

# HIGH COURT OF AUSTRALIA

GAGELER J

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ASSOCIATE PROFESSOR PETER PARRY & ORS

PLAINTIFFS

AND

SECRETARY, DEPARTMENT OF HEALTH

DEFENDANT

*Parry v Secretary, Department of Health*

[2023] HCA 9

16 March 2023

S162/2022

## ORDER

1. *The matter be remitted to the Sydney Registry of the Federal Court of Australia.*
2. *The matter continue in the Federal Court of Australia as if the steps already taken in this Court, including the filing of the applications of Toni Reihana and William Anicha Bay for leave to intervene, were taken in the Federal Court of Australia.*
3. *The Registrar of this Court provide to the proper officer of the Federal Court of Australia copies of all documents filed in this Court.*
4. *The costs of the proceeding in this Court to date be costs in the Federal Court of Australia.*
5. *The costs in this Court, including the costs of this order, be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable in the Federal Court of Australia and in the discretion of that Court.*

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.







## CATCHWORDS

### **Parry v Secretary, Department of Health**

Practice – High Court – Remitter – *Judiciary Act 1903* (Cth), s 44 – Whether matter arising under *Therapeutic Goods Act 1989* (Cth) should be remitted to Federal Court of Australia – Whether matter suitable to be heard in original jurisdiction of High Court of Australia – Where significant case management and fact finding required.

Words and phrases – "arising under", "case management", "constitutional writ", "fact finding", "jurisdiction", "matter", "remittal", "special interest", "standing", "subject-matter of the proceeding".

*Judiciary Act 1903* (Cth), ss 39B, 44.

*Therapeutic Goods Act 1989* (Cth), ss 22D, 25(3)(a), 30C(2).



1 GAGELER J. By way of an application for a constitutional writ filed on 20 December 2022, the plaintiffs seek a writ of certiorari quashing the respondent Secretary's decision (or decisions) under the *Therapeutic Goods Act 1989* (Cth) ("the TG Act") in relation to use of the SPIKEVAX (elasomeron) COVID-19 vaccine in children six months of age and older. The plaintiffs alternatively seek a declaration that the Secretary's decision was made unlawfully. A writ of mandamus was originally sought but that part of the application is no longer pressed. The plaintiffs request expedition.

2 There is some ambiguity as to whether the plaintiffs seek to challenge the Secretary's provisional determination made on 9 November 2021 with respect to the SPIKEVAX vaccine, being a decision made under s 22D of the TG Act; the Secretary's decision made on 19 July 2022 to provisionally register the SPIKEVAX vaccine for use in children, being a decision made under s 25(3)(a) of the TG Act; or both. For present purposes, nothing turns on that ambiguity and it is sufficient to proceed on the basis that the plaintiffs are challenging whichever decisions by the Secretary concerning the SPIKEVAX vaccine are open to challenge by them.

3 The plaintiffs' application is made on two grounds. The first is that the Secretary's decision was unreasonable. The plaintiffs allege that is so because the Secretary could not have reasonably been satisfied of the safety and efficacy of the vaccine, or that its apparent benefits outweighed the associated risks, having regard to the evidence viewed properly and in context. The second is that the Secretary failed to comply with s 30C(2) of the TG Act, which requires the Secretary to give written notice to the Gene Technology Regulator if the therapeutic good is or contains a genetically modified product or organism, and that the decision is therefore invalid. The application is supported by a number of supporting affidavits totalling more than 2,000 pages. Applications for leave to intervene have been filed by Toni Reihana and William Anicha Bay.

4 Section 44(1) of the *Judiciary Act 1903* (Cth) empowers the Court on application or by its own motion to remit any matter pending before the Court, subject to exceptions not presently relevant, to another court that has jurisdiction with respect to the subject-matter of and the parties to the proceeding. Section 44(4) provides that such order may be made without an oral hearing. Whilst no formal application has been filed by a party seeking remittal of the matter to another court, the plaintiffs' application anticipated the possibility of remittal and made submissions opposing that course. In the Secretary's response filed 9 February 2023, the Secretary submitted the matter should be remitted to the Federal Court of Australia. In their reply filed 27 February 2023, the plaintiffs responded to the Secretary's submissions on remittal. Accordingly, both parties have had the opportunity to make, and have made, submissions on the issue of remittal, to which I now turn.

5 The Secretary submits the proceeding should be remitted to the Federal Court, which would have jurisdiction over the subject-matter of the proceeding under s 39B(1) or (1A)(c) of the *Judiciary Act*. In opposing remittal, the plaintiffs submit that this Court is the only appropriate forum for determination of the proceeding because their claim invites the Court to identify and apply a new category of standing based on the special interest said to arise "[w]here the fabric of human life might be compromised or adversely impacted". Although the plaintiffs acknowledge that "the subject matter of these proceedings is extremely complex (involving issues of modern science)" and that factual disputes may arise, they submit that the nature of any such disputes will be limited to genetically modified medicines and that in any event that factor should not be determinative.

6 The power to remit is discretionary, "to be exercised after due consideration of all the circumstances of the case"<sup>1</sup>. It has been observed that whether the Court exercises that power or permits a proceeding to continue in this Court is a matter "not just for the parties, but for the Court"<sup>2</sup>. In that regard, the statement of Brennan CJ in *Ravenor Overseas Inc v Readhead*<sup>3</sup> as to the purpose of the remittal power is instructive:

"The power of remitter contained in s 44 of the *Judiciary Act* 1903 (Cth) is designed to ensure that this Court is not diverted from its principal functions by the need to hear and determine matters in the original jurisdiction which could properly be brought in an Australian trial court."

7 This matter is not suitable to be heard in the original jurisdiction of this Court. It is evident from the parties' submissions that they are unlikely to reach agreement on a set of agreed facts, raising the prospect that significant fact finding will be required. From the parties' respective positions there can be discerned a series of factually intensive issues on which they are, or are likely to become, in dispute, including the nature and extent of the plaintiffs' interest and its sufficiency for purposes of establishing standing, which is acknowledged to be a question of "fact and degree"<sup>4</sup>; whether the vaccine at issue is or contains a genetically modified product or organism (a showing required to be made for the second ground to succeed); and the factual findings of the Secretary's delegates that supplied the basis for the challenged decision. Lay and expert evidence may

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1 *Johnstone v The Commonwealth* (1979) 143 CLR 398 at 402.

2 *Lee v The Commonwealth* (2012) 87 ALJR 232 at 233 [5]; 293 ALR 534 at 535.

3 (1998) 72 ALJR 671 at 672 [5]; 152 ALR 416 at 417.

4 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 63, 75.



3.

be required to resolve those issues. The vaccine is sponsored by Moderna Australia Pty Ltd, and it is foreseeable that a question as to its joinder as a party might arise.

8        Having regard to these considerations, significant case management and fact finding are likely to be required to conduct a hearing of the kind contemplated by the application. Undertaking that task would unduly divert the Court from its principal functions<sup>5</sup>. By contrast, a trial court will be better positioned to case manage the proceeding appropriately and determine contested questions of fact. If the first-instance decision were to be appealed or the subject of an application for judicial review, the appellate court would have the benefit of the trial judge's findings of fact.

9        I am satisfied that this matter is one "arising under" the TG Act for purposes of s 39B(1A)(c) of the *Judiciary Act*, and that the Federal Court has jurisdiction over its subject-matter and the parties on that basis. I am also satisfied, for the reasons set out, that this Court should exercise its discretion under s 44(1) of the *Judiciary Act* to remit the matter to the Federal Court.

10       Finally, the issues of intervention and expedition and the need for any extension of time for the plaintiffs to seek certain forms of relief are not for this Court to decide, but rather matters for the Federal Court on remitter<sup>6</sup>.

11       Accordingly, I would order:

1.       The matter be remitted to the Sydney Registry of the Federal Court of Australia.
2.       The matter continue in the Federal Court of Australia as if the steps already taken in this Court, including the filing of the applications of Toni Reihana and William Anicha Bay for leave to intervene, were taken in the Federal Court of Australia.
3.       The Registrar of this Court provide to the proper officer of the Federal Court of Australia copies of all documents filed in this Court.
4.       The costs of the proceeding in this Court to date be costs in the Federal Court of Australia.

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5       See *Lee v The Commonwealth* (2012) 87 ALJR 232 at 233 [6]; 293 ALR 534 at 535.

6       See *Bowtell v The Commonwealth* (1989) 63 ALJR 465 at 466; 86 ALR 31 at 32.

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5.      The costs in this Court, including the costs of this order, be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable in the Federal Court of Australia and in the discretion of that Court.

