

NSW & LOCAL GOVERNMENT

Living with COVID-19

6 December 2021

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IMPORTANT INFORMATION

Latest changes

This guide was last updated *6 December 2021*

Recent updates include:

Page 4: News section updated with recent case outcome

Updates



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Homepage



Jump to COVID-19 guide navigation homepage.

WE HEAR YOU

NSW & Local Government

Living with COVID-19 – vaccines and more

The NSW Government is the largest employer in Australia.

NSW's local governments also have a large workforce.

When contractors are added into the mix, the size of the workforce grows exponentially.

With such a sizeable workforce, it is no wonder NSW government agencies and local governments are working hard to develop wholistic responses to the complexities associated with living with COVID-19, including whether to mandate vaccines for employees.

Mandatory vaccinations raise questions around work health and safety obligations, employment and industrial issues, along with those arising under discrimination and privacy law.

Supporting you

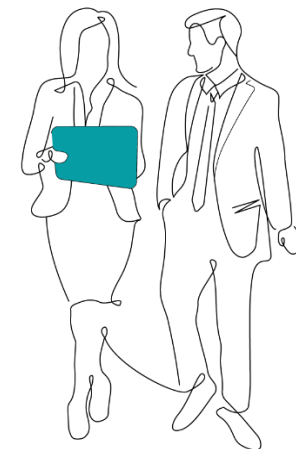
Lander & Rogers is partnering with many clients in the public and private sectors to guide them through these issues. Based on the questions you are asking, we have developed the following guide to assist NSW & local governments as you navigate these issues.

The DPC has also provided *Guidance for Government Sector Agencies regarding COVID-19 Vaccinations for Employees* (issued 30 August 2021), which can be accessed [here](#).

Key contacts

Sally Moten *Partner*
Workplace Relations & Safety

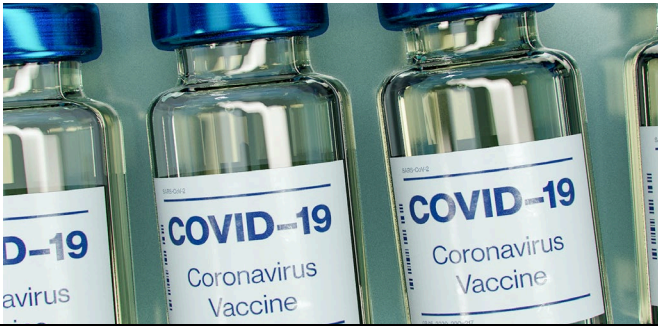
Robert Neely *Partner*
Data Privacy & Protection



Access COVID-19 news and information impacting businesses.

Case notes

Learn more about recent cases involving COVID-19.



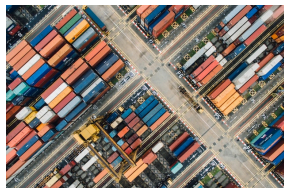
BHP COVID-19 vaccine mandate overturned

The Fair Work Commission has overturned a COVID-19 vaccination mandate by BHP, with important lessons for businesses.

[Learn more](#) about the Commission's decision and the implications for employers who are in the process of implementing, or have already done so, policies mandating COVID-19 vaccines.



Qantas mask mandate



DP World dismissal



Victorian public hospital nurses

In case you missed it

■ **Booster shots now available**

COVID-19 vaccine booster shots are now available to anyone aged 18 and over who received their second dose of a COVID-19 vaccination over six months ago. Booster vaccinations are available at GPs and pharmacies as well as NSW Health vaccination clinics, which now includes Granville Centre in Sydney's west, as Qudos Bank Arena has been reinstated as a sporting and entertainment venue.

■ **Court again rejects challenge**

On 10 November 2021, the Supreme Court of NSW rejected a challenge brought by paramedic John Larter against two public health orders mandating vaccinations. The Court found that it was open to the Minister for Health to make the public health orders, and that the Court did not have the power to determine what public health order could or should have been made.

KEY DATES



Construction workers must have had 1 dose of a COVID-19 vaccine ≥ 21 days ago OR 1 dose of a COVID-19 vaccine < 21 days ago + a negative COVID-19 test result within 72 hours prior.

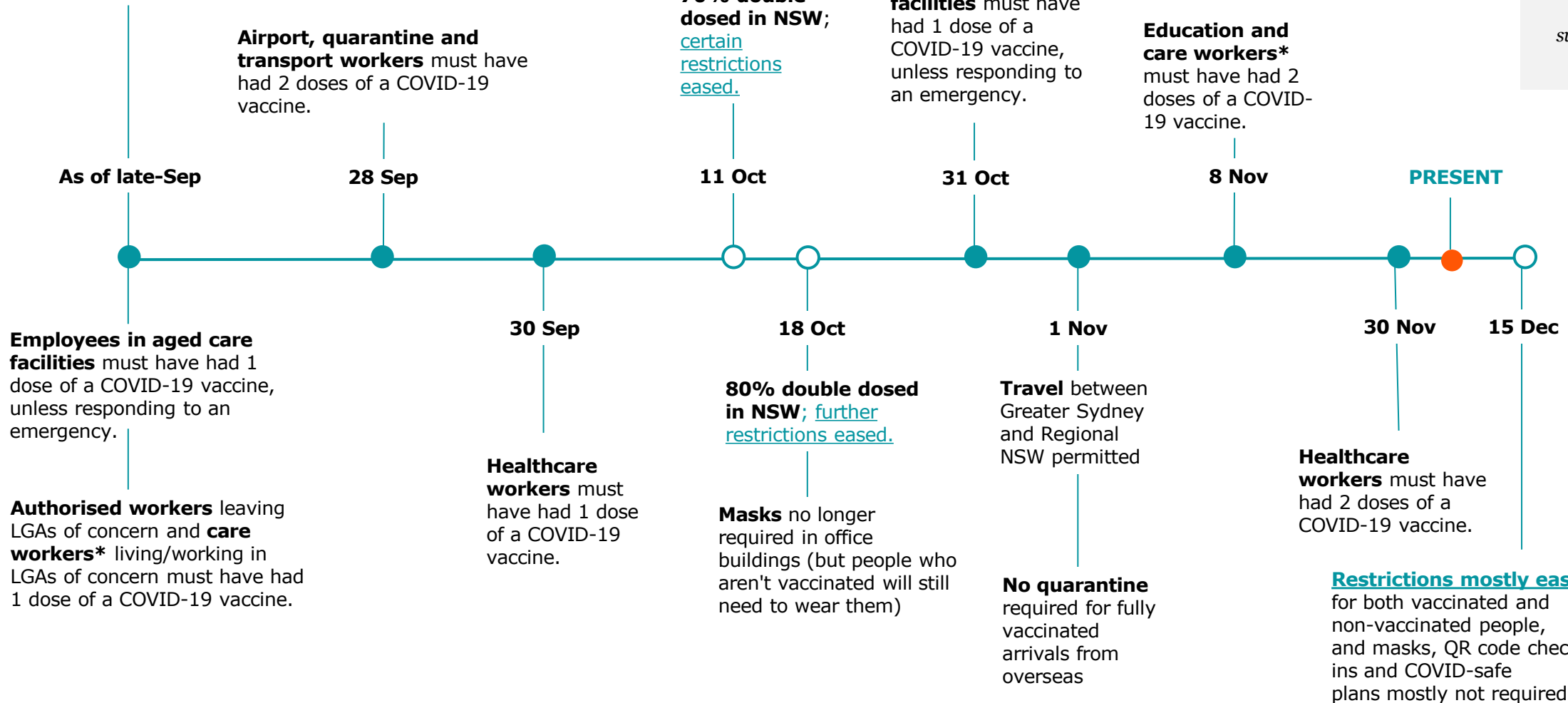
Workers in Regional NSW must have at least 1 dose of a COVID-19 vaccine to return to work

70% double dosed in NSW; [certain restrictions eased.](#)

Health practitioners or students working in aged care facilities must have had 1 dose of a COVID-19 vaccine, unless responding to an emergency.

Education and care workers* must have had 2 doses of a COVID-19 vaccine.

**Education and care workers are persons who work at a school or early education and care facility or who provide disability support service to a child.*



USING THIS GUIDE

Instructions

NSW & Local Government

Searching this document

Search this document in three simple ways:

- Keyword search
- Browse by question
- Preselected keywords

Navigation aids

Use these buttons to quickly and easily navigate this guide:



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Key contacts



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Home page



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Type here



► Browse by question

Click

► Key terms

Public health order

Mandating vaccination

Refusing vaccination

Special leave

Lawful & reasonable

Disciplinary action

Privacy legislation

Data collection

Incentives

Click the topic

*Browse by question – **click** on the below*

Mandating vaccination

- ▶ Is disciplinary action available if an employee fails to follow a direction to vaccinate?
- ▶ Which employees are already covered by a mandate to obtain a vaccine in NSW under a public health order?
- ▶ Can an agency mandate COVID-19 vaccines for employees?
- ▶ In what circumstances is an agency's mandate to obtain the COVID-19 vaccine likely to be lawful and reasonable?
- ▶ What steps should an employer take before mandating that employees have the COVID-19 vaccine?
- ▶ Can employers institute a requirement that new employees have two doses of the vaccine as a condition of employment?
- ▶ What are the vaccination requirements as of 11 October 2021?
 - ▶ **Case note:** Challenge to public health orders mandating vaccination

Employee rights

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Privacy and data collection

- ▶ What privacy legislation applies to NSW public sector agencies when collecting vaccination information?
- ▶ What vaccination information can employers collect?
- ▶ How must health information pertaining to vaccination be collected?
- ▶ Is employee consent required to collect vaccine information?
- ▶ Could agencies obtain information without it being “collected”?
- ▶ What other requirements apply when collecting vaccine information?

Risk management

- ▶ Why is it important to take steps to eliminate or limit the transmission of COVID-19 in the workplace?

CASE NOTES

Your guide

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Recent cases involving COVID-19

■ **Qantas mask mandate**

On 22 October 2021, the Fair Work Commission found that a direction by Qantas to mandate the wearing of masks in October 2020 constituted a "lawful and reasonable direction in the context of the COVID pandemic". The decision concerns a legal challenge to the mask mandate by a flight attendant that applied for an exemption on the basis of a medical certificate citing her anxiety as a ground. Qantas denied the exemption request. However, Qantas provided alternative options to the employee, including the wearing of a face shield instead, attending an independent medical examination, and completing "non-safety critical duties", all of which the attendant refused. The attendant then resigned. The attendant's representative argued that the resignation was in "circumstances that made it constructive dismissal".

The Fair Work Commission considered the attendant's resignation and concluded that she was not, on any reasonable view, left with no other choice but to resign, which is required to amount to a constructive dismissal. This, together with the clearly documented exemption process implemented by Qantas, resulted in the mask mandate being held to be a lawful and reasonable direction.

View the judgement [here](#).

■ **DP World dismissals**

A union has commenced legal action against DP World regarding its decision to dismiss 22 employees that refused to accede to a COVID-19 vaccine mandate.

The vaccine mandate implemented by the company required all employees and contractors to have received one dose of a COVID-19 vaccine by 15 October 2021 and two doses by 15 November 2021. DP World argues that, as a tier 1 employer with essential workers interacting with vessel crews at ports of entry, its employees and their families have been eligible for priority access to vaccinations since March 2021. The litigation is ongoing.

■ **Victorian public hospital nurses**

On 3 November 2021, Justice Snaden of the Federal Court of Australia published his decision rejecting legal action brought by an unregistered union for an interlocutory injunction to halt disciplinary action by Monash Health against Victorian public hospital nurses for their non-compliance with a vaccination direction.

The union argued that the disciplinary action prevented the nurses from exercising their statutory occupational health and safety consultation rights on the mandatory vaccination policy.

His Honour dismissed the application on the basis that a state-wide vaccine mandate for nurses did not provide Monash Health with any alternative to implementing the vaccine mandate policy and taking corresponding disciplinary action against any employee who did not comply with the direction, regardless of whether they asserted a right to consultation or not.

View the judgement [here](#).

Kassam v Hazzard; Henry v Hazzard

Unsuccessful challenge to public health orders mandating vaccination

The Supreme Court of New South Wales has recently published the decision of Chief Justice Beech-Jones in *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320. The decision concerns a legal challenge to NSW public health orders (PHOs) by multiple plaintiffs, including, among others, aged care workers, a paramedic, a high school special education teacher and a construction worker (Plaintiffs).

The Plaintiffs are all persons who have refused to be vaccinated against the COVID-19 virus. They alleged that the PHOs are invalid on the following grounds:

1. the Minister for Health and Medical Research, Bradley Hazzard (Minister), did not undertake any real exercise of power in making the PHOs;
2. the PHOs are either outside of the power conferred by the Public Health Act 2010 (NSW) (PHA) or represents an unreasonable exercise of the power because of its effect on fundamental rights and freedoms;
3. the manner in which the PHOs was made was unreasonable;
4. the PHOs confers powers on police officers that are inconsistent with the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW);
5. the PHOs were made for an improper purpose; and
6. that in making the PHOs, the Minister:
 - i. failed to have regard to various relevant considerations;
 - ii. asked the wrong question or took into account irrelevant considerations;
 - iii. was obliged to but failed to afford them natural justice; and
 - iv. acted unreasonably.

His Honour stated that the Court is not required to determine the merits of the exercise of power by the Minister or the effectiveness of the COVID-19 vaccines. Those matters are for the decision-maker, i.e. the Minister. Instead, the Court's function is to determine the legal validity of the orders, which includes considering whether no Minister acting reasonably could have considered the PHOs necessary to deal with the risk to public health and its possible consequences.

One of the main grounds of challenge concerned the effect of the PHOs on the rights and freedoms, especially in respect of the bodily integrity of persons choosing not to be vaccinated. However, his Honour found that the PHOs did not interfere with such freedoms and, instead, curtailed the freedom of movement, which in turn affects a person's ability to work and socialise.

After reviewing the powers conferred by the PHA and making findings in respect of the Minister's decision-making processes (although, noting that the Minister did not give evidence directly yet the State provided evidence that the Minister was aware of the "Doherty Institute modelling"), his Honour rejected all of the asserted grounds of invalidity and dismissed the proceedings.

FREQUENTLY ASKED QUESTIONS

Your guide

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Risk management

Why is it important to take steps to eliminate or limit the transmission of COVID-19 in the workplace?

Key reasons why NSW and Local Government must take steps to eliminate or minimise the risks associated with COVID-19 in the workplace include:

- to comply with their obligations under the **Work Health and Safety Act 2011** (NSW) (WHS Act), which include to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by them. There are also obligations to other persons, to ensure (so far as is reasonably practicable) their health and safety is not put at risk from work carried out as part of the conduct of the NSW Government agency;

- to limit the risks associated with workers' compensation claims; and
- from an operational perspective, various commercial factors such as:
 - reducing the risk of being adversely affected by a COVID-19 event; and
 - a preference or requirement by clients or customers to deal with businesses who have adequate control measures in place.

In real terms, NSW and Local Government must either eliminate the risk of transmission of COVID-19 in the workplace, or if that is unable to be achieved, take all steps that are reasonably practicable to minimise exposure to it.

Risk of work health and safety investigations and prosecutions

Recently, it has been reported in the media that WorkSafe Victoria commenced an inquiry into the COVID-19 death of an employee after his workplace became a Tier 1 exposure site. The Australian Services Union called for and supported the investigation on the basis that all employers should be held accountable for breaches of workplace safety standards.²

It is foreseeable that similar investigations will take place for other instances of COVID-19 transmission in a workplace, which may also lead to prosecutions.

Matter outcome

In a separate matter, on 6 October, it was announced that fruit producer SPC had been cleared of any wrongdoing by WorkSafe Victoria, following concerns being raised that SPC had not properly consulted with its workers prior to implementing a mandate for the COVID-19 vaccine. SPC commented that the timing of the investigation was unfortunate, as it occurred during a lockdown in Shepparton, Victoria.

Mandating vaccination

Which employees are already covered by a mandate to obtain a vaccine in NSW under a public health order?

For some NSW government agencies and local governments, the question of whether to mandate vaccines has already been decided by a public health order.

Watch this space...

We expect the NSW Government to make further announcements in the near future, regarding the easing of restrictions.

Employee	Public health order
Quarantine workers	Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021
Designated airline workers	Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021
Designated transport workers i.e. employees who provide a transportation service to a person that arrives in NSW by aircraft, including a flight crew member, and has been, or was on the same flight as a person who has been, in another country within 14 days prior to arrival.	Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021
Construction workers* living in or temporarily staying in a <u>local government area of concern</u> , must not enter or remain at a construction site in Greater Sydney unless they comply with the rules for <u>COVID-19 vaccination requirements</u> .	Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021
Health care workers	Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021
Care service workers i.e. workers in aged care facilities and persons who provide disability services.	Public Health (COVID-19 Care Services) Order 2021
Education and care workers	Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021
Authorised workers* in NSW LGAs of concern, including early education and care and disability support.	Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021
Workers in Regional NSW – from 11 October 2021, need at least one dose of a COVID-19 vaccine to return to work.	Public Health (COVID-19 General) Order 2021

*Please note that, from 11 October 2021, there will no longer be any LGAs of concern. Accordingly, vaccine mandates relevant only to LGAs of concern will no longer apply.

Mandating vaccination

What are the vaccination requirements as of 18 October 2021?

The *Public Health (COVID-19 General) Order 2021* (General Order) has been in force since 11 October 2021, being the date on which certain restriction eased in NSW for the fully vaccinated population as a result of the state reaching its 70% target for eligible individuals to be vaccinated.

The General Order contains provisions requiring occupiers of certain business premises to ensure that persons on the premises are fully vaccinated.

The table notes the business premises at which patrons and staff are required to be vaccinated against COVID-19 under the General Order.

The General Order also contains provisions regarding working from home, workplace capacity limits, and conditions for leaving or entering restricted areas wearing masks, which since 11 October has not existed, pending changing circumstances.

There are also specific requirements for construction sites, albeit only in restricted areas, which has not existed as of 11 October, pending changing circumstances.

In respect of mask requirements, employees will need to wear masks in the workplace until 18 October 2021. Under the General Order, once NSW reaches its 80% target for vaccinations, masks will no longer be required in offices and will be optional.

Please note: the public health orders are continually being updated. We will provide further guidance and updates as they arise.

Premises	Responsible party
Holidays homes or short-term rentals (where patrons are not from the same household)	Occupier
Outdoor gatherings	Organiser of event
Vehicles and vessels (where persons are not from the same household)	Unvaccinated adults
Higher risk premises (i.e. entertainment facilities, major recreation facilities, hospitality venues, places of public worship, premises at which a significant event is held)	Occupier
Certain business premises (i.e. hairdressers, spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours or massage parlours)	Occupier
Indoor recreation facilities	Occupier
Public swimming pools	Occupier
Information and education facilities	Occupier
Retail premises that are not critical retail premises	Occupier
Workplaces where it is reasonably practicable to work from home	Unvaccinated employees

Mandating vaccination

Can an agency mandate COVID-19 vaccines for employees?

In the absence of a public health order that requires employees to be vaccinated, or specific powers provided under their enabling legislation, NSW government agencies and local government must rely on their common law authority to do so.

In short, yes, an agency or council may issue an employee a direction to have a COVID-19 vaccine provided that the direction is both lawful and reasonable.

If an agency or council purports to issue a direction to an employee that does not satisfy both of these requirements, the employer must not take disciplinary action against an employee for failing to follow that direction.

In recent weeks, NSW Police has relied on this authority to issue a policy that requires its employees to be vaccinated against COVID-19.

Recent case in the Fair Work Commission

On 27 September 2021, the Full Bench of the Fair Work Commission issued a 2:1 decision that upheld the lawfulness of an employer's direction for all of its employees to have a flu vaccination (*Kimber v Sapphier Coast Community Aged Care*).

The majority, dismissing the appeal, concluded: "*We do not intend, in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement.*"

A noteworthy aspect of the decision was a dissent from Deputy President Dean, which questioned the lawfulness of mandatory vaccination requirements, and concluded "*All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia*".

It is expected that the decision will be appealed.



lawful + reasonable = valid direction



Mandating vaccination – factors to consider in your risk assessment

In what circumstances is a mandate to obtain the COVID-19 vaccine likely to be lawful and reasonable?

There is currently no law that specifically prevents an employer from requiring an employee to be vaccinated against COVID-19. However, whether doing so would be unlawful under Commonwealth, state and territory anti-discrimination legislation in particular circumstances has not yet been tested. There is currently a general protections case before the Federal Circuit Court of Australia that deals with a face mask mandate implemented by the ABC, which is expected to proceed to hearing later in 2022.³ This case is likely to deal with issues associated with discrimination.

In terms of what is "reasonable", having regard to guidance from the Fair Work Commission (FWC),⁴ the Fair Work Ombudsman (FWO)⁵ and advice received from the Solicitor-General,⁶ a direction for an employee to receive a COVID-19 vaccination

will likely be reasonable based on numerous factors, some of which include:

- whether there is a public health order that requires the employee to be vaccinated;
- the type of work that the employee is engaged in and who they will have contact with, noting the following four tiers adopted by the Prime Minister and FWO:
 - Tier 1: employees who are at risk of acquiring the virus through direct contact;
 - Tier 2: employees working with vulnerable people;
 - Tier 3: employees with public facing roles; and
 - Tier 4: employees who are not often in close contact with others;
- whether vaccination is necessary for the employer to discharge their obligations under the WHS Act;
- whether the direction is sufficiently connected with the employees' employment - i.e. it is within the scope or subject matter of the employees' employment;

- the availability and effectiveness of the COVID-19 vaccine in limiting the transmission of the virus;
- the availability and effectiveness of any alternative control mechanisms that are able to be utilised.

There are various other factors relevant to this assessment, which Lander & Rogers is pleased to discuss with you.

Mandating vaccination

What steps should an employer take before mandating that employees have the COVID-19 vaccine?

Before implementing a mandatory COVID-19 vaccine policy, so as to ensure that any such direction is lawful and reasonable, NSW government agencies should explore all options to minimise the impact of COVID-19 on the health and safety of employees.

It is important that agencies conduct a risk assessment for their business. In that respect, Safe Work Australia has published a guideline titled "*Key considerations for undertaking a risk assessment - COVID-19*" to assist employers.⁷

In addition to conducting a risk assessment and [implementing other safety measures](#), employers should consider entitlements available to employees to provide flexibility necessary to get the COVID-19 vaccine, such as paid vaccination leave, prior to mandating that employees have the COVID-19 vaccine.

Risk-based approach

Some agencies and councils may determine that it is appropriate to have a "one-size fits all" approach and issue a direction that applies equally to all employees. Other agencies and councils may decide that certain groups present a higher risk than others, such as frontline workers, and adopt a tiered approach to mandatory vaccinations, depending on risk factors.

Lander & Rogers is here to assist you with making these complex assessments. Don't forget that the approach can be fluid and should be continuously reviewed and updated as the risk profile changes.



Protecting employees

What other measures could be used to protect the health and safety of employees as lockdown restrictions lift?

Vaccines are considered to be a high order control mechanism, meaning that they are very effective at managing the risks associated with the transmission of COVID-19 in the workplace. For this reason, where other high order control mechanisms are not able to be utilised (such as working from home) and there is otherwise a high degree of risk having regard to the factors set out above, mandatory vaccination policies may be a necessary measure for employers to discharge their obligations under the model WHS law.

This is particularly the case in circumstances where the safety regulators appear to be increasing their focus on how employers are managing this risk.

There are multiple controls that NSW government agencies can implement to assist with discharging their obligations under the WHS Act and protect the health and safety of employees, in addition to mandating the COVID-19 vaccine, including:

- maintaining a current COVID-19 Safety Plan;
- ensuring COVID Safe Check-Ins are available at the workplace;
- making rapid antigen testing available and/or implementing compulsory COVID-19 testing;
- restricting access to the workplace for those who are not vaccinated;
- requiring employees to work from home;
- implementing density and physical distancing requirements;
- requiring employees to wear face masks or gloves in the workplace;
- frequently cleaning and disinfecting high touch points;

There are many other control measures, which we would be happy to discuss with you.



Employee rights

In what circumstances may an employee lawfully refuse to follow a direction to be vaccinated?

An employee may refuse to be vaccinated where it is reasonable for them to do so.

Common examples may include:

- the employee is immunocompromised and is unable to be vaccinated;
- or their occupation is generally low risk and other control measures are reasonably available to them.

The Federal Government has revealed that a COVID-19 vaccine exemption certificate will be available for those with a legitimate medical reason as assessed and lodged by a GP, paediatrician or infectious disease physician. A legitimate medical reason may be one of the following:

- anaphylaxis after a previous dose of a vaccine
- anaphylaxis after a dose of any component of a vaccine
- significantly immunocompromised – for live vaccines only

Legitimate medical reasons do not include a blood clotting disorder, history of stroke and/or heart attack or various allergies.

Only individuals who are allergic to both polyethylene glycol and polysorbate 80 cannot get any of the three COVID-19 vaccines available.

The existence of this Federal vaccine exemption scheme reduces the disability discrimination risk exposure for employers, as it clearly sets out which medical conditions the Federal Government considers do or do not warrant an exemption from vaccine mandates.

Agencies and councils should be mindful of anti-discrimination legislation that could impact on the lawfulness of a direction, such as in circumstances where employees have particular health conditions. However, agencies can potentially rely on an exception that exists under most anti-discrimination legislation that applies where the discrimination is necessary because the person would be unable to carry out the "inherent requirements" of their position.⁸ An "inherent requirement" is more than an employer's preference that an employee be vaccinated, and must relate to an essential element of the employee's role.

Keep an eye out for the outcome in the litigation involving a NSW Ambulance paramedic challenging the public health orders mandating vaccines as arguments regarding discrimination on religious grounds have been raised.

Disciplinary action?

Is disciplinary action available if an employee fails to follow a direction to obtain a COVID-19 vaccine?

NSW Government agencies are already grappling with how to respond to a handful of employees who have refused to obtain COVID-19 vaccines required under public health orders. While these employees have not been allowed to attend work or assigned alternate duties, questions are emerging about how to respond to their refusal to comply with the requirement to be vaccinated on an ongoing basis.

Similar questions will emerge if agencies or councils mandate COVID-19 vaccines in their policies, and an employee refuses to comply with that direction.

If the direction is [lawful and reasonable](#), and the employee does not have a lawful and reasonable excuse for non-compliance, an agency or council may be able to take disciplinary action against the employee.

This could potentially include termination of employment, noting that relevant procedural fairness requirements and employee protections against being dismissed will still apply.

It is, however, recommended that employers explore all options available before taking disciplinary action.

Measures other than disciplinary action include:

- considering redeployment to an alternative role that does not require a COVID-19 vaccine;
- considering if the employee can perform all of their duties while working from home;
- standing down the employee with pay for a short period to allow the employee to obtain the vaccine;
- access to paid leave entitlements; or
- leave without pay.



Disputes between employees

Can vaccinated employees refuse to work with non-vaccinated employees?

Also from 11 October, employers must continue to allow an employee who is fully vaccinated to work from home if it is reasonably practicable to do so.

As workplaces emerge from lockdown, it is only natural that strongly-held views will emerge between those vaccinated and unvaccinated against COVID-19.

Generally, it is difficult to see how a vaccinated employee could lawfully refuse to work with an unvaccinated employee if the employer has otherwise taken appropriate steps to eliminate or minimise the transmission of COVID-19 in the workplace.

Of course, employers need to be mindful of their WHS obligations to all employees. Employers must comply with the public health orders coming into effect from 11 October which require them to keep unvaccinated employees working from home unless it is not reasonably practicable to do so.



Mandating vaccination – condition for new employees

Can employers institute a requirement that new employees require two doses of the COVID-19 vaccine as a condition of employment?

An employer may make employment conditional on any number of factors, provided they are not unlawfully discriminatory, including that prospective employees be fully vaccinated against the COVID-19 virus.

However, unless the vaccine is mandated under a public health order, it is strongly recommended that an employer implement a process for employees to request an exemption from such a condition in certain circumstances, such as medical requirements, to avoid an indirect discrimination claim.



Employee rights

Do employers need to offer special paid leave to employees getting a COVID-19 vaccine?

Traditionally, sick leave is only available when an employee is unfit for work because they are ill or injured. However, an award, enterprise agreement, other registered agreement, employment contract or workplace policy may include extra rules about using sick leave.

While employers are not required to offer special paid leave to employees getting a COVID-19 vaccine, it is recommended.

Recently, the NSW Government introduced a guideline suggesting that agencies provide "flexible working arrangements to facilitate attendance at vaccination appointments, and/or access to special leave of up to two hours, or an equivalent payment at base rate of pay".⁹

In respect of local government employees, the NSW Government introduced the *Local Government (COVID-19) Splint (Interim) Award 2021* specifically providing for employees of local governments to be entitled to leave for the time "reasonably required" to receive a COVID-19 vaccine.



Is a COVID-19 policy necessary?

Do employers need to have a policy in place regarding requirements or preferences to have a COVID-19 vaccine?

A COVID-19 vaccine policy is not necessary in the workplace. However, some state and territory regulators have signalled that as the vaccine becomes more widely available, it is likely to be "recommended" to employees in occupations with a high risk of exposure to COVID-19.¹⁰

Regardless of the approach being taken to COVID-19 vaccines, we recommend NSW government agencies implement COVID-19 policies as they are a transparent way to communicate the agency's approach to managing COVID-19 in the workplace. A COVID-19 policy is a good accompaniment to a COVID-19 Safety Plan.



Incentives for vaccines?

Can employers offer incentives to employees to get a COVID-19 vaccine?

Employers can offer incentives to their employees to get vaccinated against COVID-19. However, this may potentially lead to an increased risk of workplace injury claims in the event that an employee suffers adverse reactions to the vaccine.

However, any claim would depend on its individual merits, and significant adverse reactions to the vaccine are extremely rare.

This risk can, however, be mitigated by following the 2021 permission by the TGA (2021 permission).¹¹

Pursuant to the 2021 permission, any party can offer valuable consideration (cash or other rewards) to people who have been fully vaccinated under the Government's national COVID-19 vaccination program, subject to the following conditions:

- The offer can only be made to people who have been fully vaccinated, which currently means two vaccinations.
- The offer must contain a statement to the effect that the vaccination must be undertaken on the advice of a health practitioner.
- Any reward provided must not include tobacco or medicines (other than listed medicines).
- The offer must only refer to COVID-19 vaccines generically.
- The offer must be made to all eligible people who have been vaccinated.
- An offer of alcohol must not encourage excessive or rapid consumption of alcohol, have a strong or evident appeal to minors and must be served consistent with the Responsible Service of Alcohol arrangements.¹²



Privacy and data collection

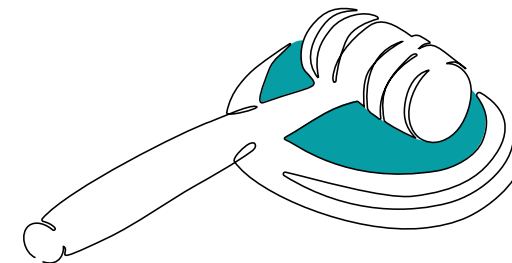
What privacy legislation applies to NSW public sector agencies when collecting vaccination information?

Agencies are governed by the Privacy and Personal Information Protection Act 1988 (PPIP Act) and the Health Records and Information Privacy Act 2002 (HRIP Act).

In relation to the handling of health information, the HRIP Act is the relevant regulation ('health information' as defined in the HRIP Act is excluded from the definition of 'personal information' under the PPIP Act).

As information about an individual's vaccination status is 'health information' under the HRIP Act, that legislation will govern the handling of COVID-19 vaccination information by agencies.

The 14 Health Privacy Principles under the HRIP Act are legal obligations, which NSW public sector agencies must abide by when they collect, hold, use and disclose a person's health information.



Privacy and data collection

What vaccination information can employers collect?

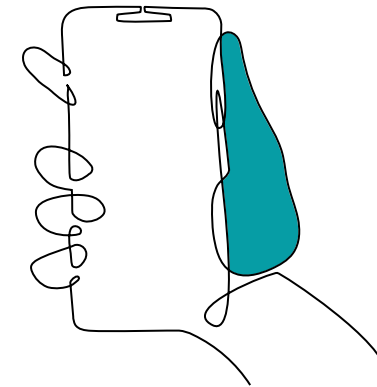
Agencies must only collect health information that is directly related to, and reasonably necessary for, one or more of their functions or activities. Agencies must therefore have clear and justifiable reasons for collecting their employees' vaccination information.

Those reasons may include compliance with legal obligations to provide a safe workplace and do all that is reasonably practicable to ensure the health and safety of their employees, clients and visitors.

If the collection of vaccination information about individuals is reasonably necessary for the prevention and management of COVID-19 in workplaces or public areas under the agency's control, then that collection should be permissible.

However, not all agencies or councils, and not all workplaces, are the same so agencies should carefully consider whether this information is reasonably necessary in the particular circumstances.

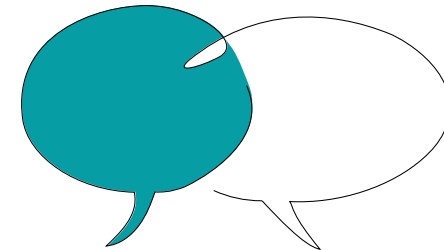
It will generally not be justified to collect vaccination status information (which is referable to a particular individual) purely for statistical or monitoring purposes.



Privacy and data collection

How must health information pertaining to vaccination be collected?

Unless it is unreasonable or impracticable to do so, an agency must collect vaccination information directly from the individuals themselves, and not from a third party.



Privacy and data collection

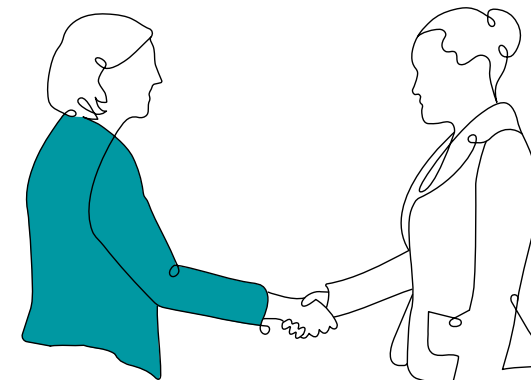
Could agencies obtain information without it being “collected”?

The HRIP Act does not define 'collection' and, unlike the Privacy Act 1988 (Cth), does not define it by reference to the making of a 'record'.

However, the HRIP Act does provide that 'holding' information means, among other things, that 'the organisation is in possession or control of the information' or, in the case of a public sector agency, 'the information is contained in a State record in respect of which the agency is responsible under the State Records Act 1998'.

Though not yet tested, this context suggests that merely asking an employee to show their vaccination status without recording that status in any record of the agency, would not constitute 'collection' for the purposes of the HRIP Act.

Where an agency intends to rely on this construction, it should ensure that no record of the employee's vaccination status is kept.



Privacy and data collection

Is employee consent required to collect vaccine information?

Consent is not required to collect health information under the HRIP Act.

However, if an agency does decide to collect vaccine information, it must take reasonable steps to ensure that its employees are aware of:

- the purpose for which the information has been collected
- whether that collection is required by law
- any person or agency to whom the agency usually discloses this information
- how the employee can view and correct their health information, and
- any consequences that will occur if they decide not to provide their information to the agency.



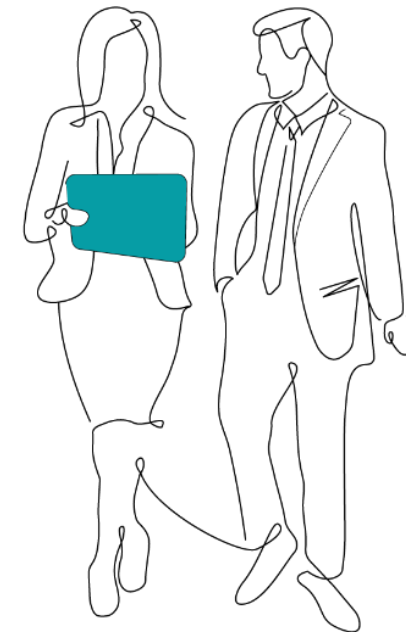
Privacy and data collection

What other requirements apply when collecting vaccine information?

Vaccine information must be managed in the same manner as any other health information collected by the agency.

Agencies should ensure that their handling of this information complies with the Health Privacy Principles, including that health information is:

- stored securely, not kept any longer than necessary, and disposed of appropriately
- protected from unauthorised access, use or disclosure
- only used for the purpose for which it was collected or for a directly related purpose, which a person would expect, unless an exception applies or the individual consents, and
- only disclosed for the purpose for which it was collected, or for a directly related purpose that a person would expect, unless an exception applies or the individual consents.



Sources of information

- 1 NSW Public Service Commission Workforce Profile Report 2020
- 2 Regulator scrutinising employee's COVID-19 death, Workplace Express, 16 September 2021
- 3 Silvia Chamoun v Australian Broadcasting Corporation & Ors, MLG4260/2020
- 4 Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818; Barber v Goodstart Early Learning [2021] FWC 2156.
- 5 Fair Work Ombudsman, [COVID-19 vaccinations: workplace rights and obligations](#) (12 August 2021)
- 6 Department of the Prime Minister and Cabinet, [Transcript](#) - 6 August 2021 (6 August 2021).
- 7 Safe Work Australia, [Key considerations for undertaking a risk assessment - COVID-19](#) (27 April 2020).
- 8 See, for example, Disability Discrimination Act 1992 (Cth) section 21A.
- 9 NSW Government Premier & Cabinet, [C2021-14 Employment Arrangements during COVID-19](#)
- 10 Example: SafeWork NSW, COVID-19 (Coronavirus) ([30 July 2021](#))
- 11 Australian Government Department of Health Therapeutic Goods Administration, [Therapeutic Goods \(Restricted Representations - COVID-19 Vaccines\) Permission \(No.3\) 2021 \(30 July 2021\)](#).
- 12 Australian Government Department of Health Therapeutic Goods Administration, [Communicating about COVID-19 vaccines \(11 August 2021\)](#).

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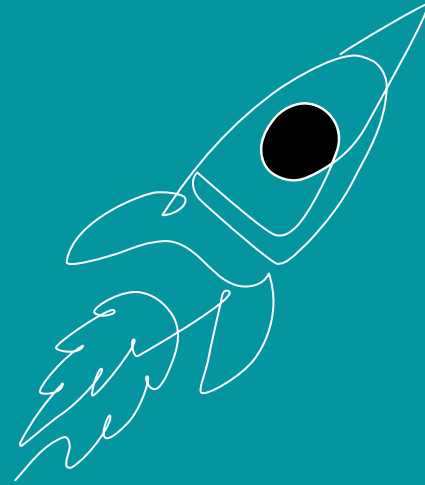
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QUESTIONS

Click [here](#) or scan below to submit a question.



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