Mandatory Covid-19 vaccinations: recent challenges to Public Health Orders

By The Law Society's Employment Law Committee - 1 December 2021

Snapshot

- Four recent decisions have received significant publicity regarding the requirements for people to be vaccinated.
- The Full Bench of the Fair Work Commission determined that it can look behind a medical contraindication certificate to determine whether it certifies an actual exemption from a mandatory vaccination requirement.
- The Supreme Court of NSW has dismissed two claims that public health orders requiring COVID-19 vaccinations for certain categories of workers were invalid.
- The Supreme Court of NSW has also dismissed a claim that public health orders authorising police to require persons to provide evidence of their name, address and vaccine status were invalid.

The October 2021 edition of the *LSJ* included the Legal Update *Mandatory Covid-19 Vaccinations – Are they lawful?* Since that article was published, four decisions have received significant publicity concerning the requirements for people to be vaccinated. This article summarises each of those decisions.

Full Bench of the Fair Work Commission – *Jennifer Kimber v Sapphire Coast Community Aged Care* [2021] FWCFB 6015

In this matter, a Full Bench of the Fair Work Commission took the opportunity to provide its views on the mandating of influenza and COVID-19 vaccinations under public health orders and what requirements must be met by an employee asserting they cannot become vaccinated due to a medical contraindication. The minority, dissenting decision has received significant publicity and scrutiny.

Jennifer Kimber had most recently been employed as a receptionist by Sapphire Coast Community Aged Care and had been employed since April 2013. In June 2020, a public health order was issued in NSW, which required all employees to be vaccinated against influenza in order to be able to enter or remain on the premises of a residential aged care facility, unless an employee was able to present a medical contraindication certificate issued by a medical practitioner.

Due to that public health order, Sapphire Coast mandated influenza vaccinations for all of its employees, unless the employee had a specific medical exemption supported by evidence, and notified all of its employees of its decision. In response, Ms Kimber initially provided Sapphire Coast with a letter from a practitioner in Chinese medicine, who stated that Ms Kimber would prefer not to be vaccinated and that she was prescribing her with immune boosting and antiviral herbs instead.

Sapphire Coast did not consider that Ms Kimber had a proper basis to refuse the influenza vaccination, and stood Ms Kimber down from her employment. Ms Kimber subsequently provided a letter of support from her doctor stating that she had a severe allergic reaction to the influenza shot in the past and had been advised not to have it

again. Ms Kimber then commenced a period of paid leave, indicating that she would like to wait and see whether the vaccination requirement may change.

Ms Kimber subsequently provided a further letter of support from her doctor, which provided more specific details in relation to her alleged severe allergicreaction, together with two undated photos showing the reaction which was said to have occurred. In addition, the doctor completed a medical contraindication certificate, but importantly did not indicate any of the specific contraindications listed on the form, instead completing the 'other' box and referencing severe facial swelling and a lasting rash.

After having sought to re-enter the workplace in contravention of the public health order, Ms Kimber was invited to show cause why her employment should not be terminated. Sapphire Coast then terminated Ms Kimber's employment on the basis that without being vaccinated against influenza, she could not fulfil the inherent requirements of her role. Ms Kimber subsequently filed an application for unfair dismissal in the Fair Work Commission ('**FWC**').

At first instance ([2021] FWC 1818), the Commission supported Sapphire Coast's decision and found that the termination of Ms Kimber's employment was not harsh, unjust or unreasonable. The Commissioner found there was not sufficient evidence to support a finding that Ms Kimber had previously suffered some form of adverse reaction to the influenza vaccination and that Sapphire Coast had taken 'an objectively prudent and appropriate approach' in dealing with these issues. Ms Kimber sought to appeal this decision.

The FWC may only grant permission to appeal an unfair dismissal decision where it considers that it would be in the public interest to do so. The majority of the Full Bench determined that it was not appropriate to grant permission to appeal and made a number of significant observations including:

- Under the public health order, it is not sufficient that a medical contraindication certificate is signed by a medical practitioner, but rather the medical practitioner must certify that the employee actually has what is, in objective terms, a medical contraindication to the vaccination;
- There was a real doubt as to the credibility of Ms Kimber's assertion that she objected to taking the influenza vaccine because of a previous allergic reaction. This doubt arose as a result of Ms Kimber not previously seeking any medical treatment, the lack of any reference to a previous adverse reaction in her initial correspondence, that she failed to report or disclose any adverse reaction until after she was stood down from her employment, and what the majority perceived to be Ms Kimber's general anti-vaccination position;
- Ms Kimber's stated unwillingness to take the COVID-19 vaccine supported the inference that she held a general anti-vaccination position. As a result, this pointed to the lack of utility in the FWC granting permission to appeal, as there could be no possibility of Ms Kimber receiving reinstatement into her role without taking that vaccination in light of subsequent public health orders; and
- The majority did not consider it to be in the public interest to permit the appeal, on the basis that it did not intend, in the circumstances of the current

> COVID-19 pandemic, to give any encouragement to 'a spurious objection to a lawful workplace vaccination requirement'.

The dissenting member stated that they had never more strenuously disagreed with an outcome in an unfair dismissal matter and that the decision at first instance manifested a serious injustice to Ms Kimber that required remedy.

The dissenting member found there was no reasonable and lawful direction given by Sapphire Coast to Ms Kimber, and that there could not be one in circumstances where Ms Kimber had a valid exemption. The member held it was not open to Sapphire Coast to form the view that the medical contraindication certificate completed on Ms Kimber's behalf did not come within the relevant exemption, or make their own diagnosis, or form their own view as to whether or not the reasons given on the form were valid. The member took the view that all that was required for Ms Kimber to come within the exemption from vaccination was to provide a valid, completed medical contraindication certificate.

The member concluded their dissenting decision by making some strong statements about Australia's COVID-19 strategy, stating that:

'The statements by politicians that those who are not vaccinated are a threat to public health and should be "locked out of society" and denied the ability to work are not measures to protect public health. They are not about public health and not justified because they do not address the actual risk of COVID. These measures can only be about punishing those who choose not to be vaccinated. If the purpose of the PHOs is genuinely to reduce the spread of COVID, there is no basis for locking out people who do not have COVID, which is easily established by a rapid antigen test. Conversely, a vaccinated person who contracts COVID should be required to isolate until such time as they have recovered.

Blanket rules, such as mandating vaccinations for everyone across a whole profession or industry regardless of the actual risk, fail the tests of proportionality, necessity and reasonableness. It is more than the absolute minimum necessary to combat the crisis and cannot be justified on health grounds. It is a lazy and fundamentally flawed approach to risk management and should be soundly rejected by courts when challenged.

All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia. It is an abhorrent concept and is morally and ethically wrong, and the anthesis of our democratic way of life and everything we value.

Australians should also vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID. Science is no longer science if… a person is not allowed to question it.

Finally, all Australians, including those who hold or are suspected of holding "anti-vaccination sentiments", are entitled to the protection of our laws, including the protections afforded by the Fair Work Act. In this regard, one can only hope that the Majority Decision is recognised as an anomaly and not followed by others' (at [179]–

[184]).

Although this dissenting decision has provided an alternate view in respect of mandating vaccinations in the workplace, those views are inconsistent with the majority in *Kimber v Sapphire Coast Community Aged Care*, and the recently revised and published positions of the Fair Work Ombudsman, Safe Work Australia, and SafeWork NSW.

On 22 October 2021 Ms Kimber lodged an application for relief under section 39B of the *Judiciary Act 1903* (NSW). It has not yet been heard or determined.

Supreme Court of NSW challenge – *Kassam v Hazzard; Henry v Hazzard*

Two separate proceedings were commenced in the Supreme Court of NSW challenging the validity of various Public Health Orders made under section 7 of the *Public Health Act 2010* (NSW) ('**Act**'), and in particular, the orders which prevented 'authorised workers' from leaving an affected 'area of concern' that they resided in, and prevented some people from working in the construction, aged care and education sectors, unless they have been vaccinated against COVID-19.

The Court rejected all of the grounds of challenge and dismissed both proceedings.

In the matter commenced by Al-Munir Kassam and three others, proceedings were brought against the NSW Minister for Health and Medical Research, the NSW Chief Medical Officer, the State of NSW and the Commonwealth of Australia. In those proceedings it was contended that the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) ('**Order**'), and section 7 of the Act were invalid. The plaintiffs in those proceedings relied on various grounds to establish the invalidity of the Order, including that:

- the Minister did not undertake any real exercise of power in making the Order;
- the Order was either outside of the power conferred by section 7 or represents an unreasonable exercise of the power because of its effect on fundamental rights and freedoms; and
- the manner in which the Order was made was unreasonable.
- In addition, the plaintiffs also contended that:
- the Order conferred powers on police officers that were inconsistent with the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW);
- the Order and section 7 of the Act were rendered invalid by s 51(xxiiiA) of the *Constitution*; and
- the Order and section 7 of the Act were inconsistent with the *Australian Immunisation Register Act 2015* (Cth).

The second proceedings were brought by Natasha Henry and five others who commenced proceedings against the NSW Minister for Health and Medical Research only. They sought declarations that the Order was invalid, along with the *Public Health (COVID-19 Aged Care Facilities) Order 2021* (NSW) and the *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* (NSW). The plaintiffs in those proceedings contended that those orders were:

- beyond the scope of section 7 of the Act because of their effect on rights and freedoms; and
- made for an improper purpose and that in making them the Minister failed to have regard to various relevant considerations, asked the wrong question or took into account irrelevant considerations, was obliged to but failed to afford them natural justice, and acted unreasonably.

In considering the grounds of challenge raised in both proceedings, the Court noted that it is not its function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risk to public health posed by COVID-19. It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines. Rather, the Court noted that its only function was to determine the legal validity of the impugned orders which included considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences.

In dismissing both proceedings, the Court made a number of important findings:

- One of the main grounds of challenge concerned the rights and freedoms of those persons who chose not to be vaccinated, especially their 'freedom' or 'right' to their own bodily integrity. The Court found that the right to bodily integrity was not violated as the impugned orders did not authorise the involuntary vaccination of anyone. The Court found that the impugned orders did curtail freedom of movement, however, which in turn affected a person's ability to work (and socialise), with the degree of impairment differing depending on whether a person was vaccinated or unvaccinated. Importantly, the Court found that curtailing the free movement of persons including their movement to and at work were the very type of restrictions that the Act clearly authorises;
- The differential treatment of people according to their vaccination status was not arbitrary and the differing approach taken by the Minister on the basis of a person's vaccine status was very much consistent with the objects of the Act;
- It was not demonstrated that the making of the Order was not a genuine exercise of power by the Minister, involved any failure to ask the right question or any failure to take into account relevant considerations, or that it was undertaken for an improper purpose. The Minister was not obliged to afford the plaintiffs or anyone else procedural fairness in making the Order;
- It was otherwise not demonstrated that either the manner in which the Order was made was unreasonable, or that the operation and effect of the Order could not reasonably be considered to be necessary to deal with the identified risk to public health and its possible consequences; and
- The Order was not inconsistent with the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), did not affect any form of civil conscription as referred to in section 51(xxiiiA) of the *Constitution*, and there was no inconsistency between the Order and the *Australian Immunisation Register Act 2015* (Cth).

In addition, there was some reliance by the plaintiffs on the dissenting judgment in *Kimber v Sapphire Coast Community Aged Care*. The Court noted that given those very different jurisdictions, the Court would not ordinarily address the reasoning in that judgment, but that it was necessary to do so given that reliance and to record why that dissenting decision was of no assistance. To that end the Court made the following comments:

'… the passages relied on and passages to similar effect throughout the judgment appear to contain assertions about the efficacy and safety of COVID-19 vaccines and other aspects of the public health response to COVID-19 that were not reflected in the evidence that I found persuasive in this case and as far as I can ascertain were not the subject of evidence in that case.

… elsewhere in [the] reasons, the Deputy President considered it necessary to opine on matters affecting either the validity or the appropriateness of making [the relevant public health order]. The function of determining its validity is for this Court to discharge and the function of determining whether it should have been made is for the political process. The Fair Work Commission has neither function.

… the Deputy President's judgment concludes with a number of clarion calls imploring "all Australians" to do things such as "vigorously oppose the introduction of a system or medical apartheid and segregation" … and "vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID" … Political pamphlets have their place but I doubt that the Fair Work Commission is one of them. They are not authorities for legal propositions.' (at [67]–[79])

Supreme Court of NSW challenge – *Larter v Hazzard*

In *Larter v Hazzard* [2021] NSWSC 1451, John Larter challenged the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021* (NSW) (and its subsequent amendment) on the ground of legal unreasonableness, contending it was not open to the Minister to make the public health orders having regard to the risk to public health posed by COVID-19. This included challenging the order on the basis that it was unreasonable to require a very small percentage of conscientious objectors within NSW Health to be vaccinated, while failing to require a larger group of private general practitioners and pharmacists (who are not employed by NSW Health and who do not work in its health facilities) to be vaccinated.

Mr Larter's position was that he had decided not to be vaccinated as he believed that the available vaccines may be the product of research, testing and production processes developed from cell lines derived from aborted foetuses, or using stem cell research, both of which were against his religious beliefs. The Court accepted that Mr Larter's beliefs were genuinely held and that his objections to the COVID-19 vaccinations derived from his own conscience.

The Court stated that its jurisdiction is confined to determining whether it was open to the Minister, in the exercise of the power granted by section 7 of the Act, to make the public health orders. It is not for the Court to stand in the shoes of the Minister and decide what public health order could or should have been made.

The Court found that the public health orders were reasonable and were open to be

made by the Minister, for reasons including the risks posed by COVID-19, its transmissibility, the relative inefficacy of the vaccines to protect vulnerable persons, and the integrated nature of NSW Health. The Court stated that it was not to the point that the Minister could have done more or less:

'The range of decisions reasonably open to the Minister is, in this context, wide. As long as the decision sought to be impugned falls within the ambit of those which are reasonably open, this Court has no power to set it aside on the grounds of unreasonableness.' (at [86])

The Court also noted:

'Although the vast majority of health care workers did not need the incentive provided by the orders to be vaccinated, the effect of the orders was to remove the increased risk of transmission posed by unvaccinated NSW Health workers. It would be of no comfort to the vulnerable patient who is infected by the unvaccinated health care worker to be told that he or she was unlucky by being in the wrong ward at the wrong time because most health care workers had been vaccinated.' (at [83])

Supreme Court of NSW challenge – *Can v New South Wales*

In *Can v New South Wales* [2021] NSWSC 1480, Ibrahim Can challenged two public health orders made under section 7 of the Act on the basis that they purported to authorise police officers to require persons to produce evidence of their name, place of residence and vaccination status, irrespective of whether an offence was suspected.

Mr Can was found to have standing to bring the proceedings on the basis that the orders interfered with his private right to leave his home by requiring him to carry and produce evidence if he did so, and it was immaterial that a large number of members of the public were similarly affected.

The Court considered that there was no relevant distinction between the clauses of the public health orders considered in *Kassam v Hazzard* and *Henry v Hazzard*, which were found not to infringe the privilege against self-incrimination, and those challenged in this matter. The Court found that directions in the public health orders specifically providing that 'required evidence' be carried and produced on request expressly override the privilege against self-incrimination and right to freedom of movement and those parts of the public health orders were not invalid.

Other challenges

A number of other challenges have been commenced to mandatory vaccination requirements, including current matters before the Supreme Court of Victoria, Federal Court of Australia, and for arbitration before the Full Bench of the Fair Work Commission. We will report on any important developments arising from these matters.

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