An **essay** concerning:

Section 52 of the **Public and Environmental Health Act** of the Northern Territory;

and

Directions No. 55 (2021) made by the Chief Health Officer appointed under that Act.

Subject:

Is the NT's Vaccine Mandate Imposed By Directions No. 55 Valid Law?

The issue that this essay addresses is the question of whether paragraphs 6, 7 and 10 of Directions No. 55 made by the Chief Health Officer (the "CHO") of the Northern Territory ("NT") constitute valid laws of the NT?

My **answer** is:

> "**No**. Those provisions are **not valid laws** of the Northern Territory.
>
> "Expressed in short legal language, my basis for that viewpoint, is that these putative laws are not valid laws because, as subordinate legislation, their content is ultra vires the power given by the statute that enables the making of them.
>
> "For those who are unfamiliar with the meaning of the expression 'ultra vires' I will repeat that proposition in more basic language.
>
> "Paragraphs 6, 7 and 10 contain provisions that are beyond the scope of the delegation of power that was given to the CHO by the legislature of the NT in section 52 of the Public and Environmental Health Act ("the PEH Act") of the NT. Therefore, they are invalid and of no effect."

I will explain my basis for this conclusion in the subsequent content of this essay. Before doing so, I extend my apologies to members of the legal profession for the ponderous way in which I have expressed my reasoning. I offer the explanation that the bulk of what follows has been crafted as an essay (in contrast to the traditional lawyer's opinion) in the hope that it can be read and understood by non-members of the profession. That aim is motivated by the belief that our community may soon be teetering on the

edge of a precipice of despair, and I consider it is time, for those of us in a position to do so, to make efforts to ensure that the public is better informed.

The "Mandate"

By paragraphs 6 and 7 of the NT CHO's Directions No.55, workers in a range of specified industries, who have not received a completed course of doses of an approved COVID-19 vaccine, are prohibited from attending their normal workplace. Paragraph 10 of those Directions imposes a reciprocal obligation on the employer of a worker to ensure that the worker does not attend the workplace. By s.56 of the PEH Act a liability for 400 penalty units is imposed on any offender who contravenes a direction made by the CHO.

The combined effect of these 4 provisions is customarily referred to as the "Vaccine Mandate".

Acceptance as Settled Law

By the normalisation of that phrase the public, the media, and (very importantly) the leadership of industry have come to regard as settled law the proposition that affected workers are obliged to become vaccinated, and their employers must not permit the affected workers to continue to perform their employment duties in the workplace, unless those workers comply.

The assertion "It is the law!" is commonly heard in the discourse between employers and employees. Politicians and journalists regularly utter similar phrases with an order of confidence similar to that which would be expected of an evangelist quoting the 10 Commandments!

In my view, with immeasurably less justification!

Law by Executive Fiat

The purpose of this essay is to expound a view on matters of law. Regrettably any useful analysis of the validity of a law made by the fiat (command) of a member, or servant, of the executive government must necessarily involve consideration of matters that some observers may consider to be political. Such matters are only raised in this essay as a means of drawing the reader's attention to the fact that a law made by a Minister (a member of the executive government) or by a public servant (a servant of the executive government; usually one that holds a statutory office) is exceptional and subject to stringent and specific legal constraints.

Elected Legislatures

A better description of such matters would be constitutional (rather than political). In the contemporary common law world (essentially anywhere that English is an official language), the making of laws for the peace order and good government of society is the exclusive province of elected legislatures. Our common law system has a cultural abhorrence of the making of laws by individual people. This quite natural hostility evolved as a response to the edicts of hereditary monarchs.

The decrees of the old kings were sometimes benign, sometimes oppressive but were always undemocratic. Subsequently the era of powerful monarchs waned but the legal system did not relax. over the centuries various candidates emerged with the ambition to replace the kings. Typically, the aspirants to individual undemocratic lawmaking powers were Ministers of State but certain high officers of what is now called the public service also featured in the occasional drift to one man rule.

Common Law Response

From very early times, our common law set its face against any form of rule by the autocratic decree of an individual person. A range of legal doctrines were evolved to provide a suite of techniques by which such undemocratic activity could be legally controlled, restrained and in some cases prevented. In recent centuries, the public statutes of the various English-speaking democracies have also introduced measures to regulate one-person-rule.

It would not be helpful if I were to articulate a full table of all of the possible constraints that our common law, and statutes, have devised to make one-person-rule untenable. That would be unnecessary. To answer the question upon which this essay focuses, one need only consider one of the many relevant principles. That is the doctrine of ultra vires in its application to delegated legislation.

Delegated Legislation

The heart of an important common law doctrine in respect of one-person-rule is that:

- Making law is the exclusive province of the duly constituted legislature of the jurisdiction ("the legislature");
- It will **always** be **unlawful** and **invalid** for a single individual, whether Minister or public official, to purport to make law;
- **Unless** that individual person's power to make law is expressly, and specifically, **authorised by** a **delegation** of power **from** the **legislature** to the relevant Minister (or officer);

- Also, **no delegation** may be made **except by** the legislature passing a properly constituted **Act containing the delegation** (referred to as the "enabling Act" or sometimes "the parent legislation");

- Any **delegation** contained in an enabling act **must not be general**;

- A **delegation** will be **invalid unless** it is **specific** and restricted to **"in-fill" law** designed to **give effect to** the **enabling act** (or make it more workable);

- The **delegated power** will **always** be construed as **limited to the scope** of the express **words of** the **delegation** as contained in the enabling act;

Any example of a subordinate lawmaking power being exercised in a way which offends against the last stated element of the doctrine – an exercise of delegated power that exceeds the scope of the words of the delegation – is said to be ultra vires (meaning that it is beyond power).

Role of Legislatures

It is in the name! "Legislature" means a body that makes laws; the name comes from the Latin – leges - meaning law. Where a minister or public official legitimately makes a law under a delegation from the legislature that is classified as subordinate legislation. In a crude use of language, we might say that the description "subordinate legislation" connotes the sense that the relevant Minister or public official is under the orders of the legislature insofar as regards any power to make law on the basis of the delegation.

Here, my discourse risks giving offence by appearing to postulate a political viewpoint. I suggest that a fairer classification of what I wish to say is that it will be a case of speaking of constitutional matters. The point that I wish to discuss is that laws are reasonably easy to pass. A majority of like-minded members of a legislature (usually called a party) form a government. A committee of the government forms a cabinet. The cabinet acquires a dual role; i.e., its members remain as legislators in their capacity as members of the legislature, but they also perform the non-lawmaking role of the executive government of the jurisdiction.

The cabinet segregates itself into Ministers in charge of the various ministries of government. When a Minister discerns that there is outdated, unsatisfactory or no sufficient law suitable to regulate the affairs of his or her portfolio, the minister proposes to cabinet that the governing party introduce into the legislature a proposed new law to cover the situation. If the cabinet supports the proposal, it commends the proposed new law to the governing party. If supported by the governing party, the proposed new law is introduced into the legislature for approval by a majority of the legislators. Sometimes such proposals pass into law; on other occasions

the legislature, by majority vote, rejects the proposal and it does not become law.

That is the way that law is made in the common law world. Where the legislature can be classified as fully elected, the process is called democracy. The law is not made by Ministers or public officials unless the legislature makes a delegation to them in accordance with the principles of the doctrine set out above.

I raise this question:

> "Why didn't the government of the NT introduce a law into the Legislative Assembly of the NT in usual manner to establish the legal regime by which it desired to address the circumstances of our community suffering the risk of an unwanted infectious disease? Wouldn't it have been much simpler to do so? Troublesome lawyers cannot normally question a regular enactment of the legislature!"

The question, and the possible answers to it, raise some interesting issues!

What Are CHO Directions?

The CHO's subordinate laws which are commonly called "the vaccination mandate" are an example of one-person-rule by a public official. The CHO is no more than a servant of the executive government. Under our legal and constitutional system, he does not possess any inherent lawmaking authority. However, he does have a statutory delegation to that end by force of s.52 of the PEH Act. A study of that delegation confirms that the legislature has limited the delegated authority of the CHO to a period when a public health emergency has been declared.

If no public health emergency is declared, the CHO has no authority to make any laws under the delegation. Any directions that he purported to make would be a nullity! If, however, there is a declared public health emergency, then the CHO can make directions which have the force of subordinate law provided they are valid. Validity will depend on a number of factors, but for the purposes of this essay, a critical factor will be compliance with the doctrine of ultra vires. That is, the directions must not intrude into an area of societal activity that is not encompassed in the terms of the delegation as set out in s.52.

Meaning of Emergency

Prior to progressing that examination, it is desirable to place the concept of a "public health emergency" under scrutiny. On certain predications, s.48 of the PEH Act empowers the NT Minister for Health to declare a public health emergency. It is probably safe to assume that the predications have been satisfied but I do not propose to examine the issue as it is unlikely to

be relevant to this discussion. The original declaration reveals that the Minister specified the existence of

> "a public health emergency....arising out of the serious public health risk from Novel coronavirus (COVID-19)".

In the numerous renewals of that declaration (effectively every 90 days) the formula used has been reduced to the phrase "the public health emergency" with a reference back to the original declaration. Hence it is safe to conclude that at the time at which the CHO made the Directions No. 55 there apparently was a "public health emergency" for the purposes of the PEH Act.

It is nonetheless useful to ask, what is an "emergency"? Turning again to the Oxford English Dictionary, we find the meaning of that word is relevantly defined as:

> "A **serious**, **unexpected**, and potentially **dangerous situation** requiring immediate action."

That ordinary meaning of the word "emergency" gives one pause for thought. At the risk of seeming unconcerned regarding the medical security of my fellow citizens, I raise this, possibly inconvenient, question:

> "How can any set of circumstances be unexpected if they have been ongoing since February 2020 – almost two years prior to the making of the mandate directions?"

In law, there is an answer; which is:

> "Because the minister has said so; and she has the power to say so by force of s.48 of the PEH Act!"

Sociopolitical Answer

The legal answer to the riddle of how circumstances which are not a surprise, and are fully expected, can be classified as an emergency is postulated in the previous paragraph (an answer worthy of a character from a Lewis Carrol novel). However, I suggest that there is another answer that will repay examination. That is, the sociopolitical answer, which is:

> **Sociopolitical Answer**
>
> The NT's executive government believes it should have exclusive control over the Covid pandemic response. For that reason, it is not willing to trust the normal democratic process and ask the legislature to enact laws of the nature and content that the executive government endorses as the measures necessary to cope with the pandemic situation. The executive

> government is afraid that the full elected Legislative Assembly of the NT would not pass that legislation.

Crudely expressed, the NT cabinet wants a Vaccine Mandate, with the force of law, but doesn't have the guts to put it to a vote of the Assembly elected by the people of the Northern Territory for the purposes of making law. They know that they would lose. So, they are attempting to exploit the scope for one-person-rule offered by the PEH Act emergency powers. There is no other logical explanation.

It is quite untenable to suggest that the urgency of the problem demands an urgent executive action. The NT cabinet has had almost 24 months to react in a proper constitutional manner. The NT's situation is similar to that which prevails in many jurisdictions around the world. For some reason, regardless of having adequate time to do so, the preponderance of western governments obdurately refuse to address the problems of the pandemic in a democratic manner.

A social commentator in the United States recently made some observations regarding one the Biden government's vaccine mandates which it attempted to impose on approximately 80,000,000 workers by the use of delegated legislation in the form of work safety rules made by the US Occupational Health and Safety Agency (the equivalent of an Australian Work Health agency). The US Supreme Court declared that delegated legislation to be invalid. Discussing the case, the commentator offered his theory as to why the Biden administration had relied on delegated legislation rather than simply approaching United States Congress for the passage of a proposed law.

The commentator said words to this effect:

> "If elected legislatures were asked to enact legislation of this kind, they would refuse."

Significance of Sociopolitical Answer

The situation is no different in the NT. There has been ample time for the NT cabinet to formulate a recommended law for our elected legislators to consider and enact on our behalf. However, the executive government of the NT has resolutely failed to do so! The burning question is, why? There are three choices of possible explanation. The answer can only be one, or other, or a combination, of incompetence, megalomania or the belief that the NT's Legislative Assembly would not agree to pass laws of the type which the executive government desires to have in force.

The most charitable explanation, and the choice that I would make, is the third possible answer. The executive government does not trust the legislative arm of our jurisdiction with an issue so complex. Some readers may shrug off the significance of this observation and the previous

paragraphs. Indeed, some critics may be hostile and suggest that I am arguing a political point of view.

Emotional Issues

I readily acknowledge that my choice of explanation, or any sociopolitical explanation, has no bearing on the legal question of whether the NT's vaccine mandate is invalid by reason of it being ultra vires. However, in reply to any critic, I would say that my motive for raising these matters is to remove the influence of emotion from the analysis. My wish is to make clear that there is ample scope, and there remains quite sufficient time, to protect the NT community from the medical risks of the pandemic by the enactment of considered and adequately supported legislation introduced into the Legislative Assembly, debated in the normal matter and passed into law if approved by a majority in that institution.

Any finding of invalidity of the mandate, as expressed in the Directions, will not leave the public unprotected. There is no legitimate basis on which to harbour an emotional fear of such an outcome! That outcome will simply require the members of the executive government of the NT to revert to their proper role which is not lawmaking! Their proper role is, the execution and administration of the laws of the NT duly enacted by its Legislative Assembly!

The time is now appropriate for me to cease introductory remarks and present my analysis of the legal merits, or otherwise, of the putative Vaccine Mandate that is said to be in force in the NT. I will begin that process by discussing an actual example which strongly suggests that there is a general acceptance of the so-called Vaccination Mandate as being valid and binding law! I will put a case that the public has been hoodwinked.

Focal Example

For the purposes of illustration, I will refer to the facts of an incident with which I am personally familiar. On 16 November 2021, an employer wrote to one of its truck drivers – who is now a Fair Work Commission un-fair dismissal claimant, in these terms:

> "Lawful and reasonable direction by [employer name redacted].
>
> "12. You are hereby directed to provide to your [employer name redacted] Leader by 12:00 noon on Monday, 22 November 2021:
>
> "(a) evidence that you have received your first COVID-19 vaccine dose; and
>
> "(b) evidence that you have a scheduled appointment to receive your second COVID-19 vaccine dose; or

> "(c) certification from a medical practitioner of a medical exemption that you are unable to have a dose, or further dose, of a COVID-19 vaccine due to a medical contraindication or an acute medical illness.....
>
> "14. A failure to comply with the direction in paragraph 12 by the required deadline, will constitute a failure to comply with a lawful and reasonable direction and this will be regarded as conduct warranting disciplinary action which may include the termination of your employment.
>
> "15. In the alternative, if you remain unable to attend the workplace to perform your job, [employer name redacted] may have no option other than to terminate your employment as it cannot continue to place you on unpaid leave indefinitely."

Assumption of Legal Force

The heading of the employer's paragraph 12 strongly suggests that the employer considers its instruction to be no more, and no less, than a lawful instruction. Subsequently, in its notice of termination of employment, the employer put that question beyond debate. It's letter of 26 November 2021 contains the following critical text which unambiguously clarifies the employer's belief. It reads:

> "This decision has been made because, despite repeated requests and sufficient time in which to comply, **you have failed to comply** with [employer name redacted]'s **lawful** and reasonable **direction** and because, due to your unvaccinated status, for the reasons previously explained to you, you are unable to attend for work and perform your job."

These examples, raise the question of on what basis did the employer consider the direction to be lawful?

There are only two (2) possible bases upon which an instruction given by an employer can be legitimately classified as "lawful". These are:

1. The **primary**, and most obvious, **basis** upon which an employer might classify an instruction as being "lawful" is the situation where the **employment contract**, or terms implied into it by force of general common law, confer on the employer an entitlement to give such a direction;

2. The **second** possible **basis** on which an employer might correctly classify an instruction as being "lawful" can only be a provision of a valid **law** which expressly applies to the particular employment

relationship, or necessarily applies to all, or an identified class, of employment relationships by reason of its generality.

In this analysis, when I use that expression "law", I intend to refer to laws made by, or with the authority of, the relevant legislature. The phrase "with the authority of" the legislature refers to any subsidiary laws (by whatever name including the name "Directions") that may be made by a Minister or a government servant (commonly called an officer) under a power delegated to them by force of a valid law of the relevant legislature.

When specifically speaking of these subsidiary laws made pursuant to delegated power, I will use the expression "subordinate legislation". That a technical phrase and I will utilize it to highlight, and reinforce, the reality that Ministers and other officers in government service do not possess any organic power to make law. They can only make a law by the methods prescribed by an authorisation given by a law passed by the legislature and within the terms relating to subject matter which has been specified in that law.

Contract Does Not Cover It

Nothing in the relevant employee's written employment contract, nor the applicable enterprise bargaining agreement, empowered the employer to give any such an instruction. It is true that the common law implies certain unwritten terms into employment contracts. However, it would be an ill informed and reckless advocate who put forward an argument to the effect that common law implies into an employment contract a right given to an employer to direct an employee as to his or her private medical affairs! To put such an argument invites the recognition of its absurdity!

Inevitably therefore one must conclude that the employee's employment contract would not justify the employer's contention that its direction was "lawful". The preponderance of employment relationships throughout the NT community would be similar. Of course, there will be exceptions where it will be possible to say that the employment contract does justify the employer's intervention in the medical affairs of the employee; but such would be very special cases.

Mistake About Law?

No disrespect to the employer is intended by my remarks in the previous paragraphs. A typical employer might be forgiven for succumbing to the blizzards of propaganda constantly expounded in public by political and industry leaders, with the supine concurrence of an incurious media, to the effect that the mandates are law. Indeed, scrutiny of the correspondence quoted above would strongly suggest that the text used was written by, or at the very least prepared on the detailed advice of, a qualified legal advisor.

Confusion of Legal Advice

Any such legal advisor may have advised on the law of some other Australian jurisdiction rather than that of the Northern Territory. I am unaware of the content of the statute law of the state of Victoria but based on its reputation, I do not find it difficult to imagine that a Victorian law, whether an act of Parliament or subordinate legislation, may perhaps have been correctly reported in those terms with the result that the employer confused that advice as being applicable to all jurisdictions in Australia.

Employer Believed Mandate Was Law

Whatever may be the explanation, it is inescapable that employer's basis for the instruction is, and remains, an assumption that the "mandate" is the law. How else would the employer justify the use of the expression "lawful and reasonable direction"?

No National Mandate

This essay relates exclusively to the law of the Northern Territory. The reader of this essay must dismiss the influences of all jurisdictions other than the Northern Territory. That is proper because there is no national law imposing any vaccination mandate. There cannot be such a national law as the Federal Parliament has no jurisdiction over general health issues. Except for international quarantine, and certain funding measures, constitutionally health is a state matter, and the Commonwealth does not pretend otherwise. A review of Commonwealth law will make clear that there is no such thing as a national mandate notwithstanding the terminology that has become common.

The laws of the other jurisdictions of Australian are similarly not relevant to this essay. Each jurisdiction in the Australian federation has the duty, and privilege, of establishing its own laws with respect to health. The law adopted by, for example, the state of Victoria in respect of mandates has no operation in the Northern Territory. The same position applies to the law of each of the other Australian jurisdictions.

NT Statute Law?

It follows, from the foregoing, that the focus of this essay must be an examination of NT statute law and its subordinate legislation. The scope of NT legislation to be reviewed is simplified by accepting the cue provided by the introductory paragraph of Directions No. 55 in which the Chief Health Officer asserts that in making Directions No.55 he has acted by force of s.52 of the PEH Act.

The CHO expressly states:

> "under section 52 of the Public and Environmental Health Act 2011 (the Act), [that he considers it to be] necessary, appropriate or desirable to take action to alleviate the public health emergency in the Territory, declared by instrument entitled 'Declaration of Public Health Emergency', dated 18 March 2020, (the public health emergency declaration), by making the following directions"
>
> [after which 18 paragraphs follow accompanied by an interpretation schedule of 2 pages]

In those circumstances, the Northern Territory laws that must be examined to answer the question of whether paragraphs 6, 7 and 10 of Directions No. 55 are valid laws, may be safely restricted to the content of the PEH Act and the text of paragraphs 6, 7 and 10. The CHO has expressly acknowledged that no other Northern Territory law is relevant.

As the CHO has acted under the power conferred upon him by **s.52** of the PEH Act, it is necessary and appropriate to study the contents of that section. It reads as follows:

> **52 CHO's emergency powers**
>
> (1) If an emergency declaration is in force, the CHO may take the actions (including giving oral or written directions) the CHO considers necessary, appropriate or desirable to alleviate the public health emergency stated in the declaration.
>
> (2) The actions the CHO may take include any of the following:
>
> > (a) reducing, removing or destroying the public health risk causing or threatening to cause the emergency;
> >
> > (b) issuing warnings in relation to the emergency;
> >
> > (c) segregating or isolating persons in an area or at a particular place;
> >
> > (d) evacuating persons from an area or a particular place;
> >
> > (e) preventing persons accessing or entering into an area or a particular place;
> >
> > (f) controlling the movement of vehicles within an area.
>
> (3) The directions the CHO may give include directions requiring any of the following:

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> (a) a person to undergo a medical examination of a general nature, or of a stated kind, immediately or within the period stated;
>
> (b) a stated person to remain in, or move to or from, a stated area or place immediately or within a stated period;
>
> (c) a stated thing to be seized or destroyed;
>
> (d) a stated person to provide oral or written information relating to the emergency.

Review of ss.52(1)

ss.52(1) constitutes the legislature's nomination of the CHO as an officer to be delegated to make subordinate legislation in certain circumstances. That is, the CHO is named as a delegate of the legislature to make laws. If he does so, those laws are to be called directions. Such directions, if valid, are to have the force of law by virtue of other provisions in PEH Act. It is unnecessary to review those provisions.

The first qualifying circumstance for the making of valid directions is the existence of a public health emergency declared under the legislation. That is unarguable. These introductory words – "If an emergency declaration is in force" – in the first line of ss.52(1) are clear authority for that proposition. Moreover that requirement has been satisfied.

Note however the CHO's delegated **powers** are **limited to** that which the **CHO**

"**considers necessary**, appropriate or desirable **to alleviate**"

that particular public **health emergency**. It is not an unlimited power to make social rules with the force of law regarding all and any classes of activity that the CHO may wish to regulate. The power is limited to that which is directed at alleviating the particular public health emergency. That limitation calls for an examination of the meaning of the word "alleviate" (the meaning of "emergency" is discussed elsewhere).

Meaning of Alleviate

The Oxford English dictionary defines the word "alleviate" as being a verb meaning

"**make** (pain or difficulty) **less severe**".

The present context therefore suggests that the word "alleviate" as used in ss.52(1) refers to making the emergency less severe. I have already discussed the meaning of "emergency" i.e., a "serious, unexpected, and potentially dangerous situation requiring immediate action". For the moment, I won't make any further analysis of how these two words fit the puzzle that is under consideration except in respect of this point. If there is no emergency, then nothing can alleviate it. If there is nothing to alleviate, there is no predication upon which the delegated power can be justified and therefore it may not be exercised.

In the next few paragraphs, I pose the question "Has the emergency disappeared?".

Possible Challenge

I feel the need to offer some observations about the point of whether the emergency has disappeared because I regard it as a possible avenue for other analysts who may want to mount an argument which is different to my ultra vires analysis. Possibly there may be scope for a judicial challenge of the current extended version of the original declaration of emergency. An argument might be crafted along the lines that the current extension of the original declared emergency ought to be set aside for the reason that at the time of the extension renewal, the NT community was already no less than 15 months into the pandemic.

Hence, it might be argued, at the time of the most recent extension, there was no unexpected situation. If that argument were to be successful further reliance on the CHO's emergency powers would not be possible. Then, it would be essential for the executive government to submit a proposed replacement law to the legislature for consideration.

Elastic Emergencies

When scrutinising the legislative concept of an emergency, one cannot help but be cognisant of how elastic the concept has become under the current executive government. As recently as when the original emergency was declared by proclamation made on 18 March 2020, the duration of the emergency (fixed by s.50 in its then form) was limited to 5 days. That fact is acknowledged in the proclamation! However by force of some amendment that I have not yet traced, it appears that subsequently s.50 was amended to permit the duration of an emergency to be fixed for 90 days [see s.50(1)(a) in its current form].

Since that amendment the executive government has, on 5 occasions, extended the emergency by 90 days. That measure is authorised by a provision in the PEH Act which permits extensions. That is as may be but any reasonable person would think that a set of circumstances that have lasted for a length of time in the order of 450 days (5 x 90) could not be truly unexpected. I speculate that perhaps this feature of the current

emergency declaration may have the result that the existing circumstances do not conform to the true judicial meaning of an emergency. If so, perhaps the time is ripe for a court to intervene and declare that the declared emergency no longer exists for the purposes of the PEH Act!

I will not develop that argument any further. I have expounded it merely to stimulate the possibility of some other analysts may pursuing it.

Can ss.52(1) Stand Alone?

I now turn to a detailed examination of whether paragraphs 6, 7 and 10 of Directions No.55 are valid, and pose the question:

> Do the terms of paragraphs 6, 7 and 10 fall within the limits imposed by s.52 on the CHO's delegated power to make law?

The starting point must be the foundation of the CHO's power which is ss.52(1). That subsection has already been shortly discussed but further analysis is required. To recapitulate, it authorises the CHO to take actions (including making directions) that he or she considers necessary, appropriate or desirable to alleviate a public health emergency. If ss.52(1) were all that appeared in the legislation, a court would bound to rule that the generality of the delegation impugned its validity!

ss.52(1) is Too General

ss.52(1) would be open to the criticism that it was an unlimited delegation. The common law does not permit a legislature to gift its powers to some other person or entity without limitation by definition. An opponent in that debate may assert that ss.52(1) must not be construed in isolation. An advocate of the validity of ss.52(1) will point to the fact that ss.52(2) and ss.52(3) contain additional provisions that in fact deal with the detail of what the CHO may do. Therefore, the contra argument will be, when those subsections are taken into account, ss.52(1) cannot be said to be so general as to make an unlawful delegation.

Very neat; but the proponents of the contra argument may come to regret enlisting the aid of ss.52(2) and ss.52(3). To do so impliedly admits that, if ss.52(1) stands alone, it does not achieve a permitted delegation. It is not specific enough! On its own the delegation which ss.52(1) purports to make is of such broad scope as to be an unqualified gift by the legislature of its powers. How else can the breath of ss.52(1) be seen? A test of this view of the breath of the delegation sought to be achieved by ss.52(1) is offered under the next two headings.

The CHO's Delegation

Looked at in isolation, the powers that ss.52(1) confer on the CHO, are expressed in these words:

> [the CHO] "**may take the actions** (including giving oral or written directions) the **CHO considers necessary, appropriate or desirable** to alleviate the public health emergency"

I propose a test based on the assumption that ss.52(1) is not so broad as to be invalid in isolation. Assuming, for the purposes of the test, that to be a correct legal interpretation, there must be a corollary. That is, it must be the case that ss.52(2) and ss.52(3) are not necessary for the validity of ss.52(1). Having settled on that matrix, I posit a test as follows:

Test Scenario

> **My Test**: Assume that the CHO has formed the view that the problem of insufficient rest is one of the factors that put human beings in danger of contracting Covid 19. It is his settled view, formulated on a reliable scientific basis, that the precaution of getting to bed before 8 PM will reduce cross infections in the community. Moreover he is confident that such a measure of rest will have a markedly beneficial effect on the immune systems of the general public and thereby significantly reduce the risk of individuals contracting the accursed disease.
>
> Believing that he has been given power to take any action that he considers necessary, appropriate or desirable to alleviate the public health emergency, and noting the content of ss.52(1) which defines the term "action" as including giving oral or written directions) the CHO issues written directions requiring that all persons resident in the Northern Territory of Australia must be in bed at their homes by 8 PM each evening. He issues an additional written directive that bans the use of entertainment devices after 8 PM each evening (whether television, radio or any other digital or mechanical device which has a similar function).
>
> The CHO also issues a written direction to the NT Commissioner of Police requiring that the Commissioner designate 15 fully equipped police officers, with appropriate transportation, for each electoral ward in the Northern Territory and order them to patrol those wards each evening and apprehend and prosecute any person found to be out of bed after 8 PM with authority to enter any premises to search for non-compliant residents and or entertainment devices.
>
> The directions require the Commissioner to order the police officers to seize and destroy any entertainment devices found to be in use after 8 PM. The CHO also issues a written direction requiring all places of public entertainment and or refreshment

> to close forthwith until further notice. In this respect a broad range of premises are specified including without being limited to hotels, bars, nightclubs, restaurants, cafés and beer gardens. This last direction includes a provision authorising health inspectors to forcibly close any premises found to be non-compliant.

Appearance of Validity

Some would be brave enough to argue that the actions of the CHO were lawful by force of the delegation to him in the legislation. Certainly, there is subjective compliance with one of the main predications of the putative delegation. Yes, the CHO's belief (he **considers**) that his actions in the test scenario would be **desirable to alleviate** the public health emergency clearly fall within the requirements of the express words of ss.52(1). Moreover it is likely that he will be scientifically correct in the judgement made. His actions (including directions) would clearly alleviate the public health emergency.

But is that the true issue? Isn't the true question whether the CHO would have had the lawful power to institute such actions (including directions)?

Bedtime Story or Nightmare?

Vital features of that burning question are these component issues:

- By enacting ss.52(1), did the legislature really intend to pass to the CHO unfettered power to make laws which forbid societal movement after 8 pm, abolish nocturnal commerce and employment and prohibit access to electronic amusements other than during daylight hours (with the incidental impediment to the dissemination of information)?

- Doesn't the nature and quality of that breadth, and detail, of control over society approach a magnitude such as amounts to an unfettered and undefined abdication of the power, or at least a substantial part of the power, to make laws for the peace order and good government of the NT?

Would Be Invalid

On a judicial consideration of the validity of the CHO's imaginary regime of societal regulation, postulated in my hypothetical fact scenario, the ruling would be:

> "that ss.52(1) does not specify the nature and qualities of the actions (including directions) that this statutory officer may do as a delegate of the legislature."

The determination of the court would be that the legislature must not purport to delegate its power in terms so broad and ill-defined as to amount to an abdication. In the hypothetical case of ss.52(1) being the only head of power which purported to make a delegation of lawmaking authority to the CHO, it is not realistic to expect that the court would uphold such acts of purported lawmaking and thereby hand over the management of society to an unelected statutory officer operating from such vague terms of reference.

OSHA Decision in US

On 13 January 2022, the US Supreme Court decided the case of National Federation of Independent Business, Et Al. v. Department of Labor, Occupational Safety and Health Administration, Et Al. The case is widely referred to in news and information as the **OSHA case** for the initials of the defendant agency. The focus was a similar situation to that which would arise if we were to attempt to resolve the issue of the CHO's lawmaking authority by reference only to ss.52(1). The US Supreme Court's judgement provides an insight into the proper interpretation of enabling powers similar to s.52. At page 6, speaking of the US Federal equivalent of our Parliament, the court said:

> "We expect Congress to **speak clearly** when authorizing an agency to exercise powers of **vast economic and political significance**."

That sentiment is relevant to the interpretation of ss.52(1). The Parliament of the Northern Territory has not spoken clearly in ss.52(1) to the effect that the CHO will have authority to make subordinate legislation which upends society. The subsection, if it stood alone, should not be interpreted as having that breadth and impact.

Three Limbs of s.52

Nonetheless, there is a measure of importance in the generality of ss.52(1) which I will now explain.

The only limit on the generality of ss.52(1) is the power granted to the CHO is that he or she must "consider" any actions taken to have been "necessary, appropriate or desirable to alleviate a public health emergency"; but the subsection itself specifies no examples nor any limits of such actions. As there must be limits, the absence of limits in ss.52(1) invites a construction of the totality of s.52. When one makes a careful study of the totality of s.52, we see that it is divided into three (3) distinct limbs.

These are:

1. **ss.52(1)** which identifies the CHO as the legislature's delegate and, in general terms, foreshadows the structural nature of the powers

that are to be exercised by that delegate. That is the purpose and effect of these words: – "may take **the actions** (**including** giving oral or **written directions**)". Note there are no other words in ss.52(1) section which clarify or define the nature and character of the actions or directions;

2. **ss.52(2)** which, seeks to distinguish, and define, the difference between actions and directions. Its introductory words read, "The **actions** the CHO **may take include any** of the following:".. It then offers a list of six (6) actions as those that are "the following". These include, in summary terms, doing things to reduce or destroy the public health risk, issuing warnings, segregating or isolating persons, evacuating persons, preventing access to areas and controlling the movement of vehicles; and

3. **ss.52(3)** which performs a similar mission in respect of directions. It seeks to distinguish, and define, the difference between directions and actions. It's introductory words are – "**the directions** the CHO **may give include directions** requiring any of the following:" It then offers a list of four (4) actions as those that are "the following". These include, in summary terms, ordering particular persons to undergo a medical examination, giving orders that control the movement of stated persons, giving orders that stated things to be seized or destroyed and giving orders that a stated person provide information.

Legislature's 3 Part Plan

These three (3) subsections reflect the legislature's three-part plan to define the nature and limits of its delegation of power to the CHO. It does so by the means of:

- ss.52(1) identifies the CHO as the entity who is to be empowered to take "actions (including giving oral or written directions)";

- ss.52(2) subsequently specifies examples of "actions". The combination of ss.52(1) and ss.52(2) empowers the CHO to undertake executive actions; and

- ss.52(3) specifies examples of "directions". The combination of ss.52(1) and ss.52(3) is the only instance where a delegation of any lawmaking power can be found in s.52.

Consideration of these three limbs makes clear that it is not ss.52(1) that delegates law making power to the CHO. It is the combination of the identification of the CHO as the repository of delegated law making power ss.52(1) (the first limb of s.52) and the specification of examples of law making in ss.52(3) which completes a grant of delegated authority to the CHO to make law in the form of directions. Without ss.52(3), the first

subsection of s.52 will be invalid, for relevant purposes, as an abdication of legislative power.

Significance of "Include"

The contra argument must be considered; that is, some will say that the foregoing structural analysis overlooks the significance of the words "including" as it appears in ss.52(1) and "include" as it appears in ss.52(2) and ss.52(3).

In respect of the appearance of the word "includ**ing" in ss.52(1)**, I say that the word "actions" followed by the words "(includ**ing** giving oral or written directions)" is merely an omnibus expression to convey the meaning that the CHO is to be invested with authority for both executive and legislative functions. That collection of terminology is no different in substance from the formula "actions and oral or written directions" or "actions, oral directions or written directions or any or all of them". In ss.52(1) the appearance of the word "**including**" does **not** serve the **same purpose as** does the word "**include**" **in** ss.52(2) and **ss.52(3)**.

In particular, ss.52(3) expounds the formula "The directions the CHO may give include directions.....", the word "**include**" **serves** an entirely different purpose. The mission of the word "include" in that context is **to signal what type of lawmaking exercise** that the legislature contemplated when it made the delegation that it put into effect by the combined operation of ss.52(1) and ss.52(3).

Includes Any Other Type of Direction?

There will be those who argue that the word "include" leaves open the possibility of any other type of direction in addition to the four examples that are given in the list provided by ss.52(3). That is not a convincing argument. Taking into account that a putative delegation will not be valid unless it is expressed in terms that provide limits to the ambit of the legislative power that is delegated, this argument will experience difficulty when confronted with the question: "**Where and what are** the **limits of** the **category 'any other' direction**"? There will not be any that can be pointed to.

ss.52(3) List Not Exhaustive

Putting a similar point, the proponents of the "includes any other type of direction" construction would perhaps argue "the list of four (4) examples specified in ss.52(3) is not exhaustive. The argument would continue "There can be 'other' directions of a similar nature to those specified in the list." To that I ask which of these, quoting the precise list of ss.52(3) examples, are similar procuring the non-consensual termination of an employment relationship and condemning a dismissed worker to unemployment:

- ordering particular persons to undergo a medical examination;
- giving orders that control the movement of stated persons;
- giving orders that stated things to be seized or destroyed; and or
- giving orders that a stated person provide information?

The answer is **none of them!**

Objects of PEH Act

Before expressing a conclusion, it is appropriate to take cognizance of another structural element of the legislation. I refer to **s.3** which sets out the objectives of the PEH Act and reads as follows:

> **3 Objects of Act**
>
> (1) This Act has the following objects:
>
> (a) to protect and promote the health of individuals and communities in the Territory;
>
> (b) to provide a flexible capacity to protect the health of particular individuals and communities in the Territory from emerging environmental conditions, or public and environmental health issues, that may impact on their health and wellbeing;
>
> (c) to enable special action to be taken to protect the health of particular individuals and communities in the Territory who are at public health risk or facing particular health problems;
>
> (d) to improve the public and environmental health outcomes of all Territorians in partnership with individuals and the community;
>
> (e) to monitor, assess and control environmental conditions, factors and agents, facilities and equipment and activities, services and products that impact on or may impact on public and environmental health.
>
> (2) In carrying out the objects of this Act, regard should be had to the precautionary principle.

It is customary, and desirable, to pose the question "Do the objects of the Act, or any of them, require, facilitate or encourage an interpretation of the

enabling act (the PEH Act) which supports the validity of the contended delegated legislation"? I see nothing of that nature in s.3.

Conclusion

In expressing my conclusion, I ask to be excused for language inspired by the words of the US Supreme Court in the OSHA case. I have no words that are superior.

The PEH Act does empower the CHO to make laws in respect some measures that address health threats but it does not authorise the CHO to mandate workplace contractual outcomes, as between employer and employee. Very few social relationships are as fundamental to our civilization as an individual's entitlement to earn his or her living. Paragraphs 6, 7 and 10 of Directions No. 55 are putative laws that purport to exercise powers that are, of **"vast economic and political significance**" in a way that interferes with a person's fundamental right to earn his or her living and, in a typical case, has the inevitable consequence of loss of gainful employment. The question, then, is whether the Legislative Assembly "plainly authorized" the CHO's to make directions with the force of law that mandate such an outcome. It does not. The PEH Act does not "speak clearly" to authorize the CHO to exercise such powers.

Outcome: Paragraphs 6, 7 and 10 of Directions No. 55 are not valid laws because, as subordinate legislation, their content is ultra vires the power given by the statute that is said to enable the making of them.

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