

SUBMISSION TO PARLIAMENT ON THE FAIR WORK AMENDMENT (PROHIBITING COVID-19 VACCINE DISCRIMINATION) BILL 2023.

Summary

News Conference of 6 Aug 2021 left employers outside of the legal system and a law unto themselves.

Misinformation by government authorities lead to confusion for employer decisions.

Employers never understood the roll of COVID-19 vaccines in the pandemic.

Pfizer vaccine is part of health care response not public health response.

Employers only followed Government guidelines for a few months at most.

Fair Work/Industrial Relations system was never able to regulate employers and allowed them to abuse employees.

The current amendment bill is the most effective and efficient solution to resolve the issues caused by employer vaccine mandates.

Mandates by Employers in the workplace.

6th August 2021: Former PM Scott Morrison held a news conference as reported by ABC news:

‘This week canned food producer SPC became the first non-health-related Australian business to announce it would be banning unvaccinated employees from the end of November. Qantas says it is considering demanding workers get the job.’

‘Mr Morrison listed airline workers, aged care workers and retail staff as examples of those for whom it may be appropriate to mandate vaccines.’

Safe Work Australia [SWA] and Fair Work Ombudsman [FWO] both federal government agencies, issued guidelines to assist employers if they chose to mandate vaccines in the work place.

FWO: ‘To assist in assessing whether directing an employee to be vaccinated against COVID-19 is reasonable, it may be helpful as a general guide to divide work into 4 broad tiers.’

Tier 1 work, ‘eg. employees working in quarantine or border control.’

Tier 2 work, ‘eg. employees working in health care or aged care.’

‘An employer’s direction to employees performing Tier 1 and Tier 2 work is more likely to be reasonable.’

Tier 3 work, ‘interaction with other people such as customers, other employees or the public.’ ‘A direction to receive a vaccination is more likely to be reasonable if community transmission of COVID-19 is occurring.’

Tier 4 work, ‘eg. Working from home.’ ‘An employer’s direction to employees performing Tier 4 work is unlikely to be reasonable.’

‘reasonable is always fact dependent and needs to be assessed on a case by case basis.’

6 Aug 2021 Morrison further states: “Ultimately employers need to consider those matters and make their own decisions.”

“These are legal decisions that have to pass a reasonable test and ultimately decided by the courts.”

6 March 2023: Sky New’s Sharri Clarkson interviews Morrison: “But not once as prime minister did I delegate my authority as prime minister, to make decisions, to any public servant (employer).”

“Individual states went down that path, the federal government and the medical expert advisory panel...never recommended to National Cabinet, never once, that those broad mandates should be applied.”

Comment: Morrison’s reference to retail workers and airline workers, as may be appropriate for mandates suggest that all Tier 3 workers are appropriate for mandates, the largest section of the

work force.

The vague statement by FWO for Tier 3 workers that mandates may be appropriate if community transmission is occurring! Question, when is community transmission not occurring?

“needs to be assessed on a case by case basis.” Was impracticable in the workplace and was already stated by SPC that their mandate was ‘broad’ based.

Morrison did delegate his authority to both public and private sector employers.

With no clear lines of authority Morrison would allow the courts (industrial relations system) to decide the inevitable conflicts that would arise. As will be shown the decisions would only go in one direction.

On the 6 Aug 2021 Morrison never stated that the medical expert advisory panel did NOT recommend ‘broad’ mandates.

Thus Morrison’s ambiguous, confusing and contradictory statements left employers to their own conclusions and without medical, scientific or ethical expertise it was inevitable that errors of judgement would be made by employers. Those errors of judgement are still occurring today.

What is a vaccine supposed to do.

October 2022: in a European Parliamentary enquiry a question was asked of a Pfizer executive Janine Small: “was the Pfizer COVID vaccine tested on stopping the transmission of the virus before it entered the market.” The answer was “NO”. A shock to many and a revelation to many others but it should not have been as following statements show.

11 December 2020: FDA News Release for EUA of Pfizer vaccine states; ‘nor is there evidence that the vaccine prevents transmission of SARS-CoV-2 from person to person.’ The article also states that when given as a series of two injections three weeks apart, for a period of seven days after the second dose there is clear evidence that the vaccine may be effective in preventing Covid-19 with data not available to show how long this protection lasts. It should be noted that many Australians who have been vaccinated have had COVID-19 at least once.

25 January 2021: ABC News reported the TGA had approved Pfizer’s COVID-19 vaccine for use in Australia. Dr Brendan Murphy stated: ‘The vaccine was designed to reduce the negative health impacts of COVID-19, but Dr Murphy warned that it was not clear yet whether the vaccine would reduce transmission rates.’

Aug 2021: SWA states in the guidelines for employers ‘However, a vaccinated person may still unknowingly carry and spread the virus to others around them, including workers and others in their workplace.’

April 2022: Senator Antic during Senate Estimates asked the CMO Professor Kelly what was the % reduction in transmission of the virus, from the vaccines. It is telling that he refused to answer. He was eventually persuaded to send the answer privately! Senator Antic later disclosed the answer to % reduction in transmission was ‘modest’. In this context the dictionary stated that modest meant fairly low and fairly low was one level above very low!

20 October 2022: In response to the European parliament admission, ABC fact checker RMIT in their ‘CheckMate’ stated: ‘According to Professor Leask, the before-market trials of COVID-19 vaccines had a “primary outcome of reducing risk of any disease and severe disease, but not transmission.” Referring to provisional approval by the TGA, ‘this approval would be granted for its use as “active immunization to prevent coronavirus **disease**(COVID-19) caused by SARS-CoV-2.”

Latest Advice Department of Health and Aged Care: ‘Are COVID-19 vaccines effective?’ ‘All vaccines approved for use in Australia are very effective at stopping people from becoming very sick if they catch COVID-19. ‘How the vaccines work.’ ‘The vaccines train your immune system to recognise and clear out the virus, before it makes you seriously ill.’ No mention of transmission of infection.

NSW Government. Antivirals-your questions answered: ‘Antiviral medicines target the virus (SARS CoV-2) that causes COVID-19 to prevent it infecting healthy cells in your body and multiplying. This helps stop the spread of the virus inside your body and helps your immune system to fight off infection. By reducing how severe the illness is, you are less likely to go to hospital,’

Conflicting Statements:

It is not that far in the past that we all remember the sort of comments noted below, noting the abusive and derogatory nature of some of these comments which in turn lead to ostracizing and discrimination in society.

17 October 2022: Nine news: ‘Yes, they claimed the vaccines would prevent transmission.’ In response to the Pfizer executive’s admission of no evidence of transmission. The quotes from public figures during the pandemic.

Gladys Berijiklian

15 Sept 2021: “Unvaccinated people spread the disease more readily.”

20 Sept 2021: “If you choose not to be vaccinated, its one thing to make that decision for yourself and your family, but your also making that decision, suggesting that you don’t care if your more contagious to other people...,because as Dr Chant and myself and everybodys been saying, even if your double vaccinated and have underlying health conditions you can still be at risk. I worry for people like my parents or others in the community who are aged or fully vaccinated, but yet could still be vulnerable.”

Brad Hazzard: 29 July 2021: “there are a lot of people who **don’t base their decisions in science or evidence**...not wanting to take vaccines, my message to them is you’re being **extremely selfish** if you think you cannot have a vaccine just because you don’t want to have a vaccine, well you should think about what your doing to your family and to the community, and I would say even more than that, **what a hide** you have, what a **ridiculous position** is that when you’re going to put health staff at risk, and when you get sick you’re going to expect to come into hospital and get paid for by taxpayers.”
(and anyone who is overweight and develops heart disease or COVID-19 and you’re going to expect to come into hospital and get paid for by the taxpayers!)

Mark McGowen: 31 Oct 2021: “,we want the public to be confident in these public settings, and that they’re only mixing with other vaccinated people. People less likely to be carrying or able to pass on the disease...Life will become very difficult for the unvaccinated from 31 January.”

Steven Marshall: 25 May 2021: “This isShe’s among the first 16 years olds in regional S.A. to roll up her sleeve and get a Covid-19 vaccine. By getting vaccinated she is not only helping protect herself, but is preventing others from suffering from this insidious disease.”

Michael Gunner N.T.: 6 Jan 2022: “,people who are not vaccinated present the greatest risk of spreading the virus and are the most at risk of becoming seriously ill if they get the virus.”

March 2023: Response to question by Senator Babet to Minister of Health Katy Gallagher at senate enquiry: “,its not just about an individual’s decision and keeping yourself safe. Its keeping other people safe from these, from this, virus, people who aren’t able to be as protected as some of us. So its actually a community responsibility to be vaccinated.”

23 Dec 2021: Public Health (COVID-19 Vaccination of Health Care Workers) Order (NO 3) 2021. Issued by Brad Hazzard. 3(f) “ensuring that health care workers are vaccinated will reduce-

- (i) The risk of infection, severe disease and death in the workers, and
- (ii) The risk of transmission of infection from workers to patients and other workers.”

Comment:

The traditional vaccine effect of stopping transmission is ineffective in the Pfizer vaccine and was not considered in its development.

The antiviral effect of reducing severity is effective for a relatively short period of time, no more than a few months, hence the need for constant boosters.

While official statements only refer to the antiviral effectiveness of the vaccines, public statements have usually referred to the antiviral effects and a supposed ability to stop transmission of infection. Governments were verbally abusive and sanctioned social isolation and ostracization of the unvaccinated on the basis of misinformation.

These types of comments encouraged employers to behave in a similar abusive manner to their employees.

Difference between Public Health System and Health Care System and the roll of Vaccinations.

The Health Care System; Traditionally the medical system, a system designed to prevent or treat disease or illness in the individual using various therapies within a clinical or hospital setting.

The health care system is a bottom up system ie the authority resides with the patient. The basis of the patient's authority is the **right of informed consent**. The basis of informed consent is the assumption that the patient will ultimately take responsibility for the outcome in their own body and therefore have the right to choose. Informed consent is based on the premise that no medical therapy is safe and effective without qualification and its application is by situation, timing, dosage, the needs and physiology of the patient, benefit/risk analysis, and personal beliefs.

Informed consent occurs in two stages. The first is the right of the patient to be given all the pros and cons of a particular therapy. The second stage is the patient's right to make a decision without coercion whether to proceed, seek a second or any number of opinions or not proceed at all.

Public Health System: The aim of the public health system as distinct from the healthcare system is to create a healthy environment for the whole community to minimize the risk of disease and ranges from building codes, clean water, clean air requirements, to road safety, compulsory seat belts, and includes health promotion such as "slip, slop, slap".

The important consideration for our purposes is the public health system does not have informed consent. The individual does not get to choose whether they have a sewerage system on their property or whether to wear a seatbelt and while the individual does not have informed consent they do have choice, comply with the rules or face a penalty!

There are only two main instances of medical therapies being used in the public health system, fluoridation and vaccination. Both have been controversial but fluoridation is not mandated and while there is inconvenience and the rise of the bottled water industry there is no penalty for not taking fluoride.

Vaccinations: Vaccinations are a medical therapy used to treat the individual within the health care system, a system designed to protect the individual's rights, but because the medical therapy is designed to stop transmission of the disease within the community the therapy also has a public health application, a system designed to protect the rights of the community over the rights of the individual and without the protection of informed consent. Traditionally vaccines have been given within the health care system and promoted within the public health system giving a community emphasis to vaccination but still retaining the protection of informed consent. The first major

change to this policy was in 2015, when former PM Morrison as Minister of Social Security initiated a No Jab, No Pay policy for childhood vaccination, where conscientious objection was removed and penalties imposed within Morrison's Social Security department consisting of denied benefits. This was followed by the states initiating No Jab, No Play policy in 2016.

Comment

Vaccines straddle the divide between the Health Care System and the Public Health System. Transmission of the disease at a community level is a Public Health issue. Severity of the disease in the individual is a Health Care issue. A vaccine may have a transmission prevention component and/or an antiviral reduced severity component.

The Pfizer vaccine as demonstrated never did have a transmission component therefore it never had a public health aspect to its usage except if the disease had overloaded the health care system. The peak usage of health care resources came in Sept 2021 but the system did not overload.

The Pfizer vaccine has an antiviral component to reduce severity of COVID-19. Therefore the vaccine comes under health care which entitles the user to the right of informed consent.

GUIDELINES GIVEN BY SAFE WORK AUSTRALIA AUGUST 2021

References:

Safe Work Australia/Covid-19 Information for Workplaces/Office/Vaccination (**SWA**)

Fair Work Ombudsman/Covid-19 Vaccination: Workplace Rights & Obligations (**FWO**)

DUTY TO REDUCE THE RISK OF COVID-19 IN WORKPLACE.

SWA: "As an employer you have a duty under the model WHS laws to eliminate or if that is not reasonably practicable, minimize the risks of COVID-19 in the workplace so far as is reasonably practicable." "This information will assist you to assess whether a COVID-19 vaccine is a reasonably practicable control measure to manage the risks of COVID-19 in your workplace."

WHS Act: S19 (1). "a person conducting a business or undertaking must ensure so far as is reasonably practicable the health and safety of: workers."

To understand the type of health and safety issues being referred to in S19, S36 gives a clearer understanding.

S36. "What is a serious injury or illness."

"In this part, serious injury or illness of a person means an injury or illness requiring the person to have "

- a) immediate treatment as an in-patient in a hospital, or
- b) immediate treatments for several types of serious injuries occurring in the workplace,
- c) medical treatment within 48 hours of exposure to a substance; and includes any other injury or illness prescribed by the regulations but does not include an illness or injury of a prescribed kind.

COMMENT:

The WHS Act is dealing with health and safety issues that originate in the workplace. For eg. Heart disease is the most widespread and deadly of diseases and there will possibly be employees in the workplace with heart disease. However the occurrence of heart disease is a health care issue and does not come under WHS laws in the workplace unless it has a direct impact on the workplace, eg. airline pilots.

Likewise with COVID-19 what happens in the community is irrelevant to WHS laws with one exception. If an employee with COVID-19 enters the workplace and transmits COVID-19 to another person in the workplace. Under these circumstances the health and safety issue arises within the

workplace and the employer is obligated under S19.

WHAT CAN EMPLOYERS DO UNDER THE GUIDELINES TO STOP THE TRANSMISSION OF COVID-19 IN THE WORKPLACE.

Safe Work Australia gives the following guidelines specific to the workplace and excluding any public health orders.

SWA: “a safe and effective vaccine is an important part of keeping the Australian community safe and healthy. The COVID-19 vaccines including boosters, available for use in Australia would help protect people by preventing serious health effects of COVID-19 in the person who is vaccinated, if they are infected with the COVID-19 virus.”

“However a vaccinated person may still unknowingly carry and spread the virus to others around them, including workers and others in the workplace. Because of this, even if your workers are vaccinated, to meet your duties under the model WHS laws and minimize the risk of covid-19 in your workplace, you **must** continue to implement all other reasonably practicable covid-19 control measures such as;

Ensuring workers do not come to their usual place of work when unwell.

Ensuring workers do not come to their usual place of work if they have tested positive for COVID-19

Ensuring physical distancing in the workplace and adhering to density limits, eg.

- supporting workers to work from home or relocating work tasks to different areas of the workplace or offsite

- staggering workers start, finish, and break times

- reducing the number of situations where workers come into close contact with others, eg. In lunchrooms and other shared spaces

Improving air quality

Practicing good hygiene

Increasing cleaning and maintenance, and

Wearing masks”

Comment

“Even if your workers are vaccinated to meet your duties under the model WHS law and minimize the risk of COVID-19 in your workplace, you **MUST** continue to implement all other reasonably practicable COVID-19 control measures.” Under the guidelines the vaccines were always part of a package. Because the vaccines do not stop transmission in the workplace, it is the other control measures that stop transmission.

Thus if the employers still believe there is a threat of transmission in the work place where are all the control measures as detailed in the guidelines and why are they mandating vaccines instead which do not stop transmission.

Is there a justification for what some employers are doing.

30 Sept 2022: AusDoc: ‘Prime Minister Anthony Albanese has announced the end of the mandatory five-day isolation period for people with COVID-19.’...’he declared the time was right to ditch one of the last significant public health measures designed to reduce COVID-19 transmission.’ ‘It was always envisaged that these measures were emergency measures,’ Commonwealth Chief Medical Officer Professor Paul Kelly said the decision was “context -specific and timing-specific” based on Australia’s “very low rates of cases, hospitalisations, ICU admissions and aged care outbreaks at the moment.”” When the crisis period ended which in NSW was 23 March 2022 vaccine mandates were gradually phased out with individual rights being returned. Nothing has changed since the 30 Sept 2022 to warrant any different course of policy.

Without medical, scientific or ethical justification how are some employers able to mandate vaccines.

Australia does not have a Bill of Rights, the substitute being antidiscrimination laws. However there are no antidiscrimination laws for health care or misuse of public health by employers. Under the current system discrimination could be applied to workers for any disease or illness or medical therapy.

27 Feb 2023: NSW Premier Perrottet during a radio interview on Ben Fordham show on 2GB stated: "I could not have made it clearer to the public service in NSW to end vaccine mandates" "I have the powers in certain areas and I have made that very clear and they have reduced those vaccine mandates. I don't have power in the private sector but I have actually spoken to leading employers across the state when I became premier for those vaccine mandates to be removed for the simple reason there is no evidence that the vaccine stops transmission."

Comment.

It should be noted that during the pandemic the state governments had dictatorial powers over their citizens but have no control over their employers! Morrison by not taking decisive action in Aug 2021 created effectively a group of Vigilante employers creating their own laws and administering their own justice.

Morrison stated on 6 Aug 2021 that: "ultimately decided by the courts." Why then is this not working

Why is The Fair Work/Industrial Relations System not regulating employers.

The I.R. system acts more as a common law arbiter than as a regulator. While the IR dispute resolution system appears quick, economical and practical on a superficial appraisal it hides a bias. The bias is in the two stage nature of the system. The first stage is a negotiating process between employee and employer. As the employee can't return to the work place the only option is compensation. The lawyers for the employer will have a knowledge as to whether the employee will win their case at the court or hearing stage. If they believe that the employee will win they will negotiate compensation. The compensation demanded by the court is usually about 6 months wages so the employer will negotiate compensation up to 6 months wages. Once compensation is agreed to the whole process ends and will not be recorded. Thus the arguments that lead to compensation will never be recorded for common law precedent. If the lawyers for the employer believe the employee's case will not succeed in the hearing they will not negotiate a compensation leaving the employee the option to walk away or go to the hearing stage. If the employee proceeds to the hearing stage the most likely outcome will be that the case will be dismissed, entered on the Caselaw website as a precedent for future cases and a disincentive for future employees at termination.

Comment

The relatively small occasional payout to a terminated employee does not act as a penalty or even a disincentive to a large employer to having unethical, prejudiced and inappropriate policy in the work place.

CONCLUSION

On the 6 Aug 2021 former PM Morrison created a legal, political and social problem by allowing employers with no medical, scientific or ethical expertise, to become a law unto themselves outside the controls of the statutory and common law IR systems, effectively vigilantes creating their own laws and administering their own justice, abusing the individual rights of employees.

While there are several solutions to this problem the most efficient and effective is the amendments presented in this Bill before parliament.

