

Mapping the legal response to COVID-19 vaccine mandates in Australia

The role of superior courts pandemic management



Scan the QR code to access my research repository profile:



Amy Thomasson

Associate Lecturer

PhD Candidate

Member of the MandEval Project



UWA
PERTH · AUSTRALIA

This presentation

What I will talk about:

01

The **types** of and **legal basis** for vaccine mandates in Australia

02

The **main areas of law** through which vaccine mandates were **challenged**: public and administrative, employment and constitutional law

03

Key **takeaways** about the role of the law in **pandemic management**

Methodology & why this work matters

- Primarily doctrinal.
- Lexis+, Westlaw AU, Jade and Austlii searched using the terms “vaccine”, “direction”, “public health order”, “COVID-19”, “vaccine mandate”.
- Confined results to **superior courts** (Supreme Court and above).
- Case repository built.
- Findings drawn from **analysis** of cases.
- Federal COVID-19 inquiry found people were **highly critical** of vaccine mandates.

Types of mandates and legal basis

- Both public and private.
- Three main types:
 1. Denial of **access to public spaces** (public space mandates);
 2. Restrictions on **movement and travel** for the unvaccinated (travel mandates); and
 3. Requirements for **employees** to be vaccinated as a **condition** of employment or to **leave their home** to attend work if they lived in an 'area of concern', or provide proof of vaccination to **attend the workplace** (employment mandates),.
- Primarily implemented at a **state level** through **delegated legislation**.

Main areas of law

- **Public and administrative:** two successful cases (*Shearer* and police force employees in *Johnston*).
- **Employment law:** one successful case (ambulance service employees in *Johnston*).
- **Constitutional law:** no successful cases.

Key takeaways

1. Given broad and far-reaching legislative power, there is little scope for the operation of the principle of legality;
2. Vaccine mandates were primarily found unlawful on procedural rather than substantive grounds, demonstrating implicit deference to public decision-makers; and
3. Human rights legislation may serve an increasingly important protective function in future public health emergencies.

1. Broad and far-reaching powers

- Powers given to public decision-makers in PH and EM legislation are **broad** – whatever they consider to be ‘**reasonably necessary**’.
- **Little room for judicial review** to operate.
- The principle of legality also has **limited application**.
- See, eg, *Kassam v Hazzard*; *Henry v Hazzard*.

[9] Although it was contended that the impugned orders interfere with a person’s right to bodily integrity and a host of other freedoms, when all is said and done the proper analysis is that the impugned orders curtail freedom of movement which in turn affects a person’s ability to work (and socialise). So far as the right to bodily integrity is concerned, it is not violated as the impugned orders do not authorise the involuntary vaccination of anyone. So far as the impairment of freedom of movement is concerned, the degree of impairment differs depending on whether a person is vaccinated or unvaccinated. Curtailing the free movement of persons including their movement to and at work are the very type of restrictions that the PHA clearly authorises. Hence, the principle of legality does not justify the reading down of s 7(2) of the PHA to preclude limitations on that freedom.

2. Procedural rather than substantive error

- In *Johnston*, Justice Martin found that the decision-making process engaged in by the Police Commissioner was deficient.
- Similarly in *Johnston*, his Honour found that the Director-General of Health did not lead any evidence necessary to make the finding sought.
- In *Shearer*, the vaccine mandate was not a mandate at all.

3. The emerging importance of human rights legislation

- Limited operation of the principle of legality and judicial review results in lack of scrutiny of decision-making.
- Who ensures adequate scrutiny of decision-making and guards against abuse of power, if not the courts?
- While rights-based challenges have generally been unsuccessful, it is the closest courts have come to evaluating the policy choices that underpinned vaccine mandates.
- Only Victoria, Queensland and the Australian Capital Territory currently have legislation that protects human rights.

Thank you!



Scan the QR code to
access my research
repository profile:



Amy Thomasson

Associate Lecturer, UWA
Member of the MandEval Project