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***Kassam v Hazzard*: Challenging the COVID-19 Vaccine Mandate in Courts**

On 15 October 2021, the Supreme Court of New South Wales handed down its decision on a challenge against New South Wales' COVID-19 vaccine mandate. The case was initiated by members of a number of industries and sectors affected by the mandate. These people were from the health, aged care, construction and education industries and sectors. Chief Justice Beech-Jones of the NSW Supreme Court eventually found against the challengers of the vaccine mandate.

This article will explain some of the key reasoning behind the Court's decision to find against the vaccine challengers, and also provide some insight into the implications of the decision.

The Court's Decision

Among the numerous other arguments provided by the vaccine mandate challengers, some of the main arguments presented were that the vaccine mandate:

1. constituted a violation of the rights to:
 - a. bodily integrity, as the mandate was forcing people to take a vaccine which they did not wish to take;
 - b. privacy, as the mandate was forcing people to disclose their vaccination status without consent, which constituted a breach of various privacy legislation; and
 - c. freedom, of movement as the vaccine mandate would restrict people from moving to and from work; and
 - d. work, as it prevented unvaccinated people deemed as essential workers from working.
2. implemented civil conscription in violation of section 51(xxiiiA) of the Constitution. This involves coercion of medical and dental services and compelling private medical information onto the Australian Immunisation Register, which is not supported by the constitution; and
3. is a breach of procedural fairness given that the plaintiffs should have been allowed to comment on or respond to a mandate which affected their "*rights, interests or legitimate expectations*" before the mandate was made.

Violation of Rights

Regarding the first argument, the Court in a lengthy judgment stated the following:

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1. The vaccine mandate did not amount to a violation of the right to bodily integrity because the vaccine mandate does not authorise the involuntary vaccination of anyone.
2. The vaccine mandate did not violate the right to privacy because there is no tort of breach of privacy. Furthermore, the mandate did not violate any privacy legislation given that information about a person's vaccination status which would need to be provided to an employer would either:
 - a. not constitute "collected" information, as per the relevant privacy legislation, unless the employer made a note or record of the person's vaccination status; or
 - b. if the information was "collected", the employer would be justified in doing so per the privacy legislation as they would be acting consistently with the "*principle in that a function or activity of their organisation is providing safe premises for their workforce, the public, students, patients or residents as the case may be*".
3. The vaccine mandate is not a violation of the freedom of movement because the restriction of movement, including their movement to and from work, is the exact type of restriction contemplated by the PHA.
4. The vaccine mandate does not violate the common law right to work, as this right does not exist. On the contrary, the common law has expressly refused to recognise a right in those terms. It instead strikes down unreasonable contractual restraints of trade. The vaccine mandate is not an unreasonable restraint of trade.

Civil Conscription

Regarding the second argument, the Court held that that the vaccine mandate did not implement civil conscription in violation of section 51(xxiiiA) of the Constitution. Section 51(xxiiiA) confers power upon the Federal Parliament to make laws in respect to:

[t]he provision of maternity allowances, widows pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription, benefits to students and family allowances...

Civil conscription involves compelling civilians to perform labour in service of the government, in this case, the provision of medical services. The Court held that the vaccine mandate did not implement civil conscription because:

1. section 51(xxiiiA) only applies to the legislative powers of the Commonwealth and not the states; and

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2. there is no evidence to suggest that the Federal government had entered into a joint scheme with the NSW state government to mandate COVID-19 vaccines. Nor was there any evidence which suggests that the Federal Government had imposed a *requirement* for NSW to mandate the COVID-19 vaccine to anyone.

Breach of procedural fairness

On the third argument, the Court found that the vaccine mandate did not breach procedural fairness because decisions which affect “a very wide class of persons” will generally not impose upon a decision-maker a duty to afford procedural fairness. Indeed, in order for a duty to afford procedural fairness to be imposed, a person needs to be able to “*identify the obligation by reference to an individual or class of persons. The obligation must be capable of identification and fulfilment, in a reasonable and practical sense, prior to the making of the decision*” (as per *Castle v Director General, State Emergency Service* [2008] NSWCA 231). As the vaccine mandate would affect millions of people in the state, and the hundreds of thousands of workers in all the essential industries and sectors, there was no duty to afford procedural fairness in this case.

It was also noted that if the vaccine mandate were deemed a legislative act rather than an administrative act, there would be no grounds for a procedural fairness argument. The Court remained silent on this matter. This is because there was no need to consider it given that even if the vaccine mandate was an administrative act, no duty to afford procedural fairness was owed.

Implications for Future Challenges

This decision is likely to have a profound negative impact on the viability of any potential challenge to a COVID-19 vaccine mandate in Australia. This is due to similarity of the vaccine mandates in each state and territory and the laws which justify them, the comprehensiveness and multi-pronged arguments which the challengers mounted against the vaccine mandate, and their failure to succeed on any of these arguments.

In Victoria, the vaccine mandates have been made under the *Public Health and Wellbeing Act* 2008 which, much like the PHA, confers wide-ranging and extensive powers to the Chief Health Officer and Health Minister. It is likely that if a similar case were brought before a Victorian Court, the court will use the *Kassam* decision as a persuasive precedent to help it to come to a conclusion. Therefore, it is likely that if similar arguments are made against the vaccine mandate, they will be rejected with the same or similar reasoning. As the *Kassam* decision covers a large array of different arguments against the vaccine mandate, it leaves vaccine mandate challengers with little scope to succeed unless they have an entirely new and convincing legal argument.

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It is however worth noting that unlike New South Wales, Victoria has a Human Rights Charter which has allegedly been breached. In a Victorian class action that has been commenced, the Victorian government is said to have “acted unlawfully by over-riding several fundamental freedoms protected by the Charter.

Furthermore, Chief Justice Beech-Jones also completely overruled the dissent of Deputy President Lyndall Dean of the Fair Work Commission in the recent case of *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCB 6015. That case concerned the dismissal of an aged care worker who refused to take a flu vaccine despite being mandated to do so by her employer. The Deputy President dissented with the decision of the majority of the full bench of the Fair Work Commission and found that the worker had been unfairly dismissed.

In her decision, the Deputy President stated that mandating vaccines was an “*abhorrent concept*” which was “*morally and ethically wrong, and the antithesis of our democratic way of life and everything we value*” and introduced “*a system of medical apartheid and segregation*”. She concluded that vaccine mandates amounted to a form of coercion which violated a person’s right to bodily integrity.

Chief Justice Beech-Jones wholly disagreed with the Deputy President’s dissent in four ways.

1. He noted that parts of the Deputy President’s decision failed to address case law about consent to a medical treatment.
2. Parts of the Deputy President’s decision contained assertions about the effectiveness and safety of COVID-19 vaccines and the public health response to the COVID-19 pandemic which were irrelevant to the *Kimber* case.
3. The Deputy President had also expressed her opinion on whether it was appropriate to make the Aged Care Order (the subject of the *Kimber* case). Chief Justice Beech-Jones noted that the “*function of determining [the order’s] 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*”.
4. Chief Justice Beech-Jones then criticised the Deputy President for effectively handing out “*political pamphlets*” in her decision by pleading for Australians to “*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*”. He stated that the Deputy President’s personal views were not legal authorities.

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Chief Justice Beech-Jones' comprehensive reply to the Deputy President's dissent in the *Kimber* case further weakens the prospects of success for any potential challenge to a COVID-19 vaccine mandate.

Despite this, there is still a chance that the vaccine mandate challengers in the *Kassam* case will appeal the decision to a higher Court. However, as of October 2021, there has been no confirmation that this has happened or will happen.

Conclusion

Paul Horvath Solicitor understands the challenges that COVID-19 vaccine mandates are posing for employers. If you need assistance, please contact our employment law team at Paul Horvath Solicitor on (03) 9642 0435 or reach out to us at admin@phsolicitor.com.au.

Nothing in this article should be relied on as legal advice. The contents of this article should be regarded as information only, and for specific legal matters, independent advice should always be sought.

Sources:

Kassam v Hazzard [2021] NSWSC 1320 (15 October 2021)

<https://www.abc.net.au/news/2021-10-15/judge-rules-out-challenges-to-nsw-covid-19-vaccination-orders/100543888>