Can employers mandate their employees receive the COVID-19 vaccine?

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Abstract
This article considers the legality of employers mandating the COVID-19 vaccination in Australia. A current and pertinent topic of debate, the author explores the multiple avenues an employer may have in order to make the COVID-19 vaccine compulsory and makes comparison to other regularly accepted vaccinations such as the influenza immunisation.

Keywords
COVID-19 vaccine, mandatory vaccine, compulsory vaccine, COVID-19

On 10 January 2020, the first reports of COVID-19, a ‘novel coronavirus’, were shared from the World Health Organization (WHO) following the initial outbreak in Wuhan, China. On 30 January 2020, the outbreak was declared a ‘Public Emergency of International Concern’ by WHO, and the first cases of COVID-19 quickly reached Australian shores. As a result, by 7 March 2020, Australia had recorded 63 cases and two COVID-related deaths.

Life as it was changed shortly after, with state and territory governments implementing mandatory lockdowns and periods of home isolation some of which lasted for months. Supermarket shelves were stripped by panic buyers and, in an almost humorous fashion, toilet paper became the most sought-after product of 2020. Scientists around the world hurried to develop a vaccine, which promised to bring a swift return to normality.

Australia’s vaccination rollout commenced in February 2021 and is progressing with the use of the Comirnaty (Pfizer), Vaxzervria (Astra Zeneca) and Spikevax (Moderna) vaccines.

Aside from development of the vaccine, the implementation and ongoing use of other behaviours, such as social distancing and better personal hygiene, has been one of the most effective strategies for reducing the transmission of COVID-19. But with a vaccine now available and in circulation, public debate has focused on the community willingness to get vaccinated and the risks associated with the vaccine. Furthermore, with many businesses eager to get their operations back to normal, many employers are seeking to mandate that their employees be vaccinated. This article will explore the legality of this request.

1Kate Faasse and Jill Newby, ‘Public Perceptions of COVID-19 in Australia: Perceived Risk, Knowledge, Health-Protective Behaviors, and Vaccine Intentions’ (2020) 11 Frontiers in Psychology 1.
2Ibid.
3Ibid.
4Andrew Moore, ‘How the Coronavirus Created a Toilet Paper Shortage’, College of Natural Resources News (Blog Post, 19 May 2020) https://cnr.ncsu.edu/news/2020/05/coronavirus-toilet-paper-shortage/.
5Rachel Gur-Arie, Ezebiesu Jamrozik and Patricia Kingori, ‘No Jab, No Job? Ethical Issues in Mandatory COVID-19 Vaccination of Healthcare Personnel’ (2021) 6(2) BMJ Global Health 1.
6COVID-19 vaccines in Australia, Department of Health (Web Page, 25 March 2022) https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines/approved-vaccines/how-they-work#covid19-vaccines-in-australia.
7Susan Michie et al, ‘Slowing Down the COVID-19 outbreak: Changing behaviour by understanding it’, BMJ Opinion (Blog Post, 11 March 2020).
8Faasse and Newby (n 1).

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The public’s opinion of the COVID-19 vaccine

The process of vaccine development is rigorous and generally takes many years to complete.1 There are also a number of factors that influence the public’s perception of a vaccine, including safety, confidence and convenience.10 For this reason, some members of the public have expressed concern about the COVID-19 vaccines, noting they were developed within 12 months which gave the illusion they were ‘rushed’ and not tested as comprehensively as other vaccines.11 Vaccine development started shortly after information about the virus was released in January, with the first stage of human clinical testing commencing globally on 16 March 2020.12 The public’s concerns have not been aided by the mass of myth, rumour and misinformation that has circulated online and in social media.13 The Australian government has been working to curb this ‘fake news’, however a significant proportion of the population still remains sceptical as to the safety of the vaccine.14

Numerous studies have shown varied, but similar, patterns of likely voluntary vaccination behaviour in Australians. A 2020 study undertaken by Faasse and Newby predicted that at least 76 per cent of adults aged over 18 would probably, or definitely, get a COVID-19 vaccination.15 Rhodes and colleagues confirmed these results; however, they acknowledged that acceptance towards a vaccine would fluctuate with the waves of the pandemic.16 Borriello suggested there may be an even higher rate of 86 per cent, but also acknowledged that factors such as the prevalence and reporting of severe side effects may affect vaccination patterns.17

Vaccines are not a new phenomenon to Australians. There are numerous professions which have historically required that employees receive a number of vaccinations – such as the influenza (flu) vaccine – at a minimum, to be able to attend work. These are traditionally professions within the health sector, however emergency services and people who work with children are also at higher risk and may be required to be vaccinated at the request of their employer.18

Mandating a vaccine

As mentioned above, there are already ways in which employers successfully mandate that their staff receive various vaccines to be eligible to work. These range from government-mandated orders and laws to the use of contracts and agreements. These will be explored below as possible avenues for mandating the COVID-19 vaccine.

State and territory public health orders

State and territory governments issued public health orders/declarations as a result of the COVID-19 pandemic. All Australian states and territories have a Public Health Act or equivalent,9 which provides each jurisdiction’s government with the power to declare a ‘public health emergency’.20 The powers granted to governments in this situation can allow them to limit public gatherings, operations and movements, as well as other directions such as for certain workers to be vaccinated.21 In New South Wales (NSW) specifically, the case of Kassam v Hazzard; Henry v Hazzard22 affirmed that the NSW Minister for Health and Medical Research has the authority to enforce statewide public health orders which require particular workers from declared industries to be vaccinated against COVID-19.

Queensland was one of the Australian states to have implemented the requirement for certain workers to be vaccinated. Until 18 May 2021, this was enacted by the COVID-19 Testing and Vaccination Requirements (Contact by Health Workers with Cases) Direction23 which required health service and hospital employees and contractors, and Queensland Ambulance Service employees, to receive the COVID-19 vaccination in order to continue to attend work.24 This order also provided penalties for non-compliance which could comprise 100 penalty units or six months’ imprisonment.25

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8Rachael H Dodd et al, ‘Concerns and Motivations about COVID-19 vaccination’ (2020) 21(2) The Lancet Infectious Diseases 161.
9Antonio Borriello et al, ‘Preferences for a COVID-19 Vaccine in Australia’ (2020) 39 Vaccine 473.
11Faasse and Newby (n 1).
12Tung Thanh Le et al, ‘The COVID-19 vaccine development landscape’ (2020) 19(5) Nature Reviews Drug Discovery 305.
13Faasse and Newby (n 1) 8.
14Bang Xiao et al, ‘Misinformation about COVID vaccines is putting Australia’s diverse communities at risk, experts say’ ABC News (Blog Post, 5 March 2021) https://www.abc.net.au/news/2021-03-04/covid-19-vaccine-misinformation-caid-communities/13186936.
15Faasse and Newby (n 1) 8.
16Anthea Rhodes et al, ‘Intention to Vaccinate against COVID-19 in Australia’ (2021) 21(5) The Lancet Infectious Diseases 110.
17Borriello et al (n 10) 478.
18Department of Health, ‘Immunisation for work’, Immunisation throughout life (Web Page, 29 March 2022) https://www.health.gov.au/health-topics/immunisation/immunisation-throughout-life/immunisation-for-work.
19Public Health Act 1997 (ACT); Public Health Act 2010 (NSW); Public Health and Wellbeing Act 2008 (Vic); Public Health Act 1997 (Tas); Public Health Act 2005 (Qld); Public Health Act 2016 (WA); Public Health Act 2011 (SA); Public and Environmental Health Act 2011 (NT).
20Public Health Act 1997 (ACT) s 119; Public Health Act 2010 (NSW) s 7; Public Health and Wellbeing Act 2008 (Vic) s 189, 190(1), 198(1), 199–201; Public Health Act 1997 (Tas) s 14–16, 42, 67; Public Health Act 2005 (Qld) ss 319, 322, 323, 333, 335, 345, 349–355, 350; Public Health Act 2016 (WA) s 56, 71, 75, 179–190; Public Health Act 2011 (SA) ss 87–90; Public and Environmental Health Act 2011 (NT) ss 48, 51–53.
21Safe Work Australia, ‘Enforceable government directions during coronavirus: COVID-19 Public health orders’ (Web Page, 16 February 2021) https://covid19.swa.gov.au/covid-19-information-workplaces/other-resources/covid-19-public-health-orders.
22[2021] NSWSC 1320.
23COVID-19 Testing and Vaccination Requirements (Contact by Health Workers with Cases) Direction 2021 (Qld).
24Ibid s 5.
25Ibid s 7.
A public health order, such as the one issued by the Queensland government, is a legally binding and enforceable legislative instrument. Enforcement of the order is within the powers of the individual jurisdiction’s law enforcement, and there have been many instances of charges laid for non-compliance with an order across the states and territories. An example of such enforcement is that of Wagga Wagga businessman Richard Moffatt, who was found guilty without conviction of breaching a NSW public health order.  

Legal requirement to provide a safe working environment

Employers are bound to a number of workplace health and safety laws according to their state or territory of operation, where their respective jurisdiction has adopted the federal model Work Health and Safety Act. Victoria and Western Australia have not adopted the model laws, however Western Australia is currently exploring options to implement elements of the model laws. There are also other legislative regimes that are relevant to specific industries, such as the Occupational Health and Safety (Maritime Industry) Act 1993, which regulates safety on ships. These laws impose a requirement to protect health and safety at work to a level which is reasonably practicable. This duty of care extends to eliminating health and safety risks where possible or minimising them in the alternative. For some workplaces, this may include the responsibility to minimise or eliminate to the extent possible the prevalence or transmission of preventable illness or disease through vaccinations. This obligation also extends to employees, who are required to take reasonable care that their acts or omissions do not adversely affect the health and safety of other people.

When considering what is ‘reasonably practicable’ when exercising the duty of care, employers need to undertake a risk assessment to identify the severity of the health risks to which their employees may be exposed, in line with any control measures. This has become commonplace during the COVID-19 pandemic, with most workplaces having undertaken multiple COVID-19 risk assessments when determining whether it is safe or not for employees to return to work in some capacity. Having considered all risks of COVID-19 present in the workplace, and all current mitigating factors, employers must then decide whether it is necessary, and reasonably practicable, for further measures such as vaccination to be taken. Employers also need to consider the likelihood that COVID-19 could spread to the broader workplace, whether any of their employees are vulnerable to severe diseases, and whether any work-related activities could be considered ‘high risk’ for contracting COVID-19, such as working in hotel quarantine.

As at June 2021, Safe Work Australia advised it was unlikely that a mandatory requirement to vaccinate was reasonably practicable for most industries. There are occasions where the decision that vaccination is necessary to meet the duty of care, is beyond the decision of the employer. The Australian Health Protection Principal Committee can recommend that all employees within certain industries be vaccinated against COVID-19, as is the case for the aged care sector. In summary, it may be possible that requiring an employee to get the COVID-19 vaccination is required in order to meet the duty of care that is providing a safe working environment.

There are significant consequences for employers who fail to comply with the prescribed work health and safety duties. These are enforced at state and territory level agencies, and the penalties range from fines to periods of imprisonment. For example, in the Australian Capital Territory (ACT), Work Safe ACT is the enforcing regulatory body, and if an employer in the ACT is found guilty of a failure to comply with a health and safety duty offence, they can face a fine of between $150,000 and $1,500,000 dependent on whether the employer is an individual or a body corporate.

Lawful and reasonable request

In line with the duty of care obligations, an employer can make a lawful and reasonable request of employees as a condition of their ongoing employment. Often, an employer makes such a request in order to comply with government legislation or orders such as the Queensland Health Order. A public health order, such as the one issued by the Queensland government, is a legally binding and enforceable legislative instrument. Enforcement of the order is within the powers of the Queensland Health Protection Committee. The committee can recommend that all employees within certain industries be vaccinated against COVID-19, as is the case for the aged care sector. In summary, it may be possible that requiring an employee to get the COVID-19 vaccination is required in order to meet the duty of care that is providing a safe working environment.

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public health order discussed above. For a request to be lawful, it must be within the terms of the employment contract, not in breach of any award or enterprise agreement, and compliant with any Commonwealth, state or territory law that applies.\(^{40}\) Such requests usually take the form of policy, and will contain exemptions, avenues for complaints or review, and penalties or consequences for non-compliance. However, it is important to consider that the use of a policy may not be appropriate for all employers, particularly smaller ones.

Prior to COVID-19, it was not uncommon in some industries to see policies implemented that required employees to receive the influenza vaccination every year to be able to continue attending work. With reference to childcare workers, this has been tested in the Fair Work Commission in *Nicole Maree Arnold v Goodstart Early Learning Limited*.\(^{41}\) In this case, it was found that a mandatory influenza vaccination request in this industry is ‘lawful and reasonable’,\(^{42}\) considering that the work undertaken by the employee ‘principally involves the care of children, including children who are too young to be vaccinated’,\(^{43}\) therefore, refusal to receive an influenza vaccination will ultimately result in a ‘valid reason’ for dismissal.\(^{44}\) This policy decision ensures that the employer is meeting their duty of care not only to employees but also their broader consumers; however, in this case the industry was a critical factor in the decision. If the applicant had been found to have been unfairly dismissed, the only available remedies would have been reinstatement\(^{45}\) or compensation,\(^{46}\) but would likely not void an employer’s policy regarding mandatory vaccination.

Further to this, in September 2021, the majority of the Full Bench of the Fair Work Commission determined in *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd*\(^{47}\) that mandating vaccinations, and dismissing those who refuse to be vaccinated, will be lawful in certain circumstances.\(^{48}\) This bought reassurance to employers that they could take actions against employees who refused vaccinations mandated by public health order. In a more recent example, the full bench of the Queensland Industrial Relations Commission (QIRC) ‘rejected submissions that Police Commissioner Katarina Carroll had no power to mandate compulsory vaccinations, did not consult staff and infringed upon workers’ rights’.\(^{49}\) As a result of this, Queensland Police Staff who had not received full vaccination by 17 December 2021 were suspended without pay.\(^{50}\) This decision again reinforced the legality of directions made to staff regarding mandatory vaccination, and the ability for employers to dismiss non-compliant staff as valid.

A universal policy of mandatory vaccination that applies to all staff of an organisation may not be ‘lawful and reasonable’ for all employees. An employer needs to consider whether being vaccinated is a critical part of the employee’s role and whether alternative arrangements could be made.\(^{51}\) Employers also need to consider how they address the needs of staff who have a genuine inability to get a vaccine, to ensure they, as employers, are not in breach of anti-discrimination laws.\(^{52}\)

For example, looking at the tertiary education sector generally, and the University of Canberra specifically, a request made to teaching staff, cleaning staff and staff who work in the retail and hospitality outlets may be considered more likely ‘lawful and reasonable’ based on the number of interactions these employees have with parts of the University and other people, compared to the same request to behind-the-scenes administrative staff who have individual offices and very little interaction with the broader university community. In the event that a uniform policy was implemented to all employees, alternative arrangements such as reallocation options or remote working arrangements would need to be considered for any staff who refuse to be vaccinated. Furthermore, it is crucial that, where bound by an Award or existing Enterprise Agreement, employers engage in proper consultation regarding mandatory vaccination where required.\(^{53}\)

**Agreements and contracts**

It is possible that an employer can require an employee to be vaccinated for certain diseases, or at an employer’s request, through a contract or agreement.\(^{54}\) This may be the employment contract, or a separate contract provided by the employer. The terms of the contract need to be

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\(^{40}\)Sarah Wood, Joel Znygier and Maddison Harrington, ‘FAQ: Employer mandated COVID-19 vaccinations’, Limelight Articles (online, 1 March 2021) [https://www.gcleg.com.au/limelight-newsletters/faq-employer-mandated-covid-19-vaccinations/](https://www.gcleg.com.au/limelight-newsletters/faq-employer-mandated-covid-19-vaccinations/).

\(^{41}\)[2020] FWC 6083.

\(^{42}\)Ibid.

\(^{43}\)Ibid.

\(^{44}\) *Fair Work Act 2009* (Cth) s 387(a).

\(^{45}\)Ibid s 391(1).

\(^{46}\)Ibid s 392(1).

\(^{47}\)[2021] FWCFCB 6015.

\(^{48}\)Clancy King, ‘Refusing the Jab, a Valid Reason for Dismissal in Australia: The Full Bench of the Fair Work Commission Upholds the Dismissal of an Unvaccinated Worker’ (Web Page, 2021) [https://www.lexology.com/library/detail.aspx?g=8f560703-98e0-40b6-97e8-e15f07c61098](https://www.lexology.com/library/detail.aspx?g=8f560703-98e0-40b6-97e8-e15f07c61098).

\(^{49}\)Paula Doneman, ‘Queensland Police Service Employees Lose Legal Bid Against Mandatory COVID Jab’, *ABC News* (online, 22 October 2021) [https://www.abc.net.au/news/2021-10-22/qld-coronavirus-covid-police-lose-bid-covid-jab/100561648](https://www.abc.net.au/news/2021-10-22/qld-coronavirus-covid-police-lose-bid-covid-jab/100561648).

\(^{50}\)Cloe Read, ‘Cop Out: 113 Qld Police Staff Off Work Without Pay for Refusing Vaccine’, *Brisbane Times* (online, 18 January 2022) [https://www.brisbanetimes.com.au/national/queensland/cop-out-113-qld-police-staff-off-work-without-pay-for-refusing-vaccine-20220118-p59p79.html](https://www.brisbanetimes.com.au/national/queensland/cop-out-113-qld-police-staff-off-work-without-pay-for-refusing-vaccine-20220118-p59p79.html).

\(^{51}\)Wood, Znygier and Harrington (n 40).

\(^{52}\) *Fair Work Ombudsman*, ‘COVID-19 Vaccinations: Workplace Rights and Obligations’, *COVID-19 vaccinations and the workplace* (Web Page, 18 February 2022) [https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace](https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace).

\(^{53}\)Ibid.

\(^{54}\)Ibid.
Refusal to vaccinate

As has been the case throughout the history of vaccinations, not everyone can or will receive all vaccines available to them. There are many reasons that employees may not want to be vaccinated, from religious reasons to health reasons and often, vaccine hesitancy. The latter is particularly relevant for the COVID-19 vaccination, noting the concerns regarding the vaccine’s rapid development as discussed earlier.

A recent decision of the Fair Work Commission has suggested, in Glover v Ozcare, that with respect to an order for an employee to receive a mandatory influenza vaccine, an employer should have considered alternative arrangements for the employee who refused to be vaccinated. Ms Glover’s position was terminated as it was stated that vaccination was an inherent requirement of her role, regardless of the fact that Ozcare did not consider the use of extra PPE as a means of reducing the risk of contraction of influenza.

While not binding, the Fair Work Ombudsman’s advice suggests that it is unlikely an employer can dismiss an employee who refuses the COVID-19 vaccine. Furthermore, the Fair Work Ombudsman also advises that employers do not have the ability to suspend employees without pay unless an enterprise agreement or other agreement between the employee and the employer allows them to. Where an employee has a legitimate reason to refuse vaccination, the employer should explore other options available to that employee such as alternative working arrangements, an example of which was Ms Glover’s use of heightened PPE as discussed above.

Human rights considerations

Mandating the COVID-19 vaccine may have consequences for both state and federal governments in terms of human rights violations. Some of the limitations and restrictions placed upon people may have violated certain rights or freedoms, such as restrictions on travel and movement, however these have been imposed in an attempt to provide for the fundamental human right to life and the right to health protected under international law.

A number of human rights, including those detailed above, are also protected within Australian laws, however these are done so on a state and territory level and not all offer these protections. The ACT has the Human Rights Act 2004, Victoria has the Charter of Human Rights and Responsibilities Act 2006, and Queensland has the Human Rights Act 2019. These laws provide people within those states and territories with a process for consultation on the human rights impact of proposed legislation.
International human rights law allows for some restrictions on rights in certain circumstances, such as a state of emergency or for public health reasons.72 These restrictions must meet the necessity and proportionality tests set under the International Covenant on Civil and Political Rights (ICCPR), being that the restrictions are necessary for the protection of one of the permissible grounds under the ICCPR and that the restriction is proportionate to the interest at stake.73 Human rights law, specifically the ICCPR, permits that any measures or restrictions put in place should be ‘strictly temporary in scope, the least intrusive to achieve the public health goals, and include safeguards such as sunset or review clauses to ensure the return to ordinary laws as soon as practicable’.74

Conclusion

Can an employer mandate that staff must receive the COVID-19 vaccine? The answer to this question was once much less certain, but the unprecedented continuation of the pandemic has reshaped this response. Initial hesitations regarding vaccine safety and an employer’s legal exposure have been superseded by government mandates, union support and an overwhelming public acceptance of the vaccine. It cannot be overlooked that mandates do present some restrictions on an individual’s human rights, however most Australians have expressed, through action, their acceptance to waive these rights in favour of collective public health benefits. There are still relevant factors which require consideration when imposing a mandate, such as any existing agreements, awards or legitimate individual reasons for refusal. However, employers should be aware that there are many ways a vaccine mandate can be enforced, whether through company policy, employment contracts or enterprise agreements and awards.

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72Amy Maguire, Fiona McGaughey and Marco Rizzi, ‘Can governments mandate a COVID vaccination? Balancing public health with human rights - and what the law says’, The Conversation (online, 30 November 2020) https://theconversation.com/can-governments-mandate-a-covid-vaccination-balancing-public-health-with-human-rights-and-what-the-law-says-150733.

73United Nations Office of the High Commissioner for Human Rights, ‘Emergency Measures and COVID-19: Guidance’ (Web Page, 27 April 2020) https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.

74Ibid.