

# TLC - EMPLOYMENT & INDUSTRIAL LAW MCLE

## CAN EMPLOYERS MANDATE VACCINATIONS?

ARTHUR MOSES SC \*

NEW CHAMBERS

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### Introduction

1. We are now at the stage of the Covid-19 pandemic where a number of safe and effective vaccines have been developed and made available throughout the world. The experience in countries like Canada, where 71% of the population has received at least one dose of the vaccination, and 54.4% is fully vaccinated,<sup>1</sup> has been that a vaccinated population has secured a return to normalcy that appears some way off in Australia where the vaccination program is less advanced for reasons which our political leaders will have to explain, and in due course be held accountable for by the electorate.
2. Regrettably, Federal and State Governments of all political persuasions have tended to engage in a blame game as if issues to do with COVID-19 are either Federal or State responsibilities or that the problem of one State does not affect another State. This is not a Federal or State problem, but an Australian problem. The COVID-19 virus does not discriminate depending on what State or Territory you reside in as an Australian. It is an issue affecting the health and well-being of all Australians. When a lockdown damages the economy of one State or Territory, it impacts upon the Australian economy which has a direct impact on all Australians. Australian employers and employees are keenly aware of this and have suffered the consequences of lockdowns for nearly 18 months.
3. On current estimates the world's pharmaceutical companies are set to provide some 10.9bn doses of Covid-19 vaccination over the course of 2021.<sup>2</sup> Some countries so far have done better than others in getting those doses into arms: "Operation Warp Speed" in the United States and the less-bombastically-named "Vaccine Taskforce" in the United Kingdom have been, by any fair measure, conspicuous successes.
4. In the United States, the CDC reported that as of 19 July more than 161 million people in the United States had been fully vaccinated against Covid-19. Of those, just 5,914 had breakthrough cases that resulted in serious illness, including 1,141 fatal cases. That amounts to some 0.0007% of the vaccinated population.<sup>3</sup>
5. We have witnessed first-hand in recent months the costs that result from Covid-19 breakouts in a largely unvaccinated population. Without the individual immunity against

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\*The views expressed in the paper are that of the author and not TLC. The paper is for general information only and is not intended as legal advice. Anyone wishing to receive advice on the matters referred to in this paper should approach their professional advisors.

<sup>1</sup> *Financial Times Covid-19 Vaccine Tracker* (updated as at 24 July 2021) <<https://ig.ft.com/coronavirus-vaccine-tracker/?areas=gbr&areas=ISR&areas=usa&areas=eue&areas=can&areas=chn&areas=ind&cumulative=1&doses=total&populationAdjusted=1>>.

<sup>2</sup> "How can more covid-19 vaccines be made available?", *The Economist*, 15 May 2021.

<sup>3</sup> <<https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>>.

the virus, the State and Territory Governments are forced to resort to that blunt instrument of virus suppression, the lockdown. As we are well aware, lockdowns are a stop gap measure that have a detrimental impact on the mental health of citizens and damage the economy. However, in a largely unvaccinated population, there is no other choice at this time, until the vaccination program is advanced in Australia.

6. It is clear that the path towards normalcy lies with vaccination of a significant portion of our population. We are not yet at the stage where supply has outstripped demand, although we will inevitably reach that stage in due course.
7. Then, we will be left with the hold-outs – individuals who will not take the vaccine absent some form of compulsion because of either complacency or anxiety in relation to the vaccines. Individuals refusing vaccination is one of the largest obstacles to widespread immunisation. How to treat this group raises questions concerning the power of Government, the balancing of that power against individual liberty and absent any compulsion by Government, whether it will be left to employers to fill the vacuum by mandating that employees are vaccinated.

### **History of Mandated Vaccinations**

8. These questions are by no means new. In the late eighteenth century the pioneering British physician, Edward Jenner, having observed that infection with cowpox conferred specific immunity to the deadly smallpox virus, developed a way of inoculating healthy children to immunise them against smallpox. The use of Jenner's vaccination spread rapidly in England, and by 1800 it had reached most European countries.<sup>4</sup>
9. Early on, Jenner himself took up the burden of promoting and distributing his vaccine. "*Operation Warp Speed*" this one-man vaccine roll-out was not. Christie's recently auctioned a letter from Dr Jenner to a "Mr Long" of Bond Street, London dated 26 June 1801, where the doctor said: "Dr Jenner presents his compliments to Mr Long and is sorry it is not in his power to send him today any vaccine virus he can depend upon, but Mr Long may be assured of its being sent as soon as possible".<sup>5</sup> Our current political leaders may recognise Dr Jenner's embarrassment at his short supply.
10. The smallpox vaccine made its way to Harvard, where Professor Benjamin Waterhouse performed the first vaccinations on American children. Waterhouse attempted to persuade President John Adams of the benefits of vaccination. He had more success, however, convincing Vice-President Thomas Jefferson. In his first letter to Waterhouse, Jefferson jubilantly declared: "Every friend of humanity must look with pleasure on this discovery, by which one evil more is withdrawn from the condition of man; and must contemplate the possibility, that future improvements and discoveries may still more and more lessen the catalogue of evils."<sup>6</sup> Jefferson was an enthusiastic proponent of Jenner's vaccine – as President in 1803 he directed Lewis and Clark to carry it with them on their famous trip westward, and "inform those of them with whom you may be, of its efficacy as a preservative from the small pox".<sup>7</sup>

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<sup>4</sup> NJ Willis, "Edward Jenner and the eradication of smallpox" *Scott Med J.* 1997 Aug; 42(4):118-21.

<sup>5</sup> <<https://onlineonly.christies.com/s/books-manuscripts-photographs-middle-ages-moon/edward-jenner-1749-1823-11/116379>>.

<sup>6</sup> *From Thomas Jefferson to Benjamin Waterhouse*, 25 December 1800  
<https://founders.archives.gov/documents/Jefferson/01-32-02-0249>.

<sup>7</sup> *Instructions for Meriwether Lewis*, 20 June 1803, <https://founders.archives.gov/documents/Jefferson/01-40-02-0136-0005>.

11. But not everyone was so enlightened. Substantial numbers of people refused to be vaccinated, and ultimately a legal response to this recalcitrance was necessary. The first regulations requiring smallpox vaccination were passed in 1806 in two Napoleonic Principalities which are now part of Italy; by 1810 a law was passed requiring smallpox vaccination for all French university students.<sup>8</sup> (By way of contemporary comparison, Prime Minister Boris Johnson on 26 July 2021 was reported to have proposed a Covid-19 vaccine mandate for all UK university students, and in so doing was accused by one Tory MP of pursuing a policy reminiscent of the dystopian futuristic World State depicted in *Brave New World*.<sup>9</sup> In fact, Johnson’s proposal is no different to that pursued in France more than a century before Huxley’s novel.)
12. Returning to the historical chronology, in 1816 Sweden passed a law requiring vaccination of the general population, albeit with an exemption for conscientious objectors.<sup>10</sup> Massachusetts had passed a similar law in 1809.<sup>11</sup>
13. The United Kingdom was somewhat slower off the mark, passing the *Vaccination Act* of 1853, which required all newborns to be vaccinated against smallpox before reaching the age of three months. Public reaction to such compulsory measures was at times fierce, and anti-vaccine riots were a not uncommon feature of Victorian England. Some campaigners saw compulsory vaccination as an extreme example of class legislation.
14. When reading about this nineteenth-century “anti-vax” movement one is reminded that there really is nothing new under the sun. The Anti-Compulsory Vaccination League was founded in 1867. The first three points of its manifesto read as follows:<sup>12</sup>
  - *It is the bounden duty of parliament to protect all the rights of man.*
  - *By the vaccination acts, which trample upon the right of parents to protect their children from disease, parliament has reversed its function.*
  - *As parliament, instead of guarding the liberty of the subject, has invaded this liberty by rendering good health a crime, punishable by fine or imprisonment, inflicted on dutiful parents, parliament is deserving of public condemnation.*
15. The pervasive fear in the nineteenth-century iteration of the anti-vax movement was that compulsory vaccination was a move towards totalitarianism. That is of course no less a central tenet of the modern version of the movement.
16. One particularly fierce riot at Leicester in 1885, attended by an estimated 100,000 people, led to a Royal Commission – which met 136 times over the course of seven years –, with the ultimate result being the *Vaccination Act* of 1898, which enabled parents to

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<sup>8</sup> DA Salmon et al, “Compulsory vaccination and conscientious or philosophical exemptions: past, present, and future”, *Lancet* (2006) 367: 436-42 at 436.

<sup>9</sup> “MPs attack ‘Beijing-style’ vaccine passport plan for university lectures”, *The Telegraph*, 26 July 2021 <<https://www.telegraph.co.uk/global-health/science-and-disease/covid-news-coronavirus-self-isolation-vaccine-cases-nhs-app/>>.

<sup>10</sup> DA Salmon et al, “Compulsory vaccination and conscientious or philosophical exemptions: past, present, and future”, *Lancet* (2006) 367: 436-42 at 436.

<sup>11</sup> DA Salmon et al, “Compulsory vaccination and conscientious or philosophical exemptions: past, present, and future”, *Lancet* (2006) 367: 436-42 at 438.

<sup>12</sup> Wolfe RM, Sharp LK. Anti-vaccinationists past and present. *BMJ* 2002; 325: 430–32 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1123944/#B6>>.

conscientiously object to vaccines and also dropped cumulative penalties against parents unwilling to vaccinate their children.<sup>13</sup>

17. Smallpox, of course, has been eradicated since the 1970s. But the questions raised by the legal measures which were enacted, take on an urgency today, where a vaccine has been produced and made available with an urgency never before seen. Questions as to what legal measures the State, and employers, may take to promote vaccination arise with no less urgency.

### **The Role of Employment Law in the Current Public Health Crisis**

18. With that historical digression at an end, I turn now to the modern workplace. In particular, I shall focus on the rights – and obligations – of employers when it comes to vaccination of their workforce.
19. The role of employers in this aspect of the fight against Covid-19 should not be underestimated. History has shown that governments have, understandably, been reluctant to impose compulsory vaccinations on unwilling citizens.
20. Speaking to radio station 3AW on 19 August 2020, the Prime Minister said that his Government would make the Covid-19 vaccine “as mandatory as you can possibly make it”; speaking to 2GB a few hours later, he said in response to a concerned caller: “can I be really clear to everyone? It is not going to be compulsory to have the vaccine ... there are no compulsory vaccines in Australia.”<sup>14</sup> With this position, combined with fringe sections of social media, deplorably certain politicians hell-bent on sowing distrust of vaccinations, and conflicting advice from various Chief Health Officers from different States, the power of employers to make employees’ jobs dependent on receiving a vaccination assumes importance in order to secure public health. This is not surprising. In the history of Australia it has been the work of private sector employers and employees which has restored our economy to productive levels after traumatic events, to the benefit of all Australians. It has not been the words or actions of politicians. The simple fact is that lockdowns will not stop and the economy will continue to be damaged, until a significant majority of the Australian population are vaccinated. Employers and employees will have to work together to ensure that this occurs because as history shows Governments are reluctant to mandate vaccinations.
21. The particular rights of employers were recently highlighted by a fracas that arose in the Westminster Parliament. Commons Speaker Sir Lindsay Hoyle circulated a memo that explained that while all Parliamentary staff would be “required” to wear a face mask to prevent the spread of Covid-19, MPs were only “encouraged” to do so.<sup>15</sup> One rule for us and another for them, it seemed. A spokesperson for the speaker later explained the reason for the difference: “We have no employment or contractual relationship with Members which would enable us to mandate the wearing of masks.”

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<sup>13</sup> This interesting history is traced in N Durbach, “‘They Might As Well Brand Us’: Working-Class Resistance to Compulsory Vaccination in Victorian England” *Social History of Medicine*, Volume 13, Issue 1, April 2000, pp 45-63.

<sup>14</sup> “Could the Government make a COVID-19 vaccine mandatory in Australia?”, *ABC News Fact Check* <<https://www.abc.net.au/news/2020-09-16/fact-file-mandatory-vaccination-is-it-possible/12661804?nw=0>>.

<sup>15</sup> “Masks Optional For MPs But Compulsory For Parliament Staff From July 19”, 12 July 2021, [https://www.huffingtonpost.co.uk/entry/mask-wearing-optional-for-mps-but-compulsory-for-parliament-staff\\_uk\\_60ec5e9fe4b0a771e7fbfe12](https://www.huffingtonpost.co.uk/entry/mask-wearing-optional-for-mps-but-compulsory-for-parliament-staff_uk_60ec5e9fe4b0a771e7fbfe12).

## Implied Terms in Contracts of Employment

22. There is a term implied in law in every contract of employment requiring an employee to obey the “lawful and reasonable directions” of their employer. In particular, as has been recognised in Australian law since at least the High Court’s decision in *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601, 621–622, employees are obliged to comply with a command that “relates to the subject matter of the employment”, “involves no illegality” and is “reasonable”. This power on the part of the employer to control their employees’ conduct goes to the heart of the employment relationship.
23. Could the scope of this power to issue lawful and reasonable directions to employees extend to a direction to receive the Covid-19 vaccination? The short answer is that it depends.
24. Because the requirement involves a consideration of the “reasonableness” of the direction, the nature and circumstances of the employment will be necessary considerations. This is highlighted by the way in which similar issues have been approached in various decisions of the Fair Work Commission.
25. The decision in *Glover v Ozcare* [2021] FWC 2989, delivered on 26 May 2021, warrants careful consideration. Ms Glover was a 64-year-old woman who worked for Ozcare as a care assistance (mainly by visiting Ozcare clients in their homes to administer care). Owing to a bad experience with the influenza vaccination as a seven-year-old in her native Philippines, Ms Glover for each of her ten years of employment with Ozcare had signed an “Employee Influenza Vaccination Declination” form, whereby she said that she was declining to have the flu vaccine due to allergies.
26. By April 2020, everything changed, and her employer was no longer willing to accept that. Ms Glover was told that she was required to have the flu vaccine to keep her job. She stood her ground, citing her allergies, and her employment was ultimately terminated. She commenced proceedings in the Commission claiming that she had been unfairly dismissed.
27. The Commission dismissed her claim, deciding that Ozcare’s direction to receive the flu vaccine was a lawful and reasonable direction to its employees in all of the circumstances. Commissioner Hunt found that the mandatory vaccine requirement was “lawful” – she observed that “Ozcare has not physically required any employees, including Ms Glover to be vaccinated against their will. It has not held an employee down against their will and inflicted a vaccination upon them”. Further, the mandate did not breach any ground of discrimination.<sup>16</sup>
28. As for whether the direction was “reasonable”, Commissioner Hunt found that it was, relying upon the following considerations:<sup>17</sup>
  - Ozcare’s vulnerable and aged clients ought to be able to expect that every precaution would be taken against influenza by employees entering their homes;
  - Ozcare may face criticism or legal challenge if an unvaccinated worker caused a vulnerable client to fall ill with the flu;

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<sup>16</sup> At [242].

<sup>17</sup> At [247]-[248].

- community-care employees could become super-spreaders of influenza, as they visit many clients' homes each day;
  - the wearing of PPE alone is an insufficient safeguard to protect vulnerable community members; and
  - Ozcare was entitled to implement its policy and rely on mandatory vaccination in any litigation and as an assurance to clients and their families as part of its commitment to safe and high-quality care.
29. In particular, Commissioner Hunt accepted Ozcare's submission that "in determining the reasonableness of the revised Employee Immunisation Policy, it is necessary to do so against the backdrop of managerial prerogative." The Commissioner accepted "that this is a decision the business considered necessary to take to safeguard its clients and employees as far as it is practicable to do so".<sup>18</sup>
30. This carefully reasoned outcome – although not binding on an Australian court – is highly instructive as to the likely approach to be taken to these difficult questions. In circumstances where it is an inherent aspect of an employee's functions to have contact with vulnerable members of the community, there is good reason to think that an employer is within its rights to issue a direction to that employee to receive a Covid-19 vaccination.
31. It is easy to think of how this type of reasoning may be extrapolated to various industries to reach a similar result. Obvious examples include health care workers, emergency service workers, transport workers and quarantine workers. Such individuals are, inevitably, the most likely both to encounter the virus in the course of their work, and thus to spread the virus.
32. Consider also the position of "fly in, fly out" workers, who travel and live together at close quarters while performing work in remote locations. Our elite athletes, within their "bubbles", are now more or less within the same category. Would it not be reasonable for an employer of such individuals to require that they be vaccinated against Covid-19, so as to prevent a disastrous "bursting of the bubble"?
33. The position is probably more contestable when it comes to other types of workers. At the more extreme end of the spectrum, it would be difficult to accept as "reasonable" a direction to an employee who works 100% remotely that he must receive the Covid-19 vaccine on pain of termination.

**Factors to be considered before issuing a direction that an employee receive the Covid-19 vaccine**

34. It is clearly arguable that employers whose employees congregate in a shared workplace will be entitled to issue a lawful and reasonable direction to employees to receive the Covid-19 vaccine. Again, this will depend to a very large extent on the nature of the workplace. Particular circumstances which are likely to be of importance include the following:
- Is the workplace "open plan", or are employees effectively able to avoid physical proximity to one another?

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<sup>18</sup> At [257].

- How many employees are typically present in the workplace? One would think that the more employees present, the greater the likelihood of a “super-spreader” event.
- Does the workplace involve contact with the general public? For example, the position of a receptionist could conceivably be different from that of the IT worker.
- What are the individual reasons for the employee declining to have the vaccine?
- Are there likely to be “vulnerable” persons in the workplace? While this factor loomed large in the *Glover v Ozcare* decision discussed earlier, I do not think that it should necessarily be given great weight when it comes to Covid-19. As we have hopefully learnt by now, it is a dangerous fallacy that the virus only endangers the elderly or the infirm. I would not regard it as a compelling reason to refuse vaccination that the particular workplace happens to be populated with young, healthy people.

### **Reasonableness of other directions relating to minimising the risk of Covid-19 in the Workplace**

35. While my primary focus is on vaccination policy, it is also worth noting that similar issues arise in other respects for Covid-19 workplace policies and lawful and reasonable directions. In the recent decision of the Fair Work Commission in *Kuru v Cheltenham Manor Pty Ltd*,<sup>19</sup> the Commission decided that an aged care facility in Melbourne had given a lawful and reasonable direction to its employees – in the context of Covid-19 – when it directed that its workplace be divided into “zones” and employees be restricted from interacting with other employees not working in the same zone without personal protective equipment. Ms Kuru, who according to the Commission’s reasons (at [56]) “considered COVID-19 to be a conspiracy”, was held to have been lawfully dismissed for meeting for a cigarette break with colleagues from different “zones” before commencing her shift.
36. This case is a good illustration of the scope of powers open to employers to stop the spread of Covid-19 in the workplace. While the context in that case – an aged-care home – is an outlier in terms of the risk of transmission and serious illness, the case does illustrate that employers must be considering all reasonable measures to protect their workforce. It may not be sufficient only to rely on what is implemented by force of law under public health orders. For example, where the circumstances of the workplace call for it, it may well be reasonable and appropriate to require workers to wear face masks, even in circumstances where such a requirement is not a part of any binding public health order.

### **Mandatory Testing for Covid-19 in the Workplace**

37. Another interesting question is whether an employer could issue a lawful and reasonable direction to an employee to undergo a Covid-19 test if they display symptoms. There is precedent that has held that employers may require their employees to undergo medical assessments where their health status is relevant to their employment. For example, in *Thompson v IGT (Australia) Pty Ltd* [2008] FCA 994 an employer was held to have issued a lawful and reasonable direction to an employee to have a medical assessment in circumstances where he had been chronically absent for physical ailments. It is likely that where an employee displays Covid-19 symptoms in the workplace, it would be lawful and

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<sup>19</sup> *Teslime Kuru v Cheltenham Manor Pty Ltd as trustee of the Cheltenham Manor Family Trust T/A Cheltenham Manor Pty Ltd* [2021] FWC 949.

reasonable to direct that employee to have a Covid-19 test in order to determine whether the workplace had been exposed to the virus.

38. Covid-19 testing is sufficiently analogous to routine drug and alcohol testing to be almost certainly permissible under WHS laws. However, there may of course be practical challenges – as has been seen to some extent in the delays that have come with the unprecedented levels of testing in Sydney’s South-West in recent weeks.
39. Cost is also a factor in increased testing. Since Sydney’s recent outbreak began some six weeks ago, laboratories have performed around 2.2 million tests. Private pathology clinics contracted by the government receive a Medicare subsidy of \$85 per test and public laboratories receive a benefit of \$42.50 per test. This adds up to some \$580 million of taxpayer money spent on Covid-19 tests.<sup>20</sup> If frequent testing is to be a part of the solution to getting workplaces back to normality, it will be necessary to ask whether this model of testing is fit for purpose.
40. One potential solution to this problem is rapid-result DIY Covid-19 tests. One such test, produced by a Brisbane start-up recently, takes about 15 minutes to give a result, with about 96% accuracy. The Biden administration has placed an order for \$312 million for these tests, and they are now being sold in pharmacies across the United States. At the moment they are prohibited from sale in Australia under Commonwealth law. I would suggest that there will be a strong push to rethink that ban in coming months as workplaces try to navigate how to safely return to normalcy.

#### **Statutory Duty of Employers**

41. So far I have focussed upon the *right* of employers to require vaccinated employees; might there also be a *duty* to do so?
42. Section 19(1) of the *Work Health and Safety Act 2011* (Cth) requires a person conducting a business or undertaking to ensure so far as is reasonably practicable the health and safety at work of workers engaged or caused to be engaged by the business or undertaking. Undoubtedly this duty is consequential when it comes to the risk of Covid-19 transmission in the workplace.
43. Section 19 sets out the “primary duty of care” imposed on a person conducting a business or undertaking and provides that such a person must ensure, so far as is reasonably practicable, the health and safety of: (a) workers engaged, or caused to be engaged, by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, whilst such workers are at work in the business or undertaking.
44. This is a broad, overarching statutory duty and, as recently observed by the High Court in *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 at [163]:

*“Section 19(2) is part of a strict liability to “ensure” a result. The offence is based upon risk, not outcome. Hence, no individual rights need be violated before the duty is breached. The duty is a general one concerned with regulating safety in the workplace. That general regulation is consistent with the 1972 recommendations of the committee chaired by Lord Robens to move away from a “haphazard mass of ill-assorted and intricate detail partly as a result of concentration upon one particular type of target”. The WHS Act, and s 19 in particular, thus follows the*

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<sup>20</sup> “Taxpayers spend more than \$580 million on COVID-19 testing in NSW”, *Sydney Morning Herald*, 27 July 2021.



*recommended model of imposing general duties, supported by regulations and codes of practice, requiring employers to participate in the making and monitoring of arrangements for health and safety in the workplace. (footnotes omitted).*

45. The duty is directed to and imposed on the person conducting the business or undertaking, and if breached such person is directly liable. However, the duty imposed by s 19(1) is not absolute, it does not require the elimination of all risks to health and safety irrespective of the means of achieving that outcome, only what is reasonably practicable.<sup>21</sup> The Act in turn, through sections 17 and 18, provides further clarification of what is required by the person conducting the business or undertaking in respect of their “management of risks” and what is meant by “reasonably practicable”.
46. Safe Work Australia has provided a guidance page for businesses trying to navigate their obligations under section 19 when it comes to Covid-19, and particularly insofar as those obligations may extend to compulsory vaccinations.<sup>22</sup> This guidance, which was published on 7 April 2021, says that “while [whether to implement mandatory vaccinations] is a decision you will need to make taking into account your workplace, most employers will not need to make vaccination mandatory to comply with the model WHS laws.” The following justifications are offered by SafeWork Australia for this view:
- at present, public health experts, such as the Australian Health Protection Principal Committee has not recommended a vaccine be made mandatory in your industry;
  - there may not yet be a vaccine available for your workers; or
  - some of your workers have medical reasons why they cannot be vaccinated.
47. It will be readily apparent that these factors are hardly decisive for all workplaces for all time, and there are real issues of substance to consider for all employers when it comes to what their obligations are in this sphere.
48. Safe Work Australia says that section 19 requires employers to perform a risk assessment to determine whether it is necessary to make vaccination compulsory for their workers. Recommended factors to consider include:
- whether workers are exposed to a heightened risk of infection due to the nature of their work;
  - whether workers have contact with people who would be especially vulnerable to severe disease if they contract Covid-19;
  - the risk of Covid-19 spreading in the workplace – for example, some workplaces require workers to work in close proximity to one another;
  - whether workers have contact with large numbers of people, such that they could be the catalyst for a “super-spreading” event; and

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<sup>21</sup> Director of Public Prosecutions v JCS Fabrications Pty Ltd and JMAL Group Pty Ltd [2019] VSCA 50 at [24].

<sup>22</sup> <<https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/vaccination>>.

- might a requirement for vaccination discriminate against a group of employees, and therefore be unlawful?

49. It should be tolerably clear, in my opinion, that a proper consideration of these factors would lead many employers to the reasonable conclusion that their obligations under s 19 *do* require them to require their employees to receive the vaccine. That will not be the case for all employers. For example, where the employee can easily perform their work remotely, then it would be unlikely that the employer could be *required* to make that person’s employment conditional upon them having the vaccine.
50. These large questions have yet to be tested in a court or Tribunal in Australia, but one suspects that it will not be long before such cases come before the courts.

**Interim measures for employers to consider implementing until employees are vaccinated**

51. In the immediate short term, while demand for the vaccine continues to outstrip supply, there are also interesting questions as to what interim measures employers should take. In accordance with the “hierarchy of control” approach, employers must consider whether there are interim measures that can be taken to reduce risks in the workplace while their workforce gradually becomes vaccinated.
52. For example, consider the position of a workforce which is a mix of older, more vulnerable individuals who are currently either fully or partially vaccinated, and younger workers, who have not yet been able to receive the vaccine, and may not be able to for some months. In such a workforce, it may well be appropriate for the employer to take measures directed to ensuring that the unvaccinated workers – who may be unvaccinated through no fault or choice of their own – do not put the more vulnerable employees at risk.
53. In these circumstances, appropriate measures might include temporary remote working plans, or perhaps even temporary stand down policies.

**Recent Developments in the United States which may provide a guide for Australian Employers**

54. Recent measures passed in New York City and California may serve as a model for regimes that could be applied to Australian workers. In New York, all municipal employees – including police officers and teachers – and in California, all state employees and on-site public and private health care workers, will be required to be fully vaccinated, or face an onerous testing regime.<sup>23</sup> The measures are explicitly intended to bolster vaccination numbers, in the face of what experts have called a “pandemic of the unvaccinated” still raging in the United States.
55. The New York law was specifically cited by Mayor Bill de Blasio as intended as an instance of the State “leading by example” for private employers. He encouraged private employers to enforce similar measures. This type of rule, where workers are required to be vaccinated, or if there is some deeply-held objection by the worker, required to undergo at least weekly testing, may well be a good example of a lawful and reasonable direction open to many

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<sup>23</sup> “N.Y.C. and California to Require Workers to Be Vaccinated or Face Testing”, *New York Times*, 27 July 2021.

employers in Australia once the vaccine is available in sufficient quantities to accommodate it.

56. US President Joe Biden's announced on Friday, 30 July 2021 [Australian time] that his administration will require all federal government employees including on-site contractors to show proof of vaccination or at least attest to it. If employees decline to attest that they have been vaccinated, then President Biden has made clear that restrictions will be placed on these employees such as wearing masks, undergoing regular testing for Covid-19 and restrictions on work travel in order to keep workplaces safe. Such restrictions would not be placed on employees who have been vaccinated. These restrictions will provide an incentive for employees to be vaccinated and would be justifiable in Australia under Commonwealth and State /Territory work health and safety laws, he said. In my view, Australian Federal and State Governments should follow the lead of US President Biden.

### **The Human Rights of Employees are to be Considered in any Direction to Receive the Covid-19 Vaccination**

57. There are other elements to the equation that employers may need to consider. While a detailed consideration of the position under anti-discrimination law is beyond the scope of this paper, real issues may arise as to whether a blanket vaccine mandate in the employment context could give rise to unlawful discrimination.
58. For example, consider the position of a pregnant employee who declined the vaccine for health reasons, or an employee with a *bona fide* religious objection to vaccination. Employers would need to take such factors into account in implementing any compulsory vaccination policy. In general, if sensible and confined carve-outs for such individuals are possible and do not undermine the employer's overall vaccination policy, then in general employers would be well advised to accommodate such factors.
59. However, there will be workplaces where such accommodations may be impossible – an example that comes readily to mind is that of aged care homes, where the risk is simply too great to allow unvaccinated workers in, and such exemptions may put vulnerable lives at risk. Anti-discrimination law allows for such matters, and where it would work an unjustifiable hardship on the employer to require it to accommodate the employee's belief or condition, the employer will likely be protected from adverse action.
60. Similar issues may arise in those jurisdictions that have enacted human rights legislation – including Victoria, Queensland and the ACT. In those jurisdictions it may ultimately be necessary for courts to determine whether mandatory vaccination is a justifiable limitation on human rights.<sup>24</sup>
61. Anti-discrimination issues have played out in the United States, in cases decided under the anti-discrimination law known as "Title VII".<sup>25</sup> That statute prohibits various forms of discrimination, including on the basis of religion, unless the employer can demonstrate "undue hardship" in accommodating the employee's request.
62. In a case decided on the eve of the Covid-19 pandemic, in January 2020, the United States Court of Appeals for the Fifth Circuit found in an employer's favour when a dispute arose

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<sup>24</sup> See K Eichelbaum, "Is Mandatory Vaccination an Unjustified Limit on Human Rights?" (2019) 25 *Auckland University Law Review* 105.

<sup>25</sup> Title VII of the Civil Rights Act of 1964.

as to a mandatory vaccination policy.<sup>26</sup> The employer, the Fire Department of the City of Leander, Texas, implemented a new policy requiring TDAP vaccinations. Mr Horvath, a driver/pump operator with the fire department, objected because he was an ordained Baptist minister and objected to vaccination as a tenet of his religion.

63. The Department gave him a choice: either transfer to a code enforcement job that did not require a vaccination, or wear a respirator mask during his shifts, keep a log of his temperature, and submit to additional medical testing. Mr Horvath did not accept either accommodation, and was fired. The Court of Appeals found that he had been offered reasonable accommodations for his genuinely held religious belief, and therefore that his dismissal was lawful. This approach would be instructive for Australian employers who encounter similar *bona fide* objections to vaccination amongst employees.

### **The Right of an Employee to Refuse to Work with Unvaccinated Colleagues**

64. Another issue which may arise in the future is whether a worker may be entitled to refuse to work in an office with unvaccinated colleagues. Under section 84 of the *Work Health and Safety Act 2011*, “A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker’s health or safety, emanating from an immediate or imminent exposure to a hazard.”
65. It might be argued that a worker is entitled under section 84 to refuse to work in close proximity to a co-worker who refuses to be vaccinated, or to take other precautions against Covid-19. I would suggest that in an ordinary work setting, section 84 would be unlikely to be engaged by the mere presence of an unvaccinated co-worker. That is the position that Safe Work Australia has taken.<sup>27</sup> However, like most of these questions, it is likely to depend on the circumstances, and it may well be the case that in certain workplaces, with employees with certain characteristics, exposure to unvaccinated co-workers may justify a worker’s refusing to carry out tasks under section 84.
66. While my focus in this talk is on *employer’s* rights and obligations, it is also worth noting the potential duties owed by workers arising from Covid-19. Under section 28 of the WHS Act, various duties are imposed upon workers, including to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons.
67. What might this duty encompass in terms of Covid-19 transmission risk? Again, this will depend on the nature of the workplace. At the extreme end of the spectrum, a worker who attended work knowing that they had been exposed to Covid-19, or had Covid-19 symptoms, and hiding that information from their employer and co-workers, may well fall foul of this legal obligation.
68. Might the duty also be consequential in terms of requiring employees to get vaccinated, or only attend work when they have a negative Covid-19 test? For the majority of ordinary workplaces that would probably be going too far – certainly it is for the moment when we are still in the relative early stages of the vaccine roll-out. But where the worker knows that he or she will be coming into close contact with vulnerable persons, a steadfast refusal

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<sup>26</sup> *Horvath v. City of Leander*, 946 F.3d 787, 789 (5th Cir. 2020).

<sup>27</sup> <<https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/general-industry-information/vaccination>>.

to be vaccinated may well have implications under the duty in section 28, if the employer does not take action first.

### **Conclusion**

69. The practical reality is that workers will take the lead from the guidance and requirements imposed by their employers. Experience shows that, on the whole, workers are willing to engage in education programs where there are run jointly by employers with trade unions and comply with lawful and reasonable directions, especially in circumstances where such directions are implemented to protect the health of themselves as well as their colleagues. Employers should not think that it is entirely sufficient to leave these critically important matters up to the common sense of their employees as they have a duty to engage with them on these issues.
70. By identifying and summarising these issues I have sought to highlight the very real issues that are likely to arise in the very-short term future for employers. The issues are profoundly important for Australia's pathway out of the Covid-19 pandemic, especially in the light of the concerning trends against vaccination based on misinformation campaigns, conflicting advice about vaccines from different Chief Health Officers around Australia and the Commonwealth government's position that it will not enact mandatory vaccine laws.
71. There is no easy answer to these issues, just as there is no one-size-fits-all approach applicable to all workplaces. Employers must be conscious of the specific circumstances of their workplace and their workforce, and give real consideration to whether their legal obligations allow them, or indeed require them, to direct their workers to be vaccinated. Employers have a singular duty to protect the health of all individuals in their workforce, and those who come into contact with their workforce – that duty is brought into sharp focus in the midst of the public health emergency we are now experiencing. Ultimately, the pathway out of the current public health emergency will be for employers to take the lead on the vaccination program and engage with their workforce in relation to the utility of vaccines and why vaccination is an important measure to prevent the spread of COVID-19.

Arthur Moses SC

30 July 2021