

## Judge puts FWC member on notice over vax views

Wednesday, October 20, 2021, 2:42pm

A Supreme Court judge has slapped down a FWC presidential member's "clarion call" for Australians to "vigorously" reject the notion of mandatory COVID-19 jabs, questioning her assertions about the efficacy of vaccines and declaring it is not her role to challenge the validity or appropriateness of public health orders.

NSW Supreme Court Justice Robert Beech-Jones made the comments in a [ruling](#) he handed down on Friday in which he dismissed two challenges to the State Government's use of Public Health Orders to make COVID-19 vaccinations mandatory for certain categories of workers (see [Related Article](#)).

Noting it is not the court's function to determine which pandemic response is best, conclude which vaccines are most effective or assess the merits of State Health Minister Brad Hazzard's decision to issue the orders, the judge further observed that one group of plaintiffs had leaned heavily on FWC Deputy President Lyndall Dean's recent dissenting judgment in [Jennifer Kimber v Sapphire Coast Community Aged Care](#) (see [Related Article](#)).

In that decision, Vice President Adam Hatcher and Commissioner Bernie Riordan backed Commissioner Donna McKenna's [ruling](#) that the receptionist had not been unfairly dismissed for refusing a [mandated](#) flu shot on the basis of a previous allergic reaction.

In a lengthy dissenting opinion, Deputy President Dean said the receptionist had been dealt a "serious injustice" that denied her the Fair Work Act's protections, partly because of an inference that she held a "general anti-vaccination position".

## Tribunal no place for "political pamphlets"

One group of plaintiffs cited at length in its arguments the deputy president's claims that "vaccine mandates" in various COVID-19 public health responses amounted to a form of coercion that violated a person's right to bodily integrity, Justice Beech-Jones observed.

"Given the very different jurisdictions being exercised by the Fair Work Commission and this court, I would not ordinarily address the reasoning in their decisions (and I doubt they would address the reasoning in mine)," said the judge, who leads the court's common law division.

"However, as the *Henry* plaintiffs sought to rely on the reasoning it is necessary to record why that judgment is of no assistance.

"First, the relevant parts of the decision relied on by the *Henry* plaintiffs do not address the case law concerning consent to a medical treatment.

"Second, 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.

"Third, elsewhere in her reasons, the deputy president considered it necessary to opine on matters affecting either the validity or the appropriateness of making the Aged Care Order under the [Public Health Act] (at [147] to [173]).

"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.

"Fourth, 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' (at [182]) and 'vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID' (at [183]).

"Political pamphlets have their place but I doubt that the Fair Work Commission is one of them.

"They are not authorities for legal propositions."

## "Inappropriate" to label anti-vaxxer: Dean

Beginning her minority decision by stating that the aged care facility dismissed the receptionist because of her "inability" to be vaccinated, Deputy President Dean said that "never have I more strenuously disagreed with an outcome in an unfair dismissal application".

While the dismissal amounted to a "serious injustice", the deputy president found "more egregious" the majority's denial of protections under the Fair Work Act, in part because of the receptionist's "inferred" anti-vax views.

The receptionist had a flu shot at work in 2015, but about a month after her 2016 shot she developed a severe skin condition that lasted 10 months.

Thereafter, she declined voluntary flu shots offered in 2017, 2018 and 2019.

"I consider that [the receptionist] is correct in saying that the flu shot is not completely safe for everyone," Deputy President Dean said.

"It is not in dispute that [she] did have the flu shot prior to the condition.

"It is also not in dispute that an appropriately qualified medical practitioner advised her that she did in fact have a medical contraindication and that she should not have the flu shot.

"To label her an anti-vaxxer in these circumstances is highly inappropriate.

"[For the majority] to suggest that [she] had a 'spurious objection to a lawful workplace vaccination requirement' in circumstances where she had been advised by her medical practitioner that she did indeed have a medical contraindication to the flu shot, advised she should not have a flu shot, and had provided a properly completed [Influenza Vaccine Medical Contraindication] form, is a terrible mischaracterisation of her and the circumstances in this case."

## "Not a conspiracy theory"

Under a 'Mandatory vaccination cannot be justified' heading, Deputy President Dean in her dissenting opinion says that it is not a conspiracy theory to maintain that all COVID vaccines in Australia "are only [provisionally approved](#), and as such remain part of a clinical trial".

"The requirement for consent in this context is not new and should never be controversial."

"The [Nuremberg Code](#) (the Code), formulated in 1947 in response to Nazi doctors performing medical experiments on people during WWII, is one of the most important documents in the history of the ethics of medical research.

"The first principle of the code is that 'The voluntary consent of the human subject is absolutely essential'.

"Informed and freely given consent is at the heart of the code and is rightly viewed as a protection of a person's human rights."

Posing the question "Can COVID vaccinations be mandated by employers on health and safety grounds?", Deputy President Dean says "the short answer to this question, in almost every case, is no".

"The risk of spreading COVID only arises with a person who *has* COVID."

"There is no risk associated with a person who is unvaccinated and does not have COVID, notwithstanding the misleading statements by politicians that the unvaccinated are a significant threat to the vaccinated, supposedly justifying 'locking out the unvaccinated from society' and denying them the ability to work.

"It should be clearly understood that employers who mandate vaccinations will be liable for any adverse reactions their workers may experience, given this is a foreseeable outcome for some people."

## "Cure" not proportionate to risk

Turning to the use in NSW of public health orders to mandate vaccinations, Deputy President Dean says "decisions taken to restrict or remove basic liberties must be proportionate and necessary to manage the risk and must be the *minimum* necessary to achieve the public health aims".

"It should be abundantly clear that there are other, far less restrictive and less intrusive ways in which we can ensure public health and appropriately address the risk of COVID without resorting to the extreme measures currently in place."

"It is now time to ask whether the 'cure' is proportionate to the risk, and the answer should be a resounding no.

"When deciding now what is actually reasonable, necessary and proportionate in terms of any response to COVID, governments and employers should actively avoid the hysteria and fear-mongering that is now so prevalent in the public discourse, and which will cloud rational, fact based decision making.

"The current PHOs have moved well past the minimum necessary to achieve public health aims, and into the realm of deprivation.

"It is not proportionate, reasonable or necessary to 'lock out' those who are unvaccinated and remove their ability to work or otherwise contribute to society."

## "Medical apartheid and segregation"

In her "final comments", Deputy President Dean says that COVID-19 [research](#) has shown "that many who are 'vaccine-hesitant' are well educated, work in the health care industry and have questions about how effective the vaccines are in stopping transmission, whether they are safe to take during pregnancy, or if they affect fertility".

"A far safer and more democratic approach to addressing vaccine hesitancy, and therefore increasing voluntary vaccination uptake, lies in better education, addressing specific and often legitimate concerns that people may hold, and promoting genuine informed consent."

"It does not lie in censoring differing opinions or removing rights and civil liberties that are fundamental in a democratic nation.

"It certainly does not lie in the use of highly coercive, undemocratic and unethical mandates.

"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."

## "Lazy and fundamentally flawed approach"

The deputy president continued that "blanket rules" such as mandating vaccinations for everyone in a 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 antithesis 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 it a person is not allowed to question it."

**In an unusually combative sign-off** for the ordinarily collegiate tribunal, Deputy President Dean concludes her decision by declaring that "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."

**Deputy President Dean**, a member of the FWC since 2016 (see [Related Article](#)), disclosed in the Commission's [annual report](#), released today, that she doesn't have any outside interests apart from her role as chair of [The Alpine School](#), a Rudolf Steiner school in the Snowy Mountains.

**Sent:** Monday, 18 October 2021 6:49 PM

**Subject:** Dean Linkedin comment

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### WILL HISTORY REPEAT? THAT IS UP TO YOU

Today marks two years since the passing of my beloved Father. There is not a day that goes by where I don't think of him and what he gave to our family and so many others, despite the trauma he experienced as a young child during the Holocaust.

As the daughter and granddaughter of Holocaust survivors I have lived with the knowledge of atrocities committed upon millions of Jewish people for as long as I can remember. It started with small seemingly plausible steps, all couched in terms of what was for the 'greater good'. It was made possible by people whipped into a frenzy by fear and no longer able to think clearly.

The Western world has faced many seasonal respiratory pandemics before, but we have never responded by adopting all the trappings of totalitarianism fuelled by irrationality and fear. The World Health Organisation has never before endorsed measures with health and social impacts that will last generations. We have imported far more from China than the virus - we have imported Chinese style totalitarian social control mechanisms based upon very selective science, and many strategists assert they are delighting in the quick unravelling of our democratic values.



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**Quote from a Hungarian Jew from the Documentary, The Last Days:**



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"People wonder, "How is it that we didn't do something?" We didn't run away, we didn't hide. Well, Things didn't happen at once. Things happened very slowly. So each time a new law came out, or a new restriction, we said, "Well, just another thing. It will blow over." When we had to wear the yellow star to be outside we started to worry."

71 50 comments

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Lyndall Dean • 2nd  
Deputy President - Fair Work Commission  
I fully agree Tania



**ABC NEWS**

## A Fair Work Commission ruling on the flu jab reveals the divide on vaccine mandates

By political reporter [Matthew Doran](#)

Posted Mon 27 Sep 2021 at 6:52pm



A nursing home was justified in firing a worker who refused the flu vaccine, the Fair Work Commission says. (ABC News: Rhiannon Shine)

A deputy president of the Fair Work Commission (FWC) has railed against mandatory vaccinations in an extraordinary dissenting judgment, labelling such a decree for employees akin to "medical apartheid".

The comments from deputy president Lyndall Dean reveal the divide seen across the community on mandating vaccines.

The judgement related to a woman who was sacked from her job as a receptionist at a nursing home on the New South Wales south coast, after she had refused to get a flu shot last year when it was made mandatory by the New South Wales government.

The Sapphire Coast Community Aged Care receptionist, Jennifer Kimber, claimed she had a severe allergic reaction to a flu shot in 2016 and presented a letter from a practitioner of Chinese medicine to her employer to back up her refusal to get the vaccination.

She presented another letter, from a GP in Pambula, also outlining her allergic reaction, and wrote to the chief executive of Sapphire to outline her opposition to getting the shot.

### Key points:

- The Fair Work Commission has ruled a woman fired for refusing a flu vaccine cannot appeal her dismissal
- A dissenting commissioner said the decision enables a "medical apartheid"
- The FWC said the woman held "broader anti-vaccine" views

Fair Work Commission vice-president Adam Hatcher and commissioner Bernie Riordan blocked Ms Kimber's application to appeal against her dismissal, finding she "held a broader anti-vaccination position" after she "googled all sorts of stuff" in relation to side effects of vaccines.

### Read more about the vaccine rollout:

- [Are children able to give consent to vaccinate themselves against COVID-19?](#)
- [AFL introduces no jab no play COVID-19 vaccination policy](#)
- [Woolworths, Coles, Aldi to mandate COVID-19 vaccinations for staff](#)

The pair said they did not intend "in the circumstances of the current pandemic, to give any encouragement to a spurious objection to a lawful workplace vaccination requirement".



A woman fired from her job at an aged care facility for refusing the flu vaccine has been blocked from appealing. (ABC News: Nic MacBean)

### Dissenting commissioner says vaccine mandate 'abhorrent'

But their colleague, Ms Dean, said she "strenuously disagreed" and described it as a "serious injustice", disputing the suggestion Ms Kimber was an anti-vaxxer.

"All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia," she wrote in her dissenting judgment.

"It is an abhorrent concept and is morally and ethically wrong and the anthesis [sic] of our democratic way of life and everything we value."

Ms Dean argued the case about the flu shot should be a warning in the debate about making it compulsory to get the COVID-19 vaccination.

"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," she said.

"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."

Ms Dean said Ms Kimber should be reinstated to her role.

Mandatory COVID-19 vaccinations have been ordered for workers in the aged care sector, and there were large protests in Melbourne last week about the Victorian government's decision that construction workers needed to get the shot.

1 OCT 2021 5:40 AM AEST

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## Union calls out zero casual conversion at Western Sydney Uni

National Tertiary Education Union 1100 casual staff members at Western Sydney University (WSU) have received a personalised letter informing each of them that none are eligible for conversion to permanent work, proving recent changes to the Fair Work Act are designed to protect employers against the need to convert long-term casuals to ongoing employment.

Changes to the Fair Work Act earlier this year required employers to audit their casual workforces with the deadline of this week and determine whether any casual staff are required to be converted to ongoing work on the basis of being employed on a regular pattern of work over a long period of time.

Dr Damien Cahill, NTEU NSW Secretary said, 'These new laws impose a purely token requirement on employers in the higher education sector. Few if any casual staff can or will ever meet the necessary criteria.'

"'Casual' employment in higher education nearly always involved contracts of a duration less than 20 weeks, and these contracts almost always involve breaks over the course of a calendar year, yet the work is clearly ongoing, year after year', he continued.

'This confirms our view that the entire process has been a waste of time, and has simply provided employers with an excuse to avoid serious and genuine efforts to address the growing casualisation of their workforces', Dr Cahill said.

Dr David Burchell, President of the NTEU WSU Branch of the said, 'The gross overuse of insecure employment can be addressed.

'But it requires the active participation and support of staff through our enterprise agreements. It's why the NTEU has placed insecure employment as the head of our log of claims in this round of enterprise bargaining. We are determined that this is the right historic moment to address this historic ill on a major scale', Dr Burchell continued.

'To his credit, the Western Sydney Uni Vice Chancellor has spoken publicly about his desire to head down the same path of reducing casual employment, and has spoken directly to us about the need to find an agreed means of doing so. However, after four solid months of enterprise bargaining we are no closer to agreement on addressing insecure employment than when we began. This is deeply disappointing. We cannot afford as a university community to squander this historic opportunity', said Dr Burchell.

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