 8 of the *Administrative Law Act 1978,* SEA concluded that it could not successfully pursue an application under the *Administrative Law Act 1978* and decided to pursue an application for orders in the nature of mandamus under Order 56. To do this, as it candidly acknowledged in its blog, it needed to raise funds. If not the sole reason for delay, this was a significant factor in the delay. A delay attributable to a party's attempts to raise funds to meet the legal costs of judicial review proceedings does not constitute a special circumstance for the purposes of r 56.02.[93]

104 The delay between 28 November 2021 when the 60-day period expired and 14 February 2022 is not significant. Nevertheless, it is 75 days beyond the date when the proceeding should have been commenced in compliance with the 60-day period prescribed by Order 56. An extension of time to 14 February 2022 would be more than double the period prescribed by Order 56 within which the proceeding should have been commenced.

105 Although VWA does not point to prejudice arising from the delay, each of the individuals and entities identified in the First Request may suffer significant prejudice if SEA is granted an extension of time. Absent the grant of an extension of time the proceeding will stand dismissed. It is clear from the public statements made by SEA that its application for judicial review is motivated by a desire to see the individuals identified in the First Request prosecuted for what SEA considers to have been breaches of indictable offences under the Act.

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93 *A S v Secretary to the Department of Justice and Regulation* [2017] VSC 310, [140]–[142] (Jane Dixon J).

106 The alleged contraventions of the Act as set out in the First Request are very serious. The alleged contravention of s 39G (workplace manslaughter) carries a maximum term of imprisonment of 25 years. Nineteen of the 20 individuals identified in the First Request are alleged to have contravened s 39G. Seven of the 20 individuals referred to in the First Request are also alleged to have contravened s 32 (duty not to recklessly endanger persons at workplaces) which is an offence punishable by a term of imprisonment of up to five years.

107 During the hearing on 4 October 2022 I raised with Mr Rinaldi the potential prejudice to individuals who could be exposed to very serious charges under the Act if SEA is granted an extension of time. In response he submitted that SEA would not press VWA to prosecute any individuals for a breach of s 39G if an extension of time is granted. The difficulty with this submission is that it is inconsistent with SEA's contention that the 'matter' which VWA has a statutory duty to investigate is each of the alleged breaches of the Act as set out in the First Request. The First Request includes an allegation that 19 individuals have breached s 39G. If, as SEA contends, VWA is subject to a statutory duty to investigate the alleged breach of s 39G, SEA cannot simply withdraw the allegation and retrospectively amend the contents of the First Request. Further, SEA does not resile from its allegation that seven of the individuals referred to in the First Request have breached s 32 of the Act and are therefore liable to imprisonment of up to five years.

108 In determining whether there are special circumstances justifying the grant of an extension of time I place weight on the desirability of the finality in litigation where the interests of third parties are affected.[94] The desirability of finality in the present proceeding is reinforced by the consideration that under s 132(1)(a) of the Act, subject to a residual discretion vested in the DPP, proceedings for an indictable offence under the Act (other than a workplace manslaughter offence) are to be brought within two years of the offence coming to the notice of VWA.

109 SEA does not seek mandamus to require VWA to prosecute the named individuals.

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94 Cf *Somerville Retail Services Pty Ltd v Petisi Vi* [2008] VSC 196, [65] (Kyrou J).

Nevertheless, it is plain from its public statements in aid of its fundraising campaign that the orders it seeks are in aid of achieving that outcome. If SEA is granted an extension of time it will be able to continue to seek orders in aid of achieving its goal of seeing some or all of the named individuals prosecuted for serious criminal offences. If SEA is not granted an extension of time the individuals referred to in the First Request will be freed from the not insignificant stress of potentially being subjected to prosecution for serious criminal offences which may carry lengthy terms of imprisonment.

110 An unusual feature of the present proceeding is that SEA has no interest in the potential prosecution of the 26 remaining individuals and entities over and above the interest of any member of the Victorian community. There is no question as to the standing of SEA to seek orders in the nature of mandamus. However, because its interest in the outcome of the application under s 131 of the Act is no different to that of any other member of the Victorian community it cannot point to any particular prejudice it will suffer if its application for an extension of time is rejected and its application under Order 56 dismissed. However, the 20 individuals identified in the First Request may suffer considerable prejudice if SEA is granted an extension of time and the proceeding remains on foot.

Merits of SEA's application

111 When determining whether an extension of time should be granted the merits of the application under Order 56 is a relevant consideration. It is appropriate for the Court to consider not simply whether SEA has an arguable case for the relief which it claims. Rather, it is appropriate for the Court to make an assessment of SEA's prospects of success.[95] It is therefore necessary for the court to make an assessment of SEA's prospects of obtaining an order in the nature of mandamus as set out in paragraphs 1 to 3 of the originating motion.

112 The claim in paragraph 1 is 'based on the apparent failure by VWA to investigate the

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95 *David Glass (a pseudonym) v Chief Examiner* [2015] VSCA 127, [71], [77] (Santamaria, Ferguson and McLeish JJA).

occurrences of the acts, matters or things raised in the second request (21 December 2021) by reference to the First Request (29 September 2020), that is to investigate the 26 other individuals or entities raised in the First Request'.[96] An assessment of the merits of SEA's application requires consideration of the strength of its contention that VWA failed to investigate the alleged breaches of the Act by the 26 remaining individuals and entities. This contention is not supported by direct evidence. Insofar as SEA contends that there is a basis for inferring that no investigation was undertaken, SEA bears the onus of establishing this inference. On the evidence before the Court, the basis for inferring that VWA conducted no investigation is weak.

113 VWA's letter of 29 September 2021 and the attached media release informed SEA that VWA's investigation of all 27 individuals and entities was complete. The letter expressly referred to SEA's request under s 131(1)(a) for VWA 'to bring prosecutions against various individuals associated with the initial iteration of the hotel quarantine program'.[97] Second, the letter stated that VWA's investigation was complete and that VWA has 'now fulfilled its obligation to you under s 131 of the Act'.[98] Third, the letter attached a media release which included the following:

> This complex investigation took 15 months to complete and involved reviewing tens of thousands of documents and multiple witness interviews.
>
> A review of the material from last year's COVID-19 Hotel Quarantine Inquiry provided relevant context and information that informed parts of the investigation.
>
> The decision to prosecute has been made in accordance with WorkSafe's General Prosecution Guidelines, which requires WorkSafe to consider whether there is sufficient evidence to support a reasonable prospect of conviction and whether bringing a prosecution is in the public interest.
>
> Inquiries into other entities associated with this investigation including hotels, security firms and other government departments and agencies have concluded.[99]

114 On 29 September 2021 SEA was told by VWA that it had undertaken a complex

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96 Plaintiff's Written Submissions dated 12 August 2022, 3 [9].

97 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 90.

98 Ibid.

99 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Media release of VWA dated 29 September 2021, 91–92.

investigation which had involved reviewing tens of thousands of documents and multiple witness interviews. SEA was also told that VWA had undertaken a review of the material from the Coate Inquiry which provided relevant context and information that informed parts of the investigation. A reasonable person in the position of SEA would have concluded that VWA had looked at the very same material which SEA examined for the purpose of preparing its 'Case for the Prosecution'. A reasonable person in the position of SEA would not have concluded that there had been a failure to investigate the alleged breaches by the 27 individuals and entities. Rather, a reasonable person would have concluded that VWA had investigated the alleged breaches of the 27 individuals and entities and had concluded that it was appropriate that only one of those entities be prosecuted, namely the Department of Health.

115 SEA's First Request of 29 September 2020 placed particular weight on the witness evidence and documents produced to the Coate Inquiry:

> On the basis of the sworn evidence provided by the witnesses to and the documents produced to the Victoria government Board of Inquiry into the Hotel Quarantine Containment Program (also known as the Inquiry into COVID-19 Quarantine Containment) headed by Jennifer Coate and also in public statements made by Premier Daniel Andrews, the former Minister for Health, Jenny Mikakos, the Chief Health Officer, Brett Sutton and the Deputy Chief Health Officer, Annaliese Van [sic] Diemen, it is now clear that these occurrence, acts and omissions have to date resulted in more than 17,800 people contracting the COVID-19 virus, hundreds of people being admitted to hospital as inpatients and 765 people dying as a result of contracting the virus (as at 27 September 2020).[100]

116 SEA's First Request preceded the report of the Coate Inquiry. An interim report was published on 6 November 2020 and a final report of 12 December 2020. It is clear that Mr Phillips considered that the final report vindicated his belief that the 26 remaining individuals and entities had breached the Act as alleged. In Mr Phillips' letter to the DPP dated 9 August 2021 he contended:

> The Coate Inquiry Report provides more than sufficient evidence to satisfy

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100 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2020 from Mr Kenneth Phillips to Mr Gordon Cooper, 15.

prima facie cases yet still no proceedings have been commenced.[101]

117 SEA submits that as at 2 February 2022 a reasonable person in its position would have inferred from the absence of prosecutions that VWA had not conducted any investigation of the alleged breaches of the Act by the 26 remaining individuals and entities. During the hearing on 4 October 2022 I observed that this submission would have much greater force if SEA was able to point to any findings in the Coate Inquiry report which provided a basis for VWA to commence prosecutions against one or more of the remaining 26 individuals and entities.[102] On 31 August 2022 SEA was asked to address the following questions:

> 7. What is the 'the sworn evidence provided by the witnesses to and the documents produced to the Victoria government Board of Inquiry into the Hotel Quarantine Containment Program (also known as the Inquiry into COVID- 19 Quarantine Containment) headed by Jennifer Coate and also in public statements made by the Premier Daniel Andrews, the former Minister for Health, Jenny Mikakos, the Chief Health Officer Brett Sutton and the Deputy Chief Health Officer, Annaliese van Diemen' referred to in the fourth paragraph of the first request?
>
> 8. On what basis does the plaintiff submit that s 39G of the Occupational Health and Safety Act 2004 has been contravened by the 20 individuals identified in the first request? Does the plaintiff submit that any employees involved in the hotel quarantine program died as a consequence of the conduct of any of the identified individuals or entities?

118 SEA was placed squarely on notice in advance of the hearing on 4 October 2022 that the findings in the Coate Inquiry report would be relevant to the Court's determination of whether SEA should be granted an extension of time should the Court find that the originating motion was filed out of time.

119 I pointed out during the hearing on 4 October 2022 that in respect of the politicians alleged by SEA to have breached the Act I had not discerned any finding in the Coate Inquiry report, and Mr Rinaldi had not taken me to any finding, which would provide any basis for VWA to commence a prosecution.[103] In response, Mr Rinaldi submitted that whether the findings in the Coate Inquiry report warranted prosecutions being

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101 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 9 August 2021 from Mr Kenneth Phillips to Ms Kerri Judd QC, 60.

102 Transcript of Proceedings, T 23 L 24–29 (4 October 2022).

103 Ibid T 44 L 1–7.

brought against the remaining individuals and entities was a matter for VWA to investigate.[104]

120 The Coate Inquiry's findings in respect of the 26 remaining individuals and entities are relevant to an assessment of the merits of SEA's claim for relief in the nature of mandamus requiring VWA to conduct an investigation of the alleged breaches of the Act by the remaining individuals and entities. If the report's findings constituted a prima facie case of breaches of the Act as contended by Mr Phillips in his correspondence with the DPP, such findings, coupled with VWA's failure to commence prosecutions, would support an inference that VWA failed to investigate the alleged breaches of the Act. Conversely, if the report's findings do not support a conclusion that the 26 remaining individuals and entities have breached the Act, VWA's failure to commence prosecutions against the individuals and entities does not support an inference of a failure by VWA to investigate the alleged breaches of the Act.

121 Nineteen of the 20 individuals referred to in the First Request gave evidence before the Coate Inquiry. Michelle Giles, Deputy Public Health, did not give evidence and is not referred to in the report's findings. As such, the report's findings do not provide any basis for a prima facie case that Ms Giles breached any provision of the Act.

122 The report's findings in respect of the individuals referred to in the First Request do not support a prima facie case that any of those individuals breached the Act. The report made express findings in respect of Premier Daniel Andrews and Ministers Mikakos, Neville and Pakula. The report found that the decision to engage private security was not a decision made at Ministerial level,[105] expressly excluding the Premier, former Minister Mikakos, Minister Neville and Minister Pakula from having any involvement in the decision. The report found that the procurement and contracting process for private security did not have the direct oversight of Minister

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104 Ibid T 44 L 8–9.

105 COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations dated 21 December 2020, Volume I, 21.

Pakula.[106] The report also finds that the Premier, former Minister Mikakos and Minister Pakula were not thoroughly or properly briefed about the operation of the Quarantine Hotel's private security.[107] There were also deficiencies in the briefing of Minister Neville, such as the failure to inform her of requests for additional ADF support:

> … [T]he decision to engage private security was not a decision made at the Ministerial level. The Premier and former Minister Mikakos said they played no part in the decision. Similarly, Minister Neville and Minister Pakula stated they were not involved in the decision. Minister Neville was aware of the proposal but not responsible for it and Minister Pakula appears not to have been told until after private security had been engaged. Enforcement of quarantine was a crucial element of the Program that the Premier had committed to adopt it, but neither he nor his Ministers had any active role in, or oversight of, the decision about how that enforcement would be achieved.
>
> … the Inquiry received more than 70,000 documents in response, including Cabinet documents. No document was produced to the Inquiry that definitively revealed who made the decision to engage private security or how the initial decision-making process occurred.[108]

123 The report found that Professor Sutton and other members of the Public Health Team at DHHS 'had no role in the decision to engage private security' as well as 'no role in their management or oversight'.[109] Although Professor Sutton had concerns about the decision not to appoint him as State Controller, the report notes that he did not elevate this issue to the former Minister for Health, Minister Mikakos.[110] The report noted that although Ms van Diemen as head of Public Health Command was responsible for providing IPC guidance, that team had no accountability for or direct understanding of its implementation.[111] The report made no negative findings about Professor Sutton or Ms van Diemen, nor about Simon Crouch, the Acting Deputy Chief Health Officer or Mr Noel Cleaves, DHHS, Manager Environmental Health, Regulation and Compliance.

124 The report found that Ms Andrea Spiteri and Mr Jason Helps as State Controllers were

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106 Ibid.
107 Ibid.
108 Ibid 156 [291], [293].
109 Ibid 132 [131].
110 Ibid 293 [279].
111 Ibid 16 [68].

'operationally accountable for the quarantine of return travellers'[112] (but not public health or policy decision-making) and that their roles were 'vast and complex'.[113] The report makes no negative findings against Ms Spiteri or Mr Helps.

125 The report found that it would have been unreasonable to expect Chief Commissioner of Police Patton, Commissioner Crisp and Mr Ashton (former Chief Commissioner of Police) to consider the specific public health issues generated by the use of private security guards,[114] so long as the security personnel were properly trained.[115] Mr Ashton gave evidence that he expected security personnel's role to be confined to a 'static guarding'.[116] The report contains no negative findings in respect of Mr Timothy Tully, Victoria Police Commander, Officer in Charge, Operation Soteria.

126 The First Request alleges that all members of the management team known as the State Control Centre contravened ss 25, 26, 39G and 144 of the Act. Although the State Control Centre was found to have had a role in the decision to engage private security, the Report qualified their involvement by stating that 'neither Mr Eccles nor those present at the SCC meeting professed to be public health experts' and 'it was not reasonable to expect that they should have turned their minds to the full extent of the supervision and training issues, the role changes and the increase in private security numbers that occurred over time'.[117]

127 The report contains no negative findings in respect of Ms Melissa Skilbeck, DHHS, Deputy Secretary or Mr Simon Phemister, Secretary for Jobs, Precincts and Regions. These individuals are alleged by SEA to have contravened ss 26 and 39G of the Act, thereby rendering them liable for a term of imprisonment.

128 VWA's letter of 29 September 2021 advised SEA that a prosecution had been brought against the Department of Health 'as the responsible agency of the Crown'.[118] This

112 Ibid 266 [105].
113 Ibid 298 [308].
114 Ibid 131 [123].
115 Ibid 193 [190].
116 Ibid.
117 Ibid 132 [128].
118 Exhibit KNP-1 to the Affidavit of Kenneth Norman Phillips dated 14 February 2022, Letter dated 29 September 2021 from Mr Dmitry Rozkin to Mr Kenneth Phillips, 90.

characterisation of the role of the Department of Health is consistent with the findings of the Coate Inquiry. One of the central findings of the report was that the Department of Health had the overall responsibility for the administration of the Hotel Quarantine Program. The Department's role as the 'control agency' in charge of the program vested it with 'clear responsibility' to administer the program in collaboration with the various support agencies involved in the program.[119] Despite the role of the support agencies, the Report concluded that 'DHHS was responsible for ensuring that the plans for the Operation, including division of responsibilities, chains of command and overall accountability were understood by all operating within it':[120]

> DHHS accepted that it was the control agency for the overall response to the COVID-19 pandemic. DHHS appeared to accept that its responsibilities included the control of the identified hazard, which, in the context of the pandemic response, was the virus. However, the precise functions and responsibilities of DHHS as control agency in the context of the Hotel Quarantine Program were matters of deep disagreement before the inquiry…
>
> The weight of the evidence is that, at all material times, DHHS had 'overall responsibility' for the Hotel Quarantine Program as (a) not only the government agency responsible for public health, but (b) also the government agency that had responsibility for the exercise of the statutory powers of detention that mandated the detention of people in quarantine and (c) the designated control agency in the emergency management framework in which the Program was set. The fact that it did not see itself as having this responsibility and did not accept this responsibility, either during its involvement in the Program or throughout this Inquiry, can be understood as being a progenitor of many of the problems that eventuated in the Hotel Quarantine Program…
>
> In my view, the designation of DHHS as control agency vested it with clear responsibility to deliver that response with the collaboration of multiple support agencies responsible for the proper delivery of that support agency response, as was required, and to ensure that those agencies were working together so that the response fulfilled its aims. But that did not remove or vary the overall need and responsibility for the single agency, DHHS, to take control of the Program and exercise the necessary vigilance required to ensure its safe and proper operation shaped into a best practice model.
>
> … At a minimum, as control agency, DHHS was responsible for ensuring that the plans for the Operation, including division of responsibilities, chains of command and overall accountability, were understood by all operating within it. Evidence of this clear leadership role is documented in several iterations of the Operation Soteria plan and further evidence by the leadership hierarchy of the Program, where all key roles were filled with DHHS staff or staff appointed

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119 COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations dated 21 December 2020, Volume I, 287 [239].

120 Ibid 287 [240].

by DHHS.[121]

129 It was a legitimate exercise of prosecutorial discretion for VWA to bring a prosecution solely against the Department of Health as the responsible agency of the Crown.[122] Further, the nature and extent of any investigation to be undertaken by VWA in respect of the alleged breaches of the Act as set out in the First Request was a matter within VWA's discretion. The relief claimed in paragraph 1 of the originating motion is for an order in the nature of mandamus requiring VWA to investigate 'in accordance with its statutory duty under sections 131(2A) and 131(2C) of the *Occupational Health & Safety Act*'. Neither s 131(2A) or s 131(2C) impose a duty on VWA to conduct an investigation in a particular manner or with a particular outcome. VWA is subject to a duty to commence and complete and investigation of a referral under s 131 in as timely a manner as is reasonably practicable. However, VWA retains a discretion as to how an investigation will be undertaken. In general, mandamus will not command the performance of a duty in a particular way if there is a discretion as to how the duty is to be performed.[123]

130 SEA's First Request makes extremely serious allegations against a raft of individuals. The findings of the Coate Inquiry Report do not support a finding that there is a prima facie basis for the alleged contraventions. SEA's claim that VWA failed to conduct an investigation of the allegations against the remaining individuals and entities, is weak. The objective evidence points strongly to the conclusion that VWA reviewed the findings of the Coate Inquiry as well as reviewing tens of thousands of documents and conducting multiple witness interviews before making a decision to prosecute the Department of Health as the responsible agency of the Crown. The objective evidence points strongly to the conclusion that VWA did conduct an investigation sufficient to discharge its statutory duty under s 131(2A).

131 SEA's claim in paragraph 2 of the originating motion for an order in the nature of

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121 Ibid 280 [190], 285 [222], 287 [239]–[240].

122 Cf *Likiardopoulos v The Queen* (2012) 247 CLR 265; *Martin v Nalder* [2016] WASCA 138, [41]–[57] (Tottle J).

123 *Plaintiff M61/2010E v The Commonwealth* (2011) 243 CLR 319, 358–9 [99]–[100] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Moran v Department of Justice & Regulation* (2015) 49 VR 119, 125 [21] (McDonald J); *Singleton v Victorian Building Authority* [2019] VSC 416, [49] (Garde J).

mandamus requiring VWA to give reasons why it is not prosecuting the remaining 26 individuals and entities is weak. In an application for judicial review a decision maker's statement of reasons must be read fairly and not in an unduly critical manner. The reasons must also be read in light of the content of the statutory obligation pursuant to which the statement of reasons was prepared.[124] Further, where reasons are given it is impermissible to speculate upon matters beyond those referred to in the reasons, which may have motivated the decision. The reasons given by the decision maker must be accepted as being the decision maker's reasons.[125]

132 VWA's letter of 29 September 2021, read fairly and not in an unduly critical manner, does provide a reason why VWA was not prosecuting the remaining 26 individuals and entities. The reason was that VWA decided to prosecute the Department of Health as the responsible agency for the Crown. This was a legitimate exercise of prosecutorial discretion. SEA's claim for mandamus is not premised on the adequacy of the reasons provided for the decision not to prosecute. Rather, it is premised on a failure to give any reasons why the 26 remaining individuals and entities were not prosecuted. VWA's letter of 29 September 2021 discharged the statutory duty under s 131(2A)(ii) by providing a reason why the remaining 26 individuals and entities would not be prosecuted.

133 SEA's claim in paragraph 3 of the originating motion is weak. There are two preconditions which must be satisfied in order for the duty under s 131(3) to be enlivened. First, VWA must advise the person who made a request under s 131(1) that a prosecution will not be brought. Second, the person must make a request in writing for the matter to be referred to the DPP. On 29 September 2021 Mr Phillips made the following request, purportedly in reliance on s 131(3) of the Act: 'I again formally request that WorkSafe's investigative materials in relation to all matters be immediately provided to the DPP in compliance with WorkSafe's statutory

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124 *BDV17 v Minister for Immigration* (2019) 268 CLR 29, 45 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

125 *Re Australian Insurance Employees Union; ex parte Academy Insurance Pty Ltd* (1988) 78 ALR 466, 467 (Dawson J); *Fertility Control Clinic v Melbourne City Council* (2015) 47 VR 368, 377 [23] (McDonald J).

obligations under s 131(1) of the *Occupational Health and Safety Act 2004* (Vic)'.

134 Section 131(3) does not impose an obligation upon VWA to provide its investigative materials to the DPP. Insofar as the relief claimed in paragraph 3 seeks an order requiring VWA to provide its investigative materials to the DPP, the claim is misconceived. It is apparent from the DPP's letter to VWA on 4 October 2021 that VWA did offer to provide the DPP with its full investigative brief. The offer was declined. Although the offer to provide a full investigative brief was made, s 131(3) did not require VWA to provide the DPP with all of its investigative materials.

Conclusion

135 SEA has not established special circumstances warranting the grant of an extension of time. The significant potential prejudice to the individuals identified in the First Request weighs against SEA being granted an extension of time. The delay in the filing of the originating motion was due to the misconceived application under s 8 of the *Administrative Law Act 1978* and SEA's fundraising campaign. Neither of these matters constitutes special circumstances. SEA's claim for relief in paragraphs 1 to 3 of the originating motion lacks merit. As such, there would be little, if any, utility in the grant of an extension of time. The proceeding will be dismissed. I will provide the parties with an opportunity to make submissions as to the costs of the proceeding.

136 My provisional view is that VWA should pay SEA's costs incurred during the period 14 February 2022 to 2 August 2022 which are referable to VWA's failure to contend that the originating motion was filed out of time. These costs should be on the standard basis to be taxed in default of agreement. These costs will include costs incurred by SEA in respect of VWA's application for the trial of separate questions. Such costs will be in addition to the costs order made on 21 June 2022. My provisional view is that for the period subsequent to 2 August 2022 SEA should pay VWA's costs on a standard basis to be taxed in default of agreement.

CERTIFICATE

I certify that this and the 55 preceding pages are a true copy of the reasons for judgment of the Honourable Justice McDonald of the Supreme Court of Victoria delivered on 2 December 2022.

DATED this second day of December 2022.

Associate