IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03402

5 BOROUGHS NY PTY LTD (ACN 632 508 304) Plaintiff

-and-

STATE OF VICTORIA & ORS Defendants
(according to the attached schedule)

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	12 December 2022
DATE OF JUDGMENT:	3 February 2023
CASE MAY BE CITED AS:	5 Boroughs NY Pty Ltd v State of Victoria (No. 3)
MEDIUM NEUTRAL CITATION:	[2023] VSC 22

PRACTICE AND PROCEDURE – Application to stay group proceeding – COVID-19 pandemic – Negligent conduct alleged against State of Victoria in implementing hotel quarantine – Plaintiff claims economic loss consequent on exercise of emergency powers under s 200 of the *Public Health and Wellbeing Act 2008* (Vic) – Criminal proceedings for breach of the *Occupational Health and Safety Act 2004* (Vic) laid against relevant State Department of Health based in part on that same conduct – Substantial overlap in issues between civil and criminal proceedings – Whether prejudice to State in defence of the prosecution if group proceeding not stayed – Whether companion principle applicable or compromised – Delay prejudice to plaintiff and group members if civil proceeding stayed – Where protective orders and case management available to ameliorate risk of prejudice.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff 5 Boroughs NY Pty Ltd	Ms W Harris KC with Mr H Whitwell	Quinn Emanuel Urquhart & Sullivan
For the First Defendant	Mr D Neal SC with Mr M A McLay and Mr R W O'Neill	MinterEllison

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 The plaintiff, on behalf of a group of Victorian businesses, claims damages from the first defendant, the State of Victoria for breach of its duty to take reasonable care in the implementation of infection prevention controls at quarantine hotels, resulting in the spread of Covid-19 into the population, and the lockdown in response, which caused economic loss to the plaintiff and group member businesses.

2 The Crown in Right of the State of Victoria (Department of Health) (**DHHS**) applied by summons (in which it described itself as 'the first defendant') to stay the proceeding pending the final resolution of the criminal prosecution against it, prosecuted by the Victorian Workcover Authority (**VWA**) in respect of alleged breaches of the *Occupational Health and Safety Act 2004* (Vic) (**OHSA)**. The basis for the stay of the group proceeding is that it is necessary for the DHHS to receive a fair criminal trial. It is convenient to refer to the applicant as the State. I will return to this issue of different emanations of the State of Victoria later in these reasons.

3 I am not satisfied that it is in the interests of justice to grant the State's application to stay the group proceeding. Interlocutory steps may progress the group proceeding without prejudice to the State's right not to assist the prosecution in proof of its case, to the extent such a right exists. The proceeding is subject to close case management and appropriate directions can be given or protective orders made as found necessary to balance the competing concerns in respect of each proposed step in the group proceeding.

Background

4 The COVID-19 Hotel Quarantine Inquiry, conducted in 2020 by the Honourable Jennifer Coate AO ('**Coate Inquiry**'), produced extensive documentation from the State that has been made available to the public.

5 On 21 August 2020, the plaintiff, 5 Boroughs NY Pty Ltd ('**5 Boroughs**') launched this proceeding, in which it claims, from the defendants, the State of Victoria and others,

damages for economic loss suffered as a result of the stage 3 and 4 lockdown restrictions on economic activity imposed during the second wave of the COVID-19 pandemic. 5 Boroughs is a representative plaintiff and the proceeding is a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic). It contends that these restrictions were the inevitable result of COVID-19 transmission events at two hotel quarantine sites caused by the negligent failure of the State to implement effective infection prevention and control measures at the sites. The claim is substantially based on matters revealed by the Coate Inquiry.

6 On 29 September 2021, the VWA filed 58 criminal charges against the Crown in the Right of the State of Victoria (Department of Health), alleging contraventions of ss 21(1) and 23 of OHSA arising out the operation of the hotel quarantine program, in the period March to June 2020. The alleged contravening conduct involves the failure to take reasonably practical steps in relation to the implementation of infection prevention and control measures at 17 quarantine hotels, including in relation to training, instructions and advice. Four charges relate to Rydges and five relate to Stamford. The remaining 49 charges relate to hotels that are not the subject of the group proceeding.

7 The criminal charges brought by the VWA are currently the subject of a committal hearing in Magistrates' Court proceeding number M12097325. The committal hearing is contested and commenced in the Melbourne Magistrates' Court on 28 November 2022. It has not yet been resolved. If the Magistrate finds the evidence of sufficient weight to support a conviction, the DHHS (as the responsible agency) will be committed to stand trial at some date to be set in due course. It is not clear that a trial would commence before 2024, possibly not until mid-2024, or precisely how long that trial would take. The prospect of an appeal arising out of the trial cannot be discounted. It is reasonable to infer that, if stayed until the determination of the VWA prosecution, the group proceeding might not recommence until 2025 and a trial of the proceeding might not conclude prior to the end of 2026.

8 The brief of evidence for the VWA prosecution is described as voluminous and

complex. It consists of more than 13,000 pages combining a very large number of statements, documents, government publications, expert reports and specialist medical/epidemiological literature sourced extensively from the Coate Inquiry and by way of notices issued under OHSA. There are 71 prosecution witnesses including experts, security guards, nurses, hotel management, security guard management, government employees who worked directly at hotel quarantine hotels during the program, and COVID-19 response leadership. Of these, approximately 49 witnesses across each of these categories are likely to give evidence relevant to the Rydges and Stamford Plaza Hotels. The State has produced further documents to the prosecution in response to OHSA processes.

9 Prior to the hearing of the stay application, the plaintiff sought greater detail as to the alleged risk of prejudice to the State. It proposed compromise through protective orders to alleviate the State's perceived risk.

10 The plaintiff's solicitor estimates that the group represented by the plaintiff comprises tens of thousands of Victorian businesses. To date, the plaintiff's solicitors have received communications from over 1,500 businesses expressing their intention to advance their claim for losses incurred during the second-wave lockdown through the group proceeding. From those communications, the plaintiff's solicitor deposes that many group members are experiencing ongoing financial hardship as a result of the lockdown the subject of the class action, for which they seek compensation through the proceedings, and that a delay in being compensated for that loss is prejudicing the financial viability of group member businesses. Some further particulars of this prejudice to group members through delay is given that I need not set out in these reasons. That group members are suffering such prejudice was not contested by the State on this application.

The applicant

11 In the group proceeding, the first defendant is the State of Victoria. The proceeding against the State is brought pursuant to s 23(1)(b) of the *Crown Proceedings Act 1958* (Vic) which provides that the State of Victoria is liable for the torts of its servants or

agents as nearly as possible in the same manner as a subject is liable for the torts of his or her servants or agents. The second defendant was at the relevant time the Minister for Health, being the Minister responsible for DHHS and the fourth defendant was at the relevant time the 'Department Head' of DHHS within the meaning of the *Public Administration Act 2004* (Vic).

12 The applicant for the stay was not the State in the sense of the entity that is named as the first defendant in the group proceeding. The defendant in the VWA prosecution is the Crown in the Right of the State of Victoria (DHHS).

13 This distinction is essentially procedural and arises from div 6 of OHSA. Section 146 provides that where proceedings are brought against the Crown for an offence against the Act, the responsible agency in respect of the offence may be identified in the initiating process. The responsible agency is the agency of the Crown whose acts or omissions are alleged to constitute the offence. That agency is entitled to act in proceedings against the Crown for the offence and, subject to any relevant rules of Court, the procedural rights and obligations of the Crown as the accused in the proceedings conferred or imposed on the responsible agency. Accordingly, the VWA inspector, who is the informant, does not nominate the State of Victoria as the defendant. Plainly, the responsible agency, the DHHS, is one source of the servants or agents of the Crown for whom the State may be liable in respect of the torts alleged in the group proceeding.

14 I directed that the first defendant (State of Victoria), have leave to be represented by Minter Ellison, which firm is retained on behalf of the DHHS in respect of the VWA prosecution. Although the remaining defendants in the group proceeding were granted liberty to apply in respect of the summons, they took no active part in the application.

State's submissions

15 The State submitted that there is significant overlap between this group proceeding and the criminal case. The criminal case includes charges under s 21 of OHSA. This section provides that it is an indictable offence to fail to provide and maintain, so far

as reasonably practicable, a working environment that is safe and without risks to health. Therefore both the group proceeding and criminal case are concerned with the implementation of infection prevention controls at the Rydges and Stamford Plaza Hotels from the commencement of the hotel quarantine program. The date range in the group proceeding extends beyond that of the criminal case, and the criminal case pertains to 15 further hotels – but the focus is the same.

16 The vast majority of evidence relevant to the source of the infection that spread into the wider community, will be common to both proceedings. Both cases allege a breach of duty in that the DHHS (or its responsible minister and secretary) failed to ensure that employees in the program were appropriately trained in infection prevention controls and that the appropriate measures were implemented and maintained.

17 A comparison between the charges (as they pertain to Rydges and Stamford Plaza) and the allegations contained in the amended statement of claim reveals that they are in substance almost indistinguishable.

18 There is no automatic right to the stay of the civil action when a related criminal case is on foot. The applicant must show a real risk of prejudice in the conduct of its defence in the criminal trial.[1]

19 The High Court has emphasised two central characteristics of the criminal process:[2]

(a) The accusatory principle: the prosecution bears the burden of proving its case beyond reasonable doubt;

(b) The companion principle: Absent a clear statutory power to the contrary, a person charged with a crime cannot be compelled to assist in the discharge of the prosecution's onus of proof.

20 While there is no privilege against self-incrimination for bodies corporate,[3] the State

---

1 *Commissioner of the Australia Federal Police v* ***Zhao*** (2015) 255 CLR 46.

2 ***X7*** *v Australian Crime Commission* (2013) 248 CLR 92; ***Lee*** *v NSW Crime Commission* (2013) 251 CLR 196; ***Lee v The Queen*** (2014) 253 CLR 455.

3 *Evidence Act 2008* (Vic) s 187.

contended that the companion principle extends beyond the privilege and has been held to apply to corporations.[4]

21 The companion principle extends to practical, not just legal, compulsion.[5] One of its fundamental aspects is the protection of forensic choices available to the defence.[6] 'The asking of questions and compelling of answers inevitably interfere with the conduct of an accusatorial trial and embarrass the defence of the accused.'[7] It is well-recognised that civil proceedings may prejudice a criminal trial, requiring a stay of the civil proceedings.[8] Indeed, it is not even necessary for the applicant to give specific evidence of the likely prejudice.[9]

22 That said, the extent to which a proceeding need be stayed to protect the fair trial of an accused, depends on the facts. In some cases, the facts may allow certain steps to be taken before granting a stay. For example, as in this case, a strike out application may not affect a pending criminal prosecution.[10] However, other interlocutory steps may cause prejudice.[11]

23 The State submitted that any further interlocutory steps in this group proceeding would cause the relevant prejudice, warranting the grant of a stay.

24 In particular, the filing of a defence in this case would force the State to take a position on various issues that it wouldn't be forced to take in a criminal trial; the State is subject to various duties in a civil context under the *Civil Procedure Act 2010* (Vic), and the Model Litigant Guidelines, by which it would not be bound as an accused in a criminal prosecution; the State would have to discover and lead evidence and foreshadow such evidence in these proceedings, as well as answer interrogatories,

---

4 *NSW Food Authority v* ***Nutricia*** *Australia Pty Ltd* (2008) 72 NSWLR 456, 490 [155], referring to *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

5 *Zhao* (n 1).

6 *Lee*, 236 [79]-[80] (n 2).

7 Ibid 236 [79].

8 *Zhao*, 60-1 [47] (n 1); ***Lucciano*** *v The Queen* (2021) 287 A Crim R 529, 534 [24]; *McLachlan v Browne (No 9)* [2019] NSWSC 10, [38].

9 *Zhao*, 59-60 [42]-[43] (n 1).

10 ***Impiombato*** *v BHP Group Limited* (2020) 143 ACSR 301, 330 [144].

11 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (2019) 138 ASCR 42, 63 [99] ('***ANZ***').

which it would not have to do in a criminal proceeding. Pleading in this case would undermine the State's ability to put the prosecution to its proof of all matters. For example, particulars as to negligence would reveal the State's position, giving the prosecution substantial forensic advantage. More extensive prejudice is likely to arise when witnesses give evidence.

25 I pause to note that it is not likely that the court will grant leave to the plaintiffs to interrogate the State as interrogatories are now uncommon in group proceedings, but I do not prejudge any application to interrogate that might be made.

26 Similarly, the State contended that documentary evidence it would be compelled to provide as part of its ongoing obligation of discovery would be a breach of the companion principle in the criminal prosecution. There is a risk that documents discovered in the group proceeding would leak to the prosecution in contravention of the *Harman* undertaking, as occurred in *Lee v The Queen*.[12] In any event, once the documents are referred to in open court the undertaking no longer prevents the prosecution from using those documents to supplement its case, and could become known to any future jurors.

27 Again, I pause to note that documents are unlikely to be referred to in open court in the group proceeding prior to the trial and it is not contested by the plaintiff that the trial of the group proceeding should await the completion of the prosecution.

28 As to the plaintiff's submissions that there could be some limited interlocutory steps taken, with mechanisms designed to mitigate any risk of prejudice to the State, including a confidentiality regime and/or the dispensation of certain disclosure and pleading duties ordinarily applicable to litigants, the State submitted as follows:

(a) There is currently no group costs order application on foot; the hypothetical possibility of one is not a reason to refuse a stay.

(b) Filing a defence or making discovery would continue to pose a very real risk of

12 *Lee v The Queen* (n 2).

prejudice regardless of the proposed mitigation mechanisms. It would limit forensic choices available to the defence; information could be disclosed that sets in motion a chain of enquiry that may expose it to criminal penalties; and disputes over pleadings/documents may give rise to prejudice and further adverse publicity through further case management conferences.

(c) Filing a full defence, including on a confidential basis, would breach the companion principle. As would discovery of documents. Limited discovery of key documents is pointless when vast troves of documents are already available to the plaintiff.

(d) A limited or 'MacDonald' defence would serve little or no purpose as a full defence would ultimately only be filed after the criminal trial so the time or efficiency savings would be marginal. The pleadings will likely be amended after evidence is led in the criminal trial, in any event. The criminal trial would narrow the issues and provide for a more focused pleading and discovery process.

(e) The authorities are against compelling pleadings and discovery where the issues between the civil and criminal proceedings are the same. They emphasise the importance of the companion principle,[13] and the appropriate weighting of the importance of criminal trials preceding civil trials.[14]

    (i) The plaintiff's attempts to distinguish *Zhao* (below) are misconceived. The point of that case is that where there is identity of subject matter, the filing of statements and the taking of evidence could not proceed in the civil proceeding, and the prejudice could not be mitigated by suppression orders. Filing a defence, even a suppressed one, would still limit the forensic options open to the accused. The evidence of prejudice given in that case was simply the obvious point that in the civil

13 *Hammond v The Commonwealth* (1982) 152 CLR 188; ***X7*** *v Australian Crime Commission* (2013) 248 CLR 92; *Zhao* (n 1).

14 *Lucciano* (n 8).

proceeding the accused would be forced to give evidence about matters directly relevant to the criminal case: 'It is not necessary for the Second Respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and circumstances relevant to both proceedings are substantially identical.'[15] The same can be said about pleading a defence to the allegations in the amended statement of claim in this case.

(ii) Similarly in *JB Asset Management*,[16] *Impiombato*[17] and *ANZ*[18] the courts held that the very strong connection between the two proceedings was sufficient to demonstrate real risk of prejudice without the defendant needing to file an affidavit or stating in great detail the risk of prejudice. In *ANZ*, the court held that ordering a defence was neither appropriate nor practical because it runs the same risks of prejudice.[19]

(f) It would not be appropriate or practical to file a defence in this case. The charges in the indictment and the prosecution opening will reveal the full case against the State, but until this occurs the full extent of the allegations are unknown. Once this is known there are various forensic choices the State must make to meet the case against it.

(iii) As the High Court held in *X7*,[20] even if the answers to a compulsory examination are kept secret and therefore could not be used directly or indirectly by the prosecution, the requirement to give answers after being charged would still fundamentally alter the accusatorial judicial process. The accused person is prejudiced in their defence of the charge by being required to answer questions about the subject matter of the pending charge because those questions inevitably limit the course to be

15 *Zhao*, 59 [42] (n 1).
16 ***JB Asset Management*** *v LBA Capital Pty Ltd* [2020] VSC 629, [18].
17 *Impiombato* (n 10).
18 *ANZ*, 60 [77] (n 11).
19 Ibid 63 [99].
20 *X7*, 142-3 [124]-[125] (n 13).

followed in the criminal defence. This was cited with approval by the Victorian Court of Appeal in *Zhao* in relation to witness statements or evidence[21] – but it would also apply to filing a defence.

(iv) Even in *MacDonald*, the case relied upon by the plaintiff as authority for the proposition that the State could simply file a truncated defence to mitigate any prejudice, Mason P, with whom Giles J concurred, was careful to say that being required to plead matters which have the tendency to self-incriminate was contrary to Australian law.[22] This applied to the provision of witness statements prior to the close of the prosecution case, and to a defence. The defendant should therefore not be compelled to include in his defence, any information that may have the tendency to expose him directly or indirectly to the penalties sought.[23]

(v) Ultimately, a full and compliant defence would be destructive of the State's right to put the prosecution to its proof in the criminal proceeding, including on the question of what it is alleged were the reasonably practicable measures to be taken during the hotel quarantine program. Whereas a bare defence would have no practical utility.

(g) As to discovery, while confidentiality arrangements might be made with respect to the documents themselves, the derivative use of the information contained therein opens a train of enquiry leading to prosecution witnesses, thus failing to properly recognise the right not to provide proof against oneself as an accused.[24] In other words, the plaintiff may make enquiries of key witnesses, in the process indicating indirectly information pleaded in the defence, and that information could via the witnesses be communicated back to those intimately involved in the prosecution, or through the evidence they

---

21 *Zhao v Commissioner of Australian Federal Police* (2014) 43 VR 187, 197-8 [26] (‘***Zhao VSCA***’).
22 ***MacDonald*** *v Australian Securities and Investments Commission* (2007) 73 NSWLR 612, 623 [64].
23 Ibid 624 [71].
24 *In Re Australian Property Custodian Holdings Pty Ltd* (2012) 93 ACSR 130, 153-4 [114].

give in court. The courts in *Rich*,[25] *MacDonald*[26] and *ANZ*[27] repeatedly refer to this danger of disclosure in respect of discoverable documents, even a list thereof, as well as in defences and witness statements. At a practical level the plaintiff has a vast trove of documents from the Coate Inquiry and the criminal trial will lead to further documents. Discovery before that point is not practical, efficient nor cost-effective.

(h) As to the documents produced to the prosecution pursuant to ss 9 and 100 of OHSA, which are included in the hand up brief in the committal, the State is willing to consent to produce these documents, without conceding their relevance.

(i) As the criminal trial progresses, all the relevant details that the plaintiff would need will emerge; they will have access to the transcripts of evidence. It is agreed that the civil trial can't occur until the criminal trial is completed. By the time that happens, and through the criminal trial process, all the necessary elements needed for the civil trial preparation will have effectively occurred anyway. There is no practical benefit to compelling an earlier deadline for these interlocutory processes if the ultimate trial is a fixed point.

Plaintiff's submissions

29 The plaintiff accepts that the criminal proceeding against the State must precede the trial of the group proceeding. However, it contended that a stay is premature at this point because there are interlocutory steps that can be taken without a real risk of prejudice to the State in the criminal proceeding. For example, the filing of defences and discovery can occur in a manner that avoids real risk of prejudice; a group costs application could similarly be made.

30 The relevant principles to granting a stay are:

---

25 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 147-8 [39].
26 *MacDonald,* 623-4 [64]-[66] (n 22).
27 *ANZ*, 220-1 [100] (n 11).

(a) The court will order a stay when the interests of justice require it.[28]

(b) A plaintiff is prima facie entitled to have their civil action tried in the ordinary course and therefore a stay requires justification on proper grounds, with the burden on the applicant for the stay.[29]

(c) The applicant needs to articulate specific matters of prejudice but caution is required in doing so.[30]

(d) A concurrent criminal proceeding is not, in itself, sufficient reason to grant a stay in a civil proceeding – more is required.[31] It must be apparent that the accused is at risk of prejudice in the conduct of its defence in the criminal trial.[32]

(e) That risk must be real,[33] and cannot be assessed on the assumption that a breach of a legal obligation not to disclose confidential information might be committed.[34]

(f) The risk of prejudice to the accused must be weighed against any prejudice from the stay in the civil proceeding.[35]

(g) In appropriate cases, the civil proceeding may be allowed to proceed to a certain stage prior to any stay being granted.[36]

(h) Each case must be judged on its own merits and the list of relevant factors may vary.[37]

---

28 *Zhao*, 58 [36] (n 1).
29 Ibid 59 [39]; *McMahon v Gould* (1982) 7 ACLR 202, 206-7.
30 *Zhao*, 59-60 [42]-[43] (n 1).
31 Ibid 58 [35]; *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2016] FCA 504, [45] (‘***ACCC v CFMEU***’).
32 Ibid.
33 *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission* (2016) 242 FCR 153, 160 [22] (‘***CFMEU v ACCC***’); *Ransley v Commissioner of Taxation* [2016] FCA 778, [22].
34 *Zhao*, 60 [46] (n 1).
35 Ibid 60-1 [47], [50]; *CFMEU v ACCC*, 60 [22] (n 33).
36 *Impiombato* (n 10); *JB Asset Management* (n 16); *MWP Transport Pty Ltd v Michael Thomas Kent* [2018] NSWSC 524.
37 *ACCC v CFMEU*, [51] (n 31).

31 The plaintiff submitted that the cases relied on by the State, *Zhao,*[38] *Lee v The Queen,*[39] *Impiombato,*[40] *JB Asset Management,*[41] have circumstances that differ from, or shed light on, this case in important ways.

(a) In *Zhao*, the stay served to preserve the accused's privilege against self-incrimination in a criminal trial in which he faced a 20 year prison sentence. In addition, the relevant legislation in that case provided that evidence given in the civil proceeding could be lawfully provided to the prosecutor in the criminal proceeding, though not admitted into evidence. No countervailing prejudice was demonstrated in respect of staying the civil proceeding. A non-publication order was not justified in light of the open justice principle, and such an order also could not protect against the prejudice because the prosecution was still entitled to the documents. In this case, the State has no privilege against self-incrimination and no legislative scheme abrogating such privilege and compelling the production of documents to the prosecutor in the criminal trial. No closed hearing of the trial is sought – only selective suppression of certain interlocutory steps.

(b) In *Lee v The Queen*, the High Court held that the wrongful release of evidence obtained by the New South Wales Crime Commission under its coercive powers to the Director of Public Prosecutions (NSW), was a miscarriage of justice. The facts showed that the Commission wrongly perceived itself as an arm of the prosecution in approving the request for the information – the case does not show there is any 'real' or elevated risk of a 'leak' to the prosecution. As the Court found in *Zhao*, this is not a valid basis for assessing prejudice in this case.

(c) In *Impiombato*, a stay of a class action was sought pending the determination of overlapping criminal proceedings in Brazil. There was evident prejudice

38 *Zhao* (n 1).
39 *Lee v The Queen* (n 2).
40 *Impiombato* (n 10).
41 *JB Asset Management* (n 16).

shown to the accused, and no equivalent prejudice to the plaintiff if the stay was granted, although it would delay the class action by over a year.[42] Nevertheless, the court dismissed the application because while the arguments carried force for the actual trial and certain interlocutory steps, a stay could not be justified at that particular point in the proceeding. The preferable approach was to consider whether particular interlocutory steps should be ordered, and the appropriate form of any such orders.[43]

(d) In *JB Asset Management*, the defendants were facing very serious criminal charges with substantial jail terms. The court accepted that if one of the defendants gave evidence at the civil trial, there was a real prospect that their right to a fair criminal trial would be prejudiced.[44] Nevertheless, a blanket stay was not required at that juncture in the proceeding. 'The interests of justice favour a step-by-step consideration of which interlocutory steps should be ordered and the appropriate way in which such steps should proceed'.[45] The Court's approach to the interlocutory steps was fine-grained. The Court held that limited discovery of such documents that would not prejudice the right to a fair criminal trial could be ordered,[46] and that the defendants were required to plead but not to plead positive defences to certain allegations.[47]

32 In this case, the plaintiff submitted that the risk of prejudice in filing a defence can be ameliorated through the mechanism frequently used by courts where civil penalty proceedings overlap with ordinary civil proceedings. This can be achieved through a targeted suppression order in respect of particular paragraphs.

33 This is distinct from the non-publication order that the court declined to make in *Zhao* in order to ameliorate the risk of prejudice in that case. The High Court held that such a mechanism was insufficient in that case because closing the court and suppressing

---

42 *Impiombato,* 331 [149] (n 10).
43 Ibid 304 [11].
44 *JB Asset Management*, [12] (n 16).
45 Ibid [19].
46 Ibid [22].
47 Ibid [24].

the evidence was contrary to the open court principle and the desire of the Commissioner to receive the evidence was not a proper basis for departing from that principle.[48] In addition, the applicable legislation permitted the disclosure of evidence to the prosecution.[49]

34 By contrast, the plaintiff seeks only to suppress certain paragraphs of the defence pending the resolution of the criminal proceeding and prior to trial. In addition, the order would not be rendered inutile by reason of legislation permitting disclosure of the documents to the prosecution. *Zhao* did not limit the discretion given to a trial judge to supress particular evidence for relevant and proper reasons to mitigate prejudice in an imminent criminal trial.[50]

35 In the alternative, the court could dispense with the rules of pleading that effectively require the defendants to articulate positive defences, to the extent complying with the rules would give rise to a real risk of prejudice. In other words, a 'Macdonald' defence,[51] used in cases were civil penalty proceedings are also on foot against a defendant in another civil case. The defence dispenses with the rules of pleading to the extent that compliance with those rules would tend to expose the defendant concerned to the penalty sought against him or her.

36 In this case the court would exercise its power under r 2.04(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) to dispense with those rules to relieve the State and other defendants from compliance with:

(a) Rule 13.07(1) which requires a party to plead specifically any fact or matter which alleges that a claim of the opposite party is not maintainable or which might take the opposite party by surprise; and

(b) Rule 13.10, which relevantly requires particulars to be given where that is necessary to avoid surprise at trial—

48 *Zhao*, 60 [44] (n 1).
49 Ibid 60 [45]-[46].
50 *ACCC v CFMEU*, [96] (n 31).
51 *MacDonald* (n 22).

to the extent compliance would give rise to a real risk of prejudice to the State in the criminal proceeding. The defendants would have the right to amend their defences, once the prosecution in the criminal proceeding had closed its case, to include any positive defences or particulars thereof that would ordinarily be included in their defences from the outset.

37 The plaintiff submitted that, in any event, there are many allegations to which the State and other defendants can plead without derogating from the principle that the prosecution must prove the guilt of an accused person. In this regard, the plaintiff doubted whether admitting the truth of alleged facts would amount to relevant prejudice. An admission indicates that the admitting party is content for the litigation to proceed on the basis that the allegation has been proven, which could be for forensic or costs reasons, and not necessarily an admission in a criminal sense.[52] Also, a review of the publicly available evidence from the Coate Inquiry already reveals what allegations are likely uncontested.

38 As to mitigating any prejudice occasioned by discovery and production of documents, recipients could be restricted to the plaintiff's legal team and experts, and those recipients could undertake to keep the documents strictly confidential. Alternatively, or in addition, discovery and production could be limited to documents that would not prejudice the State in the criminal proceeding. This could include the Coate Inquiry documents, currently publicly available, and the documents already obtained by the prosecution throughs its coercive powers under ss 9 and 11 of OHSA. The State cannot be prejudiced by disclosure to the prosecution of something they already know.[53]

39 Discovery need not await the close of pleadings and it is possible already now to frame certain categories of discovery in this case, where it is clear from the pleadings fights that have already occurred where the parties will join issue.

---

52 *Australian Competition and Consumer Commission v Pratt (No 3)* (2009) 175 FCR 558, 594-5 [73]; *Texxcon Pty Ltd v Austexx Corporation Pty Ltd* [2013] VSC 327, [66].

53 *Williams v TT-Line* [2019] VSC 869, [31(b)].

40 Finally, there is no reason why a group costs order application could not be made, heard and determined. This alone is a reason to refuse the stay application.[54]

41 In balancing any prejudice the State may face by participating in this group proceeding against the prejudice to the plaintiff of a stay, in order to assess where the interests of justice lie, it is important to consider that the State does not face the same peril of conviction as a non-government entity would. The DHHS, if found guilty and ordered to pay a fine, would simply be paying money from one State bank account into another. This is not a case where an accused individual is facing twenty years in prison.

42 Conversely, the prejudice to group members from a stay would be considerable. The group members are some tens of thousands of businesses in Victoria. The plaintiff maintained that these persons experience ongoing financial hardship as a result of the second-wave lockdown and a delay in compensation is prejudicing their financial viability. This includes members that have to pay back rent which was subject to a moratorium during that lockdown, putting them under financial strain, some have been placed in administration or liquidation, and some are at risk of having their business deregistered as a result of losses incurred during the lockdown. Therefore, while any delay in relief is an injustice, the harm is particularly acute in this case.

43 The ongoing delay may also lead to the deterioration in the quality of available witness evidence and other recognised non-financial prejudice.[55]

44 It is also important to bear in mind the contours of the companion principle and whether it actually covers the 'foreclosure of forensic choices' argument that drives the State's stay application. In *Lee v The Queen*, the High Court explained:

> The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof. Recognising this, statute provides that an accused person is not competent to give evidence as a

54 *Impiombato*, 330-1 [147] (n 10).
55 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213-4 [99]-[101].

witness for the prosecution, a protection which cannot be waived.[56]

45 The narrowing of forensic choices is not contemplated in the stay cases as part of the companion principle. The question is what steps would expose the State to the risk of inadvertently assisting the prosecution in the discharge of its onus of proof. While *X7* does make mention of a prejudice of this kind, the cases are fundamentally different. *X7* was not a stay case; it was concerned with statutory construction of s 28 of the *Australian Crime Commission Act 2002* (Cth), and whether an examiner could summon a person to appear for examination and question them about matters relevant to pending criminal charges. The High Court concluded they could not because it would be in effect an abrogation of the privilege against self-incrimination and the Court was unwilling to read a general statutory provision as having this significant effect.

> Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in *any* way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.
>
> …
>
> As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be contempt.[57]

46 In this case the State is still entitled to keep clear its forensic choices in the criminal prosecution, which will not affected by its defence in the group proceeding.

47 Even if it were part of the companion principle that the State's forensic choices should be preserved, the State has not been able to demonstrate with any clarity the mechanism by which its choices are narrowed if the prosecution has no knowledge of what is contained in the defence. It is not clear how the State would be at risk of

---

56 *Lee v The Queen*, 477 [33] (n 2).
57 *X7*, 127 [71], 143 [125] (n 2).

assisting the prosecution to discharge its onus. This is particularly so in circumstances where the State has already made forensic choices for purposes of the Coate Inquiry and by the cross examination of witnesses occurring in the committal hearing.

Principles applying

48 The court has a wide jurisdiction to stay proceedings in the interests of justice,[58] which is an incident of its general power to control its own proceedings.

49 The plaintiff accepted that, as things presently stand, the VWA prosecution of the DHHS must precede the trial of the civil action. The plaintiff also accepted that there was a substantial overlap in the issues arising in each proceeding, and it would not seek a trial of its proceeding prior to the completion of the criminal prosecution.

50 In *Zhao*, the Court of Appeal stated the primary principle applying to be (in the context of the facts of that case) that where the subject matter of forfeiture proceedings was substantially the same as the subject matter of criminal proceedings, unless the forfeiture proceedings were stayed until completion of the criminal proceedings, the Crown could be advantaged in a manner which fundamentally altered its position vis-à-vis the accused and therefore rendered the trial of the criminal proceedings unfair. In so expressing itself, the Court of Appeal followed the High Court in *Lee v The Queen*. An appeal to the High Court in *Zhao* was dismissed.

51 The Court of Appeal identified the prejudice to the accused to be that if the proceedings were not stayed, the prosecution would be informed, in advance of the trial, of his defence because he could not realistically defend the forfeiture proceedings without telegraphing his likely defence. The result would be that the prosecution would be advantaged in a manner which fundamentally alters its position vis-a-vis the accused and rendered the trial unfair.

52 Whether there is prejudice to an accused that may render a criminal trial unfair is a question of fact that must be evaluated with care. In this case, the immediate question

---

58 *Obeid v Commissioner of Taxation* [2017] FCA 1135, [2]; *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562, [53]; *Impiombato*, 325 [122] (n 10).

is whether it is unfair to require the State to decide whether to submit to pre-trial disclosure in the group proceeding by disclosing its likely defence of substantially the same issues as are in issue in the VWA prosecution. This may prejudice its defence in the criminal trial by conferring an advantage on the prosecution by reason of such disclosure assisting it in proof of the guilt of the State. Further, possession of information by the prosecution might unfairly affect the accused's defence of the criminal proceedings even if that information could not be used as evidence against the accused.

53 *Zhao* is to be distinguished on its facts. In that case, the offences and the circumstances relevant to both proceedings were substantially identical and the High Court characterised the risk of prejudice to the accused as plain, noting that a detailed exposition of the specific matters of prejudice was unnecessary because it would make the risk of prejudice a reality by requiring the accused to reveal information about his defence, the very situation which an order for a stay sought to avoid. The High Court also rejected the submission that the forfeiture proceedings be heard in closed court as a protective measure, because the courts should not act contrary to the open justice principle save in exceptional circumstances.

54 However, in *Zhao*, the High Court noted relevantly that the prosecution would suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings. In this case, I must balance the prejudice asserted by the plaintiff in the group proceeding, as a consequence of delay, against the prejudice to the State through compromise of the companion principle in the prosecution, a proposition to be further discussed in due course. Alternative protective measures that fall short of contravening the open justice principle are also relevant to this balancing exercise.

55 Recently, in *ANZ*[59] and again in *Impiombato*,[60] Moshinsky J reviewed the authorities and identified, by summary, the principles applicable to an application to stay a civil proceeding pending the determination of criminal proceedings relating to the same

---

59 *ANZ*, 55-8 [50]-[63] (n 11).

60 *Impiombato*, 325-8 [122]-[136] (n 10). See also *Crespin v Frances* [2016] VSC 277; *JB Asset Management* (n 16).

subject matter. It is convenient to set out (without citations) and adopt from his Honour's summary such of those considerations as are relevant.

(a) As already noted, courts have the power to control their proceedings and to order a stay in an appropriate case, which is one where the interests of justice require such an order.

(b) A plaintiff is prima facie entitled to have his, her or its civil action tried in the ordinary course and a stay therefore requires justification on proper grounds (with the applicant for a stay bearing the burden of demonstrating proper grounds).

(c) It must be apparent that the defendant/applicant (the accused) is at risk of prejudice in defending the criminal trial. The risk of prejudice must be real. A civil proceeding will not be stayed merely because criminal proceedings are pending against the defendant in respect of related allegations.

(d) In evaluating prejudice, the following factors, when present, may be relevant:

    (i) prejudice to the accused's right to silence or privilege against self-incrimination;

    (ii) the possibility of publicity that might reach and influence jurors;

    (iii) It may not be necessary for the applicant for the stay to state the specific matters of prejudice before a stay could be contemplated;

    (iv) Various forms of protective orders may ameliorate prejudice, subject to the possibility that such orders may be inadequate protection of an accused's rights.

(e) Relevant prejudice to a party in the civil proceeding may arise from the existence of the criminal proceeding even in circumstances where there is not a strict identity between the applicant for the stay of the civil proceeding and the criminal accused, for example, where the accused would be a material witness

in the civil proceeding.

(f) The risk of prejudice identified by an applicant for a stay must be weighed against the prejudice that a stay of the civil proceeding would occasion.

(g) The principles relevant to the exercise of the discretion to grant a stay are not different in the case of a proceeding brought by a regulator, from those that apply in the case of a proceeding brought by a private plaintiff.

(h) In an appropriate case, the civil proceeding might proceed to a certain stage, eg setting down for trial, and then be stayed.

(i) Each case must be judged on its own merits; the matters that might individually, or in combination, be relevant to the exercise of the discretion are not rigid or closed; the factors identified in the authorities are not a prescriptive or an exhaustive statement of all of the considerations, or the weight to be attached to them.

Assessment

56 I have not been persuaded that the interests of justice dictate that the proceeding should be presently stayed so as to preclude all further interlocutory steps until the resolution of the VWA prosecution.

57 It was not contended by the State that any prejudice would be suffered if the plaintiff was permitted to apply for a group costs order under s 33ZDA of the *Supreme Court Act 1986* (Vic). The plaintiff submitted that concession was a complete answer to the defendant's present application, and while in a sense that may be correct, the proper analysis is that balancing the relevant considerations to avoid prejudice to the proper administration of justice must be understood in the context of the particular interlocutory steps that are about to occur in the civil proceeding. To do otherwise would necessarily undermine the plaintiff's right to a timely trial of the civil proceeding. Rejection of the application for a stay at this stage of the civil proceeding will not preclude another application in the changed circumstances of the continuing civil proceeding.

58 That said, assessing whether a group costs order ought to be made and if so at what percentage, requires some consideration of matters such as the possibility of a financial return to the plaintiff through resolution of, or a judgment on, its claims, the time frame of the proceeding, the likely costs and expenses to be borne by a law practice in achieving resolution and other considerations. In turn that assessment is informed by understanding the issues to be litigated. In other words, for the court to consider this application, the State should file its defence permitting the group proceeding to progress to the close of pleadings.

59 However, the State submitted that it would not be appropriate or practical to file a defence before the full case against the State in the VWA prosecution is revealed by an indictment and the prosecution opening that will follow on a magistrate's decision to commit the State for trial. It submitted that various forensic choices available to the State in meeting the case against it could be compromised. The substance of its perceived prejudice is compromise of the companion principle as disclosures of forensic choices in the defence of the group proceeding could restrict unfairly its forensic choices in the prosecution when the time comes for those choices to be made.

60 I am not persuaded by this submission. While I accept that access by the prosecution to a full defence filed by the State in the group proceeding may well present some risk of prejudice to the State in its defence of the criminal proceedings, that is not the end of the matter. A critical issue is whether and how the State's disclosures in the group proceeding would come to the attention of the prosecution, not the fact of disclosure, per se, by the State. It does not automatically follow that disclosure of the civil defence to the prosecution will occur or that the State's forensic choices would not otherwise be narrowed by some other mechanism.

61 The State could serve on the plaintiff a proposed defence identifying those parts of it that might be prejudicial to it if disclosed in the VWA prosecution. That contention could be tested and, if established, the court could order that a redacted defence be filed. The issue of access to and use of the unredacted defence could then be determined. The court might then be persuaded that the group proceeding must be

stayed without filing any defence at all, or it might conclude that disclosure of the material on which this application proceeded be managed in a manner that does not reveal any prejudicial disclosures to the prosecutors, while permitting the group proceeding to progress towards a trial, including through alternative dispute resolution processes. The legal practitioners and litigants with access to unredacted material will be subject to the paramount duty to further the administration of justice, the relevant content of which would extend to a duty to the court to keep prejudicial material confidential for the express purpose of ensuring that the information did not come to the attention of the prosecution. So much is made plain by these reasons. It should not be assumed that such a duty would be readily breached. I do not accept that an unacceptable risk of 'leakage' to the prosecution should be factored into the balance.

62 Although the plaintiff could be in possession of information that it could not immediately use, I am satisfied that the plaintiff would still be able to take significant steps towards the trial and would be able to minimise the impact of delay on group members. The precise constraints on the plaintiff are not presently clear, but understanding the issues to be in contest would likely permit it to apply for a group costs order, complete discovery, and mediate. It could mostly proof potential witnesses even if it might later need to return to that task to obtain further, particular information.

63 Such a process would not offend the open justice principle. No determination of substantive rights in the claims would be occurring by these interlocutory processes. Material to be filed in preparation for the hearing or trial of a cause is not part of the ordinary course of the open determination of the proceeding until it is tendered, or relied on, in open court.[61] As French CJ observed in *Hogan v Hinch*,[62] the open court principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny and

---

61 See, eg, *Open Courts Act 2013* (Vic) s 7(d)(iii), which provides that the Act does not limit or otherwise affect the making of an order or decision by a court or tribunal that prohibits or restricts access to a court or tribunal file.

62 243 CLR 506.

maintaining public confidence in the courts. The principle is not absolute.[63] The character of the proceedings and the nature of the function conferred upon the court may qualify the application of the open-court principle. The exceptional exercise of any power to restrict the application of the open justice principle is conditioned by the need to secure the proper administration of justice.

64 A unique feature of group proceedings is the need to inform and communicate with group members, particularly in respect of opting out, but again the nature and content of disclosure to group members during that process is best managed when the time for it has arrived.

65 The State submitted that prejudice can arise through the derivative use of information disclosed in a defence or through discovery when enquiries are made of key witnesses by an innocent communication by the plaintiff when seeking a statement from such witnesses about an issue raised by the defence that the State is otherwise entitled, by the application of the companion principle, not to disclose to the prosecution. This glib submission requires a more granular examination, such as might occur on an application to redact the State's defence in the group proceeding. It is not readily apparent how the plaintiff might unwittingly communicate such information when subject to an obligation to maintain the confidentiality of redacted parts of the defence.

66 I am also not persuaded that it is desirable in the interests of the administration of justice to stay the process of discovery. There are three principal reasons. First, the plaintiff already has substantial discovery by reason of documents that were produced by the State to the Coate Inquiry. Secondly, the State is willing to consent to produce documents obtained by the prosecution pursuant to OHSA processes. Thirdly, beyond that production it is unclear what further documents might be relevant, particularly in the absence of pleadings, and how their production might be prejudicial to the State in its defence of the prosecution. Again, rather than proceeding on the assumption that prejudice is obvious, I consider it desirable that remaining categories of undisclosed documents be assessed on this issue of prejudice to determine whether,

63 Ibid 530 [20].

when that stage of the proceeding is reached, a stay will be appropriate.

67 There is a more fundamental issue underlying the State's contentions, making it desirable to say more about the concept of prejudice in this case. The State puts its claim of prejudice on breach of the principle that a person charged with a crime cannot be compelled to assist in the discharge of the prosecution's onus of proof. However, the question of whether the companion principle applies where an agency of the State, the VWA, is prosecuting another arm of the State (DHHS) was not specifically addressed either by reference to authority or first principles.

68 The State submitted that bodies corporate do not enjoy the privilege against self-incrimination. That is what s 187 of the *Evidence Act 2008* (Vic) says. The issue of whether the DHHS is a body corporate within the meaning of that section was not addressed and may turn on the proper construction of other legislation. Section 6 of OHSA provides that the Crown in right of the State of Victoria is a body corporate for the purposes of that Act. Without deciding this issue, I prefer the conclusion that the State does not enjoy the privilege.

69 However, the State principally relied, not on any privilege against self-incrimination but on the companion principle, contending that this principle extends beyond the privilege and has been held to apply to corporations. It can immediately be noted that the State is not a corporation. This submission was based on observations of the New South Wales Court of Criminal Appeal in *NSW Food Authority v Nutricia Australia Pty Ltd*,[64] where, Spiegelman CJ stated:

> The accusatory system is, in my opinion, a fundamental element of our traditional method of determining criminal guilt. A public authority which formally alleges criminal conduct by a person must prove it. As recognised in the reasons of Mason CJ and Toohey J set out at [67] and [68] above and the observations of Deane, Dawson and Gaudron JJ set out at [153] above, the accusatory system is not co-extensive with the privilege against self-incrimination. It is derived, as many other aspects of our criminal procedure are derived, from the recognition of the imbalance of power between the State and its citizens. That imbalance extends to corporations.

70 It is a unique and significant feature of the VWA prosecution that both the prosecutor

64 *Nutricia*, 490 [155] (n 4).

and the defendant are organs of the State. It is not at all clear how the State contends that a principle founded on recognition of the imbalance of power between the State and its citizens, which extends to corporate citizens, is applicable in a contest between different organs of the State. This is a substantive conceptual distinction between the present case and the circumstances discussed in the authorities upon which the State relies for the principles it seeks to invoke as the basis for its alleged prejudice, bringing into question the foundational issue of whether the State has any entitlement to avoid what it describes as prejudice through the loss of forensic choices in the defence of the criminal proceeding by making forensic choices in the defence of the civil proceeding.

71 This issue was not specifically addressed by the parties in submissions and I am not aware of any authorities where the State has been found to be entitled to the protection of these principles that so clearly relate to protecting citizens from the State. I can foresee conceptual difficulties in applying these protections where the State is the defendant in a statutory criminal prosecution and I can foresee a path of reasoning that could extend the companion principle to this situation. The issue may need to be the subject of further argument, but at present I do not need to form a concluded view, because, assuming for present purposes that the State would be prejudiced in the manner it contends for, other considerations lead me to conclude that the interests of justice do not require the immediate stay of the group proceeding.

72 In any event, there is a distinction between prejudice through disclosure of information that the State would not be required to disclose to the prosecution, occurring through the continued progress of the group proceeding towards trial, and prejudice through constriction of forensic choices. The former might constrain the protections of the companion principle. The other form of prejudice for which the State contended does not necessarily flow from the foundational principle that the prosecution bears and must discharge unaided by the accused the burden of proof of the charges.

73 In this regard, the State relied on *X7*, distinguishable, as the plaintiff submitted, because it concerned statutory interpretation and was not a stay application. The High

Court found that being questioned by an examiner from the Australian Crime Commission about pending charges faced by the examinee, would constrain the forensic choices of a natural person facing a significant custodial sentence. The Commission conducts these compulsory examinations for the purposes of special operations or investigations into organised crime.[65] It is far from clear that compelling an organ of State, that faces only a pecuniary penalty payable to another organ of State, to file a defence or make discovery in a major, and complex, group proceeding, which defence/documents are protected from any disclosure to the prosecution (directly or indirectly) by protective orders, would constitute relevant prejudice for the purposes of a stay application.

74 In any event, I am satisfied that there are interlocutory steps that can be taken in a managed way that will not cause the State to inadvertently assist the prosecution in the discharge of its burden of proof.

75 I reject the submission that simply because there is a very substantial overlap in the issues raised in each proceeding, prejudice is clear or obvious and indeed may be exacerbated if articulated in great detail. Further, as the plaintiff submitted, the State does not face the same peril of conviction as a non-government entity would. It will not be jailed and any financial penalty moves funds from one State account to another. Any financial penalty in the criminal prosecution may be insignificant compared with its damages exposure should the plaintiff establish its claims in the group proceeding. In the context of disclosure that has occurred in the Coate Inquiry and is occurring through the committal and otherwise, it is not clear what forensic choice may be constrained and how, in order to compare the incommensurable prejudice claimed by each party. However, through protective orders, a granular analysis of the possible prejudice to the State from future interlocutory steps in the group proceeding, assuming it is entitled to the protections of the companion principle, can be evaluated

---

65 The 'primacy' afforded to criminal proceedings, and the effect of the accused disclosing information prior to a criminal trial on the 'accusatorial judicial process' was accepted by the Court of Appeal in *Zhao (VSCA)* 197-8 [26]-[27] (n 21). However, again this involved a natural person facing a serious prison term.

without causing the very consequences sought to be avoided.

76 On the other hand, the prejudice to the plaintiff and group members from a stay of the group proceeding would be considerable and possibly never adequately remedied by delayed receipt of compensation. It is estimated that the group comprises some tens of thousands of businesses in Victoria and that these businesses experience ongoing financial hardship in some cases threatening their financial viability. The State submitted that delay would be minimal because the plaintiff would progressively be substantially informed for the civil trial by the progress of the prosecution. The proposition was that by the conclusion of the prosecution the plaintiff would have all it needed to move swiftly to a trial.

77 I do not accept the State's submission in this respect. It actually envisages that it would only be at the conclusion of the prosecution that the State would file a defence and the plaintiff would then learn precisely what the issues were at trial. It might be the case that discovery would effectively be complete and what witnesses could say would be clear, but the proceeding would not have been to mediation, for one thing. Further, the overlap in the issues appears to be predominately on the question of breach and the plaintiff must establish its case on all of the elements of its causes of action. I am satisfied that a stay must occasion considerable delay. Delay in the resolution of the group proceeding will constitute prejudice that is more inimical to the proper administration of justice than the apparent restriction of the operation of the companion principle to a criminal prosecution of the State by the State .

78 For these reasons, I consider the present application to be an exceptional case where the specific matters of prejudice must be articulated, particularly because it appears to be open to the court to manage the preparation of the group proceeding for trial in a manner that would ameliorate any genuine prejudice to the State in the criminal proceeding.

Conclusion

79 Accordingly, the application for a stay of the group proceeding is refused. I will, however, give directions for case management of further interlocutory steps in

accordance with the processes discussed in these reasons. The parties are invited to confer and submit an appropriate minute reflecting these reasons.

CERTIFICATE

I certify that this and the 29 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 3 February 2023.

DATED this 3 February 2023.

Associate

SCHEDULE OF PARTIES

S ECI 2020 03402

BETWEEN:

5 BOROUGHS NY PTY LTD (ACN 632 508 304)	Plaintiff
-and-	
STATE OF VICTORIA	First Defendant
THE HONOURABLE JENNY MIKAKOS (IN HER CAPACITY AS THE FORMER MINISTER FOR HEALTH AND MINISTER FOR THE COORDINATION OF HEALTH AND HUMAN SERVICES: COVID-19)	Second Defendant
THE HONOURABLE MARTIN PAKULA (IN HIS CAPACITY AS THE FORMER MINISTER FOR THE COORDINATION OF JOBS, PRECINCTS AND REGIONS: COVID-19)	Third Defendant
KYM LEE-ANNE PEAKE (IN HER CAPACITY AS THE FORMER SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES)	Fourth Defendant
SIMON GRANT PHEMISTER (IN HIS CAPACITY AS THE SECRETARY, DEPARTMENT OF JOBS, PRECINCTS AND REGIONS)	Fifth Defendant