## 6 December 2021(change) The Premier Mr Dominic Perrottet (NSW)Email: epping@parliament.nsw.gov.auChief Health Officer and Deputy Secretary Dr Kerry Chant (NSW)Email: kecha@doh.health.nsw.gov.au

Dear Mr Perrottet and Dr Chant,

**For Your Urgent Attention: Vaccination of Authorised Workers**

My name is NAME. I am the DIRECTOR/MANAGER/SUPERVISOR/CEO of COMPANY NAME. I have been in this position for X YEARS. There are X NUMBER of employees who work for my company, and who rely on it to make a living.

I write to you in the aftermath of the Covid-19 mandatory vaccination requirements the New South Wales (NSW) Government has introduced for certain workers.

The requirements apply to:

* Workers specified in the NSW Airport and Quarantine Workers Vaccination Program, including quarantine, transportation and airport workers
* Certain residential aged care facility workers
* In-home and community aged care workers
* People providing disability services
* Certain health care workers
* Education and care workers, including teachers and education providers
* Other workers who are allowed to go into work.

Public health orders:

* [Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021](https://www.legislation.nsw.gov.au/file/Public%20Health%20%28COVID-19%20Air%20Transportation%20Quarantine%29%20Order%20%28No%204%29%202021_211128_9.44pm.pdf)
* [Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) Amendment (Transiting Arrivals) 2021](https://www.legislation.nsw.gov.au/file/Public%20Health%20%28COVID-19%20Air%20Transportation%20Quarantine%29%20Order%20%28No%204%29%20Amendment%20%28Transiting%20Arrivals%29%202021.pdf)
* [Public Health (COVID-19 Care Services) Order (No 2) 2021](https://www.legislation.nsw.gov.au/file/Public%20Health%20%28COVID-19%20Care%20Services%29%20Order%20%28No%202%29%202021.pdf)
* [Public Health (COVID-19 Vaccination of Health Care Workers) Order (No 2) 2021](https://legislation.nsw.gov.au/file/Public%20Health%20%28COVID-19%20Vaccination%20of%20Health%20Care%20Workers%29%20Order%20%28No%202%29%202021.pdf)
* [Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021](https://legislation.nsw.gov.au/file/Public%20Health%20%28COVID-19%20Vaccination%20of%20Education%20and%20Care%20Workers%29%20Order%202021_211020_5.23pm.pdf)
* [Public Health (COVID-19 General) Amendment Order (No 9) 2021](https://www.legislation.nsw.gov.au/file/Public%20Health%20%28COVID-19%20General%29%20Amendment%20Order%20%28No%209%29%202021.pdf)
* [Public Health (COVID-19 General) Order 2021](http://classic.austlii.edu.au/au/legis/nsw/covid-19_orders/ph19go2021263)

The purpose of this letter is to give you insight into the position you have put me in. The Vaccination Direction forces me to implement your policy for you and puts me at risk of significant legal liability. This is not the job of employers in general, particularly in circumstances where the direction you want me to implement is in breach of several other laws, including the Public Health Act 2010 (NSW) itself (**the PH Act**).

1. **Implementing your direction puts me at significant risk of liability**

*The State of Emergency*

On the 15 March 2020, the NSW Health Minister, Mr Brad Hazzard, executed special state powers under legislative authority, specifically, [section 7](http://www5.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s7.html) of the [*Public Health Act 2010*](https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2010-127) *(NSW)* (**the PH Act**).

[S7(5)](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s7.html) of **the PH Act** notes that any orders issued under [Section 7](http://www5.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s7.html) may be extended for further periods from time to time, but that the total period the order continues in force cannot exceed [90 days](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s7.html), unless withdrawn or made to expire sooner.**[[1]](#footnote-1)**

Since the original publication of [Public Health Orders](https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2020_2020-48.pdf) proclaimed by the Health Minister, Mr Brad Hazzard, on 15 March 2020, subsequent issuing of new or amended public health orders has occurred on a needs basis, up to and including the most recent issuance of orders which took effect on 27 November 2021.[[2]](#footnote-2)

In all states and territories, a Public Health Emergency has been declared except for New South Wales. Instead, NSW has relied on general directions issued under [section 7](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s7.html) of the Public Health Act 2010 (NSW).

Whilst general orders can be issued under [section 7](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s7.html), [section 61](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s61.html) and [section 62](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s62.html) of **the PH Act** havebeen neglected despite both sections legislatively compelling the “[Secretary](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s61.html)” or “[An Authorised Medical Practitioner](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s62.html)” to follow regulatory provisions that specifically pertain to the testing or treatment of a person with Category 4 or 5 condition (which Covid-19 is defined as).

The current COVID-19 measures in NSW are due to expire no later than 26 March 2022.**[[3]](#footnote-3)** On or prior to that date, the NSW Government could theoretically amend or extend COVID-19 emergency provisions, however, we note that;

* Extending the Public Health Emergency powers is not a given, nor is it automatic; and
* The NSW Government would be subject to many checks and balances before determining any decision to extend or amend any health provisions under **the PH Act.**

In August 2021, several public health orders applicable to the industries listed above came into effect. The public health orders are stated to be issued pursuant to the [Public Health Act 2010 (NSW).](https://legislation.nsw.gov.au/view/html/inforce/current/act-2010-127%22%20%5Cl%20%22pt.4-div.4)

Problematically, the public health orders have the effect of imposing obligations upon employers in relation to the vaccination of their workers. Essentially, they force me to implement mandatory vaccination directions to my staff, on your behalf.

***The Public Health Orders deny Procedural Fairness and Natural Justice***

The public health orders ask me to direct my staff to receive a vaccine which many of them do not wish to receive. The worker must produce evidence of having received their vaccination dose - and evidence of having received the prescribed number of doses of their COVID-19 vaccination.

The employer, owner, occupier or person apparently in charge must check that the worker provides documentation which shows either of the following;

1. received the number of doses required for a complete course of a COVID-19 vaccine, or
2. a medical contraindication preventing the provider from receiving any COVID-19 vaccine, or

(b) for other persons—documentation providing evidence the provider has received the number of doses of a COVID-19 vaccine required to be fully immunised. [[4]](#footnote-5)

The employer is not only playing the role of the owner/occupier or person in charge but also being made to act in the capacity of a GP by requesting to see and collect private and personal information regarding the health of their worker.

Furthermore, the assertion that workers featured in the direction must receive a first vaccine dose, or a second vaccine dose or book in to receive a vaccine, by a certain date, and that they will need to be fully vaccinated by a certain date in order to work implies an assumption that the state of emergency will be extended beyond 26 March 2022, which cannot be stated at this point in time.

Obviously, the pandemic is ever changing, and the response must match that change. Restrictive and mandatory measures should only be implemented as a last resort and when absolutely necessary. So, it is unclear how I can recommend or direct my staff to receive a vaccine to continue working for me based on a direction which requires them to take actions which are beyond the scope of the current state of emergency.

Although you may say that a vaccine mandate is temporary, several of my staff have pointed out to me that the act of receiving a vaccine is not. Once a vaccine is administered, it can never be removed. This puts my staff as well as myself in an impossible position.

Some staff may choose to take leave indefinitely until such a power will be unlawful or runs out; others may undergo the vaccination due to a lack of leave or an inability to get by without their job in the meantime.

All in all, there is an impression in the community that the NSW Government has issued Media Publications and Public Health orders as a means of coercion: to pressure as many people as possible into getting the vaccine before the impending deadlines made out by the Public Health Orders.

Many workers in NSW have received or will receive a direction[[5]](#footnote-6) from their employer to be vaccinated by a certain date, telling them that they must have a booking for a vaccination by a particular day or they would not be able to work. This is frankly unreasonable and negates informed consent through the threat and loss of employment if the vaccination direction is not complied with.

As an employer, I will not participate in said coercion. I am not an accessory to Government policy, particularly when that policy is improperly made and ill-conceived.

**To be clear; I refuse to terminate staff** **who refuse to undergo vaccination, particularly in circumstances where I lack the lawful authority to do so.**

On this note, there are several other issues with the legality of your approach to vaccination.

1. **You are asking me to breach Work Health and Safety law and enterprise agreements**

As an employer, I cannot make sweeping changes to the workplace, or the requirements my employees are subject to, without notice. Any directions I give must also be lawful and reasonable. It is well known that there is “a legal requirement to consult with employees about significant changes in the workplace” and that these “are set out in legislation, awards and enterprise agreements”.[[6]](#footnote-7)

Specifically, in NSW, s47, s48 and s49 of the *Work Health and Safety Act 2011 (NSW)* (**the WHS Act**) implements a duty for employers to consult with employees who are likely to be directly affected when doing any of the following (which clearly applies to the introduction of a vaccine mandate):[[7]](#footnote-8)

(1) Consultation is required in relation to the following health and safety matters—

(a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking.

(b) when making decisions about ways to eliminate or minimise those risks;

(c) when making decisions about the adequacy of facilities for the welfare of workers;

(d) when proposing changes that may affect the health or safety of workers;

(e) when making decisions about the procedures for—

(i) consulting with workers; or

(ii) resolving work health or safety issues at the workplace; or

(iii) monitoring the health of workers; or

(iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or

(v) providing information and training for workers; or

 (f) when carrying out any other activity prescribed by the regulations for the purposes of this section[[8]](#footnote-9)

In addition, the WHS Act clearly states the form that this consultation must take, which includes:

(a) that relevant information about the matter is shared with workers; and

(b) that workers be given a reasonable opportunity—

(i) to express their views and to raise work health or safety issues in relation to the matter; and

(ii) to contribute to the decision-making process relating to the matter; and

(c) that the views of workers are taken into account by the person conducting the business or undertaking; and

(d) that the workers consulted are advised of the outcome of the consultation in a timely way.

(2) If the workers are represented by a health and safety representative, the consultation must involve that representative. [[9]](#footnote-10)

The Public Health Order and the assertion within it that the worker must be vaccinated to continue their work completely ignores these provisions. I am unable to “share information about the matter” with employees when the matter is a medical procedure.

I am unable to give employees a “reasonable opportunity to express their views”, or to “take into account those views” in circumstances where you have given employers insufficient notice of the requirement to be vaccinated, nor have you consulted with us before implementing it. Importantly, you have also not given us an opportunity to consider the alternative measures which the WHS Act and regulations authorise in order to reduce workplace risk (vaccination not being one of them), which we are statutorily obligated to do at risk of significant penalty.

In other words, you are putting us in between a rock and a hard place. You are asking us to choose between:

* telling our staff they must get vaccinated and breaching NSW Work Health and Safety law as a result;[[10]](#footnote-11) or
* if you don’t follow government state directions to be vaccinated by a certain date, you risk losing your job

It is also unclear whether a direction I make for my staff to be vaccinated could be “lawful and reasonable”. The WHS Act 2011 and Regulations form a comprehensive and exhaustive statutory framework for workplace law in NSW. The degree of specificity in the WHS Act in particular, which has 276 sections and 5 schedules, indicates a clear intention to cover the field. Those legislative instruments clearly delegate to employers several means of mitigating workplace risk. **None of those means contain a requirement for employees to undergo any kind of medical intervention.** The issue of whether an employer can direct an employee to attend a medical examination has been explored quite extensively and can provide guidance here despite the requirement to undergo a medical intervention being a much more onerous one. In particular, in *Grant v BHP Coal Pty Ltd*,[[11]](#footnote-12) Dowsett, Barker and Rangiah JJ referred to the ‘principle of legality’, exploring its limits with reference to other authorities.

They said (with emphasis added:

87. In Starr v National Coal Board [1977] 1 All ER 243, Scarman LJ at 249 described a person’s right to personal liberty as a fundamental right which would be infringed by requiring the person to undergo a medical examination. It is settled that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect: see, for example, Coco v The Queen (1994) 179 CLR 427 at 437; X7 v Australian Crime Commission (2013) 248 CLR 92 at [21], [86] and [158]. That principle is known as the principle of legality.

The WHS Act lacks such “clear words or necessary implication”.

It is unclear to me why you have taken this approach. It seems reckless and ill-thought out, which is surprising given your position. You must know that asserting yourself into the employer/employee relationship as well as the employee/doctor relationship so hurriedly is inconsistent with the state’s legislative frameworks. The lack of any kind of transitional arrangement or consideration as to the consequences of such a vaccination requirement is reckless, at least. You are forcing us as employers to breach the laws we must comply with without any thought or consideration for that. I believe that I have no choice but to say no. In such circumstances, I have the right not to follow what you’re telling me to do.

1. **The PH Act is being otherwise misused**

As noted above, the public health orders in NSW have been made pursuant to s7 of the Public Health Act 2010. This is an oversimplification and a misuse of the broader public health legislative framework in NSW as well as nationally.

*Inconsistency with the Biosecurity Act*

Section 477 of the *Biosecurity Act 2015* (Cth) (**the BSA**) allows the Federal Health Minister to determine emergency requirements during a human biosecurity emergency period. Australia has at all material times been in such a period pursuant to the BSA.

Section 477(1) of the BSA says:

“(1) During a human biosecurity emergency period, the Health Minister may determine any requirement that he or she is satisfied is necessary:

(a) to prevent or control:

(i) the entry of the declaration listed human disease into Australian territory or part of Australian territory; or

(ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory …”

In addition, Section 8 of the BSA provides that:

(1) This Act does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act (except as referred to in subsection (2)).

(2) Subsection (1) is subject to the following provisions:

(c) subsections … 477(5) and 478(4) (biosecurity emergencies and human biosecurity emergencies).”

So, if the (state) PH Act is incapable of operating concurrently with the (federal) BSA, then the (federal) BSA excludes or limits the operation of the (state) PH Act.

Second, even if the PH Act is capable of operating concurrently with the BSA, Subsection 2(c) notes that, in the case of “human biosecurity emergencies” (which the Covid-19 pandemic is), the BSA limits the operation of the PH Act anyway.

Either way it is interpreted, the BSA explicitly seeks to limit and exclude the operation of laws of States and Territories which concern human biosecurity emergencies, for the sake of avoiding inconsistency. This makes sense given the comprehensive and exhaustive nature of the BSA.

We also note Section 477(5) of the BSA, which says that:

(5) A requirement determined under subsection (1) applies despite any provision of any other Australian law.

Significantly, s477(6) also says that:

(6) A determination made under subsection (1) must not require an individual to be subject to a biosecurity measure of a kind set out in Subdivision B of Division 3 of Part 3 of Chapter 2.

Note: Subdivision B of Division 3 of Part 3 of Chapter 2 sets out the biosecurity measures that may be included in a human biosecurity control order.”

Overall, the intention of the comprehensive and exhaustive BSA is clearly to cover the field in relation to the management of human biosecurity emergencies. When (as now) Australia is in a human biosecurity emergency period, due to section s8(2), state laws on that subject, even if they are capable of operating concurrently with the Biosecurity Act, are excluded and inoperative.

It is also important to note that in the BSA, emergency requirements are qualified and restricted by the significant fact that biosecurity measures cannot request an individual to be isolated, detained, tested, vaccinated, medically treated or searched (amongst other actions) in the absence of a biosecurity control order issued to the individual. There are several checks and balances which apply to the issuing of such orders, in recognisance of their seriousness. In the face of such an exhaustive, carefully drafted and overriding federal legislative framework, it is inappropriate for emergency state powers to be used as a bypass to these checks and balances, particularly in circumstances where these powers, issued at the discretion of one Government Minister, seek to breach an individual’s human rights by requiring them to undergo vaccination at short notice in order to continue to make a living.

*The PH Act itself is being Misused*

Even if you reject the notion that the BSA excludes and limits the operation of state law in this way, and even if we leave the BSA aside entirely, s7 of the PH Act must be read and understood in the context of the PH Act as a whole. Concerningly, s7 is being used as if it stands alone as some kind of ultimate discretionary executive superpower; immune from the checks and balances the remainder of the PH Act carefully imposes on it.

This misinterpretation of the applicability of s7 likely comes from the words of that section, which says that the emergency powers include to

(2)  In those circumstances, the Minister—

(a)  may take such action, and

(b)  may by order give such directions,

as the Minister considers necessary to deal with the risk and its possible consequences.

However, this must be read in tandem with the various limitations the rest of the PH Act places upon this section, and in tandem with the principles of statutory interpretation in general.

The following principles apply (with emphasis added):

* The task of construction must begin with a consideration of the text itself. **The language which has been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision**, in particular the mischief it is seeking to remedy;[[12]](#footnote-13) and
* **The context in which the Section is construed includes the context of the wider legislation as a whole**. This also applies to delegated legislation (such as Directions made under s7) which must be read in the context of its enabling legislation, being the PH Act.[[13]](#footnote-14)

So, s7 must be read in context with the rest of the PH Act. On this note, it should be said that, on the face of it, it would have been odd for Parliament to draft such a complex legislative framework for the facilitation and regulation of public health, with so many checks and balances included, only for the Minister for Health to have the power through s7 to ignore all of that entirely at his or her sole discretion.

Furthermore, the inclusion in the PH Act of s21-23 demonstrates the intention of the legislature to mirror the requirement within the federal BSA to issue a biosecurity control order at the state level by authorising the issuance of a public health order to individuals on a similar basis. I extract the entire section below, because it clearly institutes a comprehensive and carefully constructed decision-making process for the decision maker; the reason being a recognisance that the restriction of a person’s liberty is something which should only be approached with extreme caution.

**What public health order may require *the PH Act*** s7(3)(a-c)

A public health order may require a person to do something at a place that is—

(a)  to reduce or remove any risk to public health in the area, and

(b)  to segregate or isolate inhabitants of the area, and

(c)  to prevent, or conditionally permit, access to the area.

(2) Without limiting subsection s7(3) (a-c), a public health order may require a person to do any of the following at the place—

(a)  to refrain from specified conduct,

(b)  to undergo specified treatment (whether at a specified place or otherwise),

(c)  to undergo counselling by one or more specified persons or by one or more persons belonging to a specified class of persons,

(d)  to submit to the supervision of one or more specified persons or of one or more persons belonging to a specified class of persons,

(e)  to notify the Secretary of other persons with whom the person has been in contact within a specified period,

(f)  to notify the Secretary if the person displays any specified signs or symptoms,

(g)  to undergo a specified kind of medical examination or test.

(3)  A public health order may authorise the person subject to the order—

(a)  to be detained at a specified place for the duration of the order, or

(b)  in relation to an order that requires the person to undergo specified treatment at a specified place—to be detained at that place while undergoing the treatment.

(4) A public health order must—

(a)  must be in writing, and

(b)  must name the person subject to the order, and

(c)  must state the grounds on which it is made, and

(d)  must state that, unless sooner revoked, it expires—

(i)  if the public health order is made in respect of a person referred to in subsection (1)(b)—at the end of the period specified opposite the relevant condition in Schedule 1A, or

(ii)  in any other case—at the end of a specified period (not exceeding 28 days),

after it is served on the person subject to the order.

**Public health orders**

**Secretary may direct persons to undergo medical examination or testing** (cf 1991 Act, s22)

(1)  This section applies if the Secretary—

(a)  knows, or suspects on reasonable grounds, that a person has a Category 4 or 5 condition, and

(b)  considers that the person may, on that account, be a risk to public health, and

(c)  considers that the nature of the condition warrants medical examination or testing relating to the condition.

(2)  In these circumstances, the Secretary may, by notice in writing, direct the person concerned to undergo, within a specified period, a specified kind of medical examination or test relating to the Category 4 or 5 condition—

(a)  by a registered medical practitioner in general practice, or

(b)  by a registered medical practitioner practising in a specified field.

(3)  If the person fails to comply with a direction under subsection (2), the Secretary may, by further notice in writing, direct the person to undergo the specified kind of medical examination or test, at a specified time and place, by a specified registered medical practitioner.

**NCAT may confirm certain public health order** (cf 1991 Act, s 25)

(1)  An application may be made to the Civil and Administrative Tribunal for confirmation of a public health order based on a Category 5 condition or made in relation to a person referred to in section 62(1)(b).

**Note—**

The confirmation of any such order is a ***decision*** for the purposes of the *[Civil and Administrative Tribunal Act 2013](https://legislation.nsw.gov.au/view/html/inforce/current/act-2013-002)*.

(2)  As soon as practicable after such an application is made, the Civil and Administrative Tribunal is to inquire into the circumstances surrounding the making of the public health order.

(3)  Following its inquiry, the Civil and Administrative Tribunal—

(a)  may confirm the public health order, or

(b)  may vary the order and confirm it as varied, or

(c)  may revoke the order.

(4)  An inquiry under this section may not be adjourned for more than 7 days at a time.

(5)  For the purposes of an inquiry under this section, the Civil and Administrative Tribunal—

(a)  may obtain the assistance of any person having medical or other qualifications relevant to the subject-matter of the inquiry, and

(b)  may take into account any advice given by such a person.

(6)  The Civil and Administrative Tribunal’s power to ***vary*** a public health order under this section is a power—

(a)  to omit a requirement from the order, or

(b)  to include in the order a requirement that could have been included in the order when it was made, or

(c)  to substitute a requirement that could have been included in the order when it was made for any one or more of the requirements already included in the order.

(7)  This section does not apply to a public health order made in relation to a person referred to in section 62(1)(b) in relation to the COVID-19 pandemic.

(8)    (Repealed)

**NCAT may continue public health order** (cf 1991 Act, s 26)

(1)  At any time before the expiration of—

(a)  a public health order based on a Category 4 condition, or

(b)  a public health order based on a Category 5 condition and confirmed under section 64,

an authorised medical practitioner may apply to the Civil and Administrative Tribunal for continuation of the order.

(2)  An application may be made only if the applicant is satisfied that the person subject to the order would continue to be a risk to public health, as a consequence of a Category 4 or 5 condition, if not subject to a public health order.

(3)  If such an application is made and the person subject to the order notifies the Civil and Administrative Tribunal that continuation of the order is not opposed, the Tribunal may, without inquiry, continue the order for a period not exceeding 6 months.

(4)  Unless the order is continued under subsection (3), the Civil and Administrative Tribunal is to make such inquiries as it thinks fit in relation to the application and—

(a)  may continue the order, with or without variation, for a period not exceeding 6 months from the date of the Tribunal’s decision, or

(b)  may refuse to continue the order, or

(c)  may revoke the order.

**Note—**

If the Civil and Administrative Tribunal refuses to continue the order, it will continue to have effect for the period specified in the order. If the Tribunal revokes the order, it will cease to have effect on revocation.

(5)  For the purposes of an inquiry under this section, the Civil and Administrative Tribunal—

(a)  may obtain the assistance of any person having medical or other qualifications relevant to the subject-matter of the inquiry, and

(b)  may take into account any advice given by such a person.

(6)  More than one application may be made under this section in respect of the same order.

  **NCAT may administratively review public health orders relating to Category 4**

 An application may be made to the Civil and Administrative Tribunal for an administrative review under the *[Administrative Decisions Review Act 1997](https://legislation.nsw.gov.au/view/html/inforce/current/act-1997-076)* of a public health order based on a Category 4 condition by the person the subject of the order.

**Note—**

The making of any such order is a ***decision*** for the purposes of the *[Administrative Decisions Review Act 1997](https://legislation.nsw.gov.au/view/html/inforce/current/act-1997-076)*.

Again, such a requirement is therefore subject to the other stringent requirements above. It simply does not make sense for the PH Act to go to such lengths to protect the rights of an individual against an unfair or unjust requirement to be vaccinated in the context of a public health order but for those same checks and balances not to apply to blanket directions made under s362B of the same Act. This is a misuse of the Act, potentially for the purposes of avoiding said checks and balances. The intention of the Minister in this regard is irrelevant; good intentions do not render actions lawful.

So, after all of that, here I am, being asked to implement a Government mandate for my staff to be vaccinated based on a public health order which has questionable legality.

Even if there was a public health order or direction for my staff to be vaccinated made on the proper basis proposed in the other sections of the PH Act, that direction flies in the face of both;

* The primary piece of federal health legislation (the BSA), which it is inconsistent with; and
* The enabling legislation itself (the PH Act); the checks, balances, and safeguards in which it completely ignores.

In addition to these issues, there are further statutes which you are asking us to breach on your behalf.

1. **You are ignoring the doctrine of informed consent**

Any healthcare treatment, procedure or other intervention undertaken without consent is unlawful unless legislation in a state or territory, or case law, permits the treatment, procedure or other intervention without informed and valid consent.

The Australian Human Rights Commission Act 1986 (Cth), which among several international human rights covenants and treaties which it attaches via schedules, attaches article 7 of the ICCPR, being:

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation The Therapeutic Goods Administration notes that the currently approved vaccines for Covid-19 in Australia are in Phase IV trials. The vaccines are in experimental phase IV trials.

With respect to Covid-19 vaccines, trials are incomplete, and approvals were given without complete safety and efficacy data being available. The TGA says the following about the vaccines’ current “provisional approval”; [[14]](#footnote-15)

With rolling submissions, collaboration with international regulators, and proactively working with sponsors, it is expected the evaluation of COVID-19 vaccines will be significantly expedited without compromising on our strict standards of safety, quality, and efficacy. However, the timeframe for the evaluation of each vaccine will ultimately depend on when the complete data package is provided by sponsors. We have not yet received a full data package from any company.

It is very difficult for us to implement your Public Health Order in circumstances where our employees rightly tell us that they are concerned about the rushed approval and long-term safety implications of the vaccines, and when we ourselves do not have the expertise or training to reassure them.

Nonetheless, it is clear that the vaccines remain a novel technology, and we are uncomfortable directing our employees to receive it at short notice at the expense of their informed consent.

1. **You are asking us to breach Privacy, Discrimination and other laws**

If we ask or coerce our staff to get vaccinated against their will, we are very likely to find ourselves in breach of both privacy and discrimination statutes.

*Privacy*

We strongly encourage you to consider the interplay of your Public Health Orders with the *Privacy Act 1988* (Cth). Specifically, Australian Privacy Principle 3 allows for the collection of “solicited personal information”, which includes private medical information such as vaccination status, in very limited circumstances. This information must only be collected by lawful means, where it is reasonably necessary for the organisation’s functions or activities.

In this regard, we question whether it is lawful for us to collect our employees’ private medical information (their vaccination status) in circumstances where neither the Biosecurity Act or the PH Act which does not include vaccination under s7 as currently prescribed by the act. My business is not a medical body, nor a proxy for Government public health laws.

With regards to whether it is “reasonably necessary” for me to collect my employees’ vaccination status, my business has fulfilled its duties throughout the pandemic thus far without mandating vaccination. There have been no cases of Covid-19 within my workplace during this pandemic (DELETE OR CHANGE IF NOT RELEVANT). It is therefore difficult to argue that enforcing vaccination is “reasonably necessary” for my business to continue the job it has been doing successfully for almost two years, particularly given that, on the account of both the data and Government messaging, the worst of the pandemic (attributed mostly to an initial lack of familiarity and predictability with an increasingly better understood virus) has passed.

*Bullying and Harassment*

We are also deeply concerned that a mandatory direction issued by us to our employees that they receive a vaccination by a certain date could be construed as bullying or harassment, particularly if an employee is continually reminded, or pressured, to receive such vaccination.

If employees who have not been vaccinated are subject to separation, mistreatment or ostracisation this is also likely to amount to causes of action for affected employees.

*Discrimination*

The Public Health Orders also potentiate liability for us in actions of discrimination and victimisation, particularly given that they do not give us appropriate time to consider medical exemptions, nor employees time to attain them.

We note that the Anti-Discrimination Act 1977 (NSW) (ADA) as well as the Federal discrimination statutes, including the Age Discrimination Act 2004 and the Disability Discrimination Act 1992, are intentionally broad in their ambit, particularly with regards to both ‘indirect discrimination’ and ‘victimisation’. It is very possible that employees who are unwilling to receive a Covid-19 vaccination and are treated differently to vaccinated staff as a result, could fall within these definitions. As you may know, the Australian Human Rights Commission offer no-cost forums for the resolution of complaints of discrimination. We are likely to be inundated with such complaints by employees if we are to mandate vaccination.

To illustrate this issue, we draw your attention to the definition of “disability” within the [Disability Discrimination Act 1992](https://www.legislation.gov.au/Details/C2018C00125) cth;

 **disability means—**

**…**

**(c)  the presence in the body of organisms causing disease or illness; or**

**(d)  the presence in the body of organisms capable of causing disease or illness; or**

**….**

**(j) may exist in the future (including because of a genetic predisposition to that disability); (including because of a genetic predisposition to that disability**

So, if an employee is treated differently because they are not vaccinated, and therefore because of the idea that as a result of this, there exists “the presence in the body of organisms that may cause disease”, or even that they *may in future* have such organisms in their body, they may have a valid claim of disability discrimination under the Act.

We also direct your attention to Division 1 of the WHS Act, which specifically prohibits discriminatory conduct by employers against employees. “Discriminatory conduct” under this Division includes dismissing or terminating the worker, or treating them less favourably because, among other reasons, they: [raise] or proposes to raise an issue or concern about work health and safety with—

(i) the person conducting a business or undertaking, or

…

(vii) any other person who has a duty under this Act in relation to the matter, or

(viii) any other person exercising a power or performing a function under this Act, or

(i) is involved in, has been involved in or proposes to be involved in resolving a work health and safety issue under this Act, or

(j) is taking action, has taken action or proposes to take action to seek compliance by any person with any duty or obligation under this Act.

So, as a result of this section, an employee who seeks to raise an issue or concern about the safety implications of receiving a vaccine which their employer has made mandatory and is treated differently to other employees as a result, is a victim of “discriminatory conduct” under this division. It is quite clear that a direction to receive a medical procedure at risk of termination is a form of economic duress, and so, we’re at risk of breaching the WHS Act prohibitions on discrimination also.

*Workers Compensation*

You should be aware that you do not have any guarantee of indemnity from WorkCover NSW should the vaccine result in any injury and/or death to one of your employees. This means that you are completely exposed to direct liability from our employees should they become harmed through this process, including mental harm. So, there is no insurance, and as an employer you are at significant risk of catastrophic liability.

Given the insufficient time you have given us before our staff must be vaccinated, it is not possible for us to subsidize or facilitate vaccination. Most employers are simply directing their staff to undergo vaccination under the false assumption that they will not be held liable for adverse events. But the Government is not indemnifying employers directly, and neither is SafeWork NSW. As a result, there is no insurance, and as employers we are at significant risk of catastrophic liability.

1. **Conclusion**

As we said at the outset of this letter, our purpose here is to give you some insight into our position. We are confused and frustrated. The Public Health Orders put us in the inappropriate position of both Government proxy and medical advisor, neither of which we are qualified nor willing to embody.

If we are to comply with your Public Health Orders, which are themselves inconsistent with both the BSA and the PH Act, we are likely to ourselves be in breach of workplace law, discrimination law, privacy law as well as the general principle of natural justice. We are also likely to be liable for any injury or adverse reaction that our employees suffer as a result of the vaccines.

Our employees are confused and frustrated, too. It is they who have brought to our attention many of the potential liabilities we have expressed in this letter.

We refuse to be placed in such a position.

We implore you to withdraw your Public Health Orders immediately. Remove from employers and their staff the misleading and unlawful pressure to undergo vaccination in circumstances where such pressure will only lead to legal and economic chaos.

Instead of using force, which implies a lack of trust in the people of NSW, place your faith in the people of this state, that they may make the decision which they, as free citizens in a free democracy, deem prudent; without the strong hand of the Premier hanging over them.

Yours Sincerely,

NAME
POSITION

1. *Public Health Act 2010 (NSW), Part 4*  [↑](#footnote-ref-1)
2. [COVID-19 related legislation - NSW legislation](https://legislation.nsw.gov.au/information/covid19-legislation) [↑](#footnote-ref-2)
3. [PUBLIC HEALTH ACT 2010 - SECT 135 COVID-19 emergency measures (austlii.edu.au)](http://classic.austlii.edu.au/au/legis/nsw/consol_act/pha2010126/s135.html) [↑](#footnote-ref-3)
4. Example of a Public Health Order to direct a person to be vaccinated <https://legislation.nsw.gov.au/information/covid19-legislation/vaccination-health-care-workers> [↑](#footnote-ref-5)
5. Chief Health Officer Public Health Directions [Vaccination requirements for authorised workers - News (nsw.gov.au)](https://www.health.nsw.gov.au/news/Pages/20210827_01.aspx) [↑](#footnote-ref-6)
6. *Consultation and Cooperation in the Workplace,* Fair Work Australia, <https://www.fairwork.gov.au/tools-and-resources/best-practice-guides/consultation-and-cooperation-in-the-workplace> [↑](#footnote-ref-7)
7. *Work Health and Safety Act 2011(NSW)* s47,s48,s49. [↑](#footnote-ref-8)
8. *Work Health and Safety Act 2011(NSW)* s49. [↑](#footnote-ref-9)
9. *Work Health and Safety Act 2011(NSW)* s48. [↑](#footnote-ref-10)
10. Breaching the duty to consult in s47 (1) (a) attracts a Maximum penalty of—230 penalty units [Work Health and Safety Act 2011 No 10 - NSW Legislation](https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2011-010#sec.47) [↑](#footnote-ref-11)
11. [2017] FCAFC 42 at 87- 88. [↑](#footnote-ref-12)
12. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR [47] (Hayne, Heydon, Crennan and Kiefel JJ). [↑](#footnote-ref-13)
13. *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 [19] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefell JJ). [↑](#footnote-ref-14)
14. <https://www.tga.gov.au/covid-19-vaccines-undergoing-evaluation> [↑](#footnote-ref-15)