



The Interplay between Domestic and International Laws in Pandemic Risk Management - an Australian perspective

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Australia's Covid-19 Response

National COVID-19 Community Protection Framework for a COVIDSafe Australia

The measures for responding to COVID-19 at base-level, Tier 1 and Tier 2 represent a suite of measures and jurisdictions may implement any or all of them at their discretion, relevant to their epidemiological context, and in accordance with their legislative frameworks for responding to COVID-19. Strategies in Tier 1 and Tier 2 may be implemented at different times across different settings.

Base Level Strategies	Community wide	Individuals at Higher Risk ¹	Business Sector	High-risk settings ⁴
	<ul style="list-style-type: none"> Vaccination (COVID-19 & Flu) Get a COVID-19 test if you have symptoms Register positive RAT results Positive cases - stay home until acute symptoms resolve, avoid high-risk/crowded settings and wear masks outside the home for at least 7 days Hand and respiratory hygiene Maximise time spent in well-ventilated spaces Close contacts - monitor for symptoms, avoid visiting individuals at higher risk, high-risk settings, recommend wearing masks indoors and on public transport 	<ul style="list-style-type: none"> Individuals and their carers understand their risk for medically significant illness and have a plan in place with their GP Be aware of precautions² to reduce risk of exposure Get tested for COVID-19 as soon as symptoms develop to enable timely access to antiviral medications 	<ul style="list-style-type: none"> Maximise ventilation³ Business Continuity Plans in place Work, Health & Safety Policies may include: <ul style="list-style-type: none"> Vaccination programs Staff stay at home when sick Mask wearing for recovered cases and close contacts Support hand/respiratory hygiene 	<ul style="list-style-type: none"> Maximise ventilation³ Work, Health & Safety Policies including vaccination requirements. <ul style="list-style-type: none"> Positive cases not to attend work for 7 days Close contact: testing/mask wearing as per workforce guidance Infection Prevention and Control⁵ <ul style="list-style-type: none"> Hand/respiratory hygiene PPE including masks as per workforce guidance Staff training Visitor policy <ul style="list-style-type: none"> Symptom screening Close contacts RAT Outbreak management <ul style="list-style-type: none"> Plan as per local health requirements Review and maintenance of plans
Scaled Up Strategies				
Tier 1	<ul style="list-style-type: none"> Masks on public transport and in high-risk settings Indoor mask wearing RATs for close contacts 	<ul style="list-style-type: none"> Surgical masks or respirators (P2/N95) in public settings 	<ul style="list-style-type: none"> Mask wearing for staff Maximise activity in outdoor/ well ventilated areas Support for cases, close contacts and vulnerable staff to work from home, if possible 	<p>High community prevalence and/or Outbreak</p> <ul style="list-style-type: none"> Outbreak Management Plan activated and scaled up⁶ Masks wearing for visitors⁴ Staff surveillance testing RAT screening of visitors⁶ Surge workforce, if required In-reach PCR/flu testing⁷ National Medical Stockpile – deployment of additional personal protective equipment if required⁷
Tier 2	<ul style="list-style-type: none"> Masks in a range of public settings Gathering limits Isolation of cases 	<ul style="list-style-type: none"> Avoid indoor public places with high risk of infection transmission¹ 	<ul style="list-style-type: none"> Capacity limits Work from home, where possible 	

¹ Individuals over 70 years old, COVID-19 at-risk medical conditions or immunocompromised.

² For example, mask wearing, physical distancing, maximising well ventilated/outdoor settings to socialise.

³ Indoor venues that involve singing, shouting, close-range conversations (e.g., bars, nightclubs), dancing and strenuous indoor physical activity.

⁴ Includes aged care and disability care (residential and home), and hospital care settings.

⁵ Implementation of infection prevention and control (IPC) measures determined by facility work, health & safety policies and IPC guidelines in accordance with local risk assessment.

⁶ Aged care and disability residential care settings only. Visitors not required to wear masks at base level (so that residents can see faces). However, facilities will assess their own risk and may require visitor mask wearing at all times

⁷ Consider published guidance to maximise natural and/or mechanical ventilation. <https://www.coronavirus.vic.gov.au/ventilation>

Australia's COVID-19 response: the four successes and four failures

Four Successes

1. Co-operative governance informed by experts
2. Closure of international borders and mandatory quarantine
3. Rapid adoption and acceptance of enhanced special distancing measures
4. Expansion of telehealth

Four Failures

1. The Ruby Princess
2. Too slow to close the borders
3. Too slow to prepare the health system
4. Shifting strategies and mixed messages

[Stephen Duckett & Anika Stobart, *The Grattan Institute* \(12/6/20\)](#)



Australia – a federal system with 9 jurisdictions



Incorporation of international law into Australian domestic law

- Neither customary nor treaty based international law automatically incorporated into Australia's domestic law to create individual rights or duties – requires implementation by legislation.
- Common law does not necessarily conform with international law, but international law is a legitimate and important influence on development of common law, especially when international law declares the existence of universal human rights.”: *Mabo v Queensland* [no 2] (1992) 175 CLR 1, 42 (Brennan J)
- Citizens may have a “legitimate expectation” that government decision makers will take Australia's international obligations into account, though can be displaced Executive action: *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273; cf. *Minister for Immigration & Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.
- Statutory interpretation presumption: legislation intends to conform with international law.

Human Rights Protections in Australia

- No Bill of Rights in Australia
- Limited rights protection in *Commonwealth of Australia Constitution Act 1900* (Cth)
 - right to vote (s41); protection against acquisition of property on unjust terms (s51 (xxxi)); right to trial by jury (s80); freedom of religion (s116); prohibition of discrimination on basis of State of residency (s117).
- Patchwork of State/Territory human rights legislation
 - *Human Rights Act 2004* (ACT); *Charter of Rights and Responsibilities 2006* (Victoria); *Human Rights Act 2019* (Qld)
 - Expectation that any legislative reform accords with human rights norms/principles - any new or amending legislation scrutinised for compatibility with protected rights.
 - Public entities must act consistently with protected human rights (s58 Qld).
 - Laws interpreted in manner compatible with human rights to greatest extent possible (s48 Qld).
 - Laws incompatible with human rights not invalid, but States/Territories should strive to minimise human rights interferences (s42 Qld).
- Rights poorly protected: even in States with human rights legislation limited remedies where violations eg complaint & conciliation, declaration of incompatibility.
 - No stand-alone legal remedy for human rights contravention. Cannot apply directly to Court/Tribunal to resolve complaint if not resolved in QHRC. However, where individual can bring another legal action (eg discrimination) human rights act arguments may be included (piggy-back claim).
 - No right to seek monetary damages either during complaints process or in later legal proceedings for contravention of Human Rights Act.

Australian Covid-19 litigation case law: Most relevant areas of interest

- Industrial relations / Labour law
- Healthcare management (Covid-related)
- Vaccination
- Private and family life
- Freedom of movement of people
- Use of protection devices (e.g., face masks)
- Insurance – business interruption



Australian Covid-19 litigation case law: trends

- Employment law (including unfair dismissal)
 - Mask wearing directives/vaccination mandates from employers generally considered reasonable directions. Termination lawful when reasonable directions not followed.
 - COVID-19 measures considered in context of existing work health and safety obligations on employers.
 - Vaccination requirements on worksites eg mines, to curb spread of COVID-19 in workplace/community upheld.
- Vaccination and mask mandates challenges largely unsuccessful.
- Rights of the child and parenting disputes
 - Vaccination disputes
 - Child abduction cases – kept child in Australia against parenting orders – whether appropriate to return, considering COVID-19 risks.
 - Administrative law – freedom of movement in/out/within Australia & movement of goods – challenges largely unsuccessful.
- Business law - construction of indemnity under business interruption insurance coverage.

Australian Covid-19 litigation case law: timeline

- 2020 – Aged Care facility outbreak and Ruby Princess cruise ship outbreak management attracted much public, political and government attention. Class actions widely discussed. Government Health Orders made resulting in workplaces instituting COVID-measures. Employment law claims also commenced.
- 2021 – Increased numbers of deaths in aged care - further class actions suggested. Increase in cases around vaccination mandates, face masks and restriction of movement and public assembly in the context of lockdown orders.
- 2022 – class actions continuing. Ruby Princess class action (*Karpick v Carnival PLC (ARBN 107 998 443 / ABN 23107998443) & ANOR*) first to proceed to hearing - part heard and adjourned until 7 December 2022. Remaining 4 class actions (aged care outbreaks) continuing through case management procedures and do not yet have hearing dates.
 - Challenges to COVID-19 Health Orders and vaccine mandates dismissed or discontinued – now largely redundant as a limited number of restrictions remain in force.

Vaccination mandate case study:

Larter v Hazzard [2022] NSWCA 238

- s7 *Public Health Act 2010* (NSW) required state-employed healthcare workers to be vaccinated by particular dates
- L, a paramedic in NSW Ambulance Service, decided not to be vaccinated due to religious beliefs and was prohibited from doing work by public health orders made by Minister under s7
- L sought declarations that public health orders invalid
- Primary judge dismissed application
- L sought leave to appeal against both primary judgment and costs orders against him.

Larter v Hazzard [2022] NSWCA 238 (cont...)

- *Order's purported operation beyond the Act's 90-day limit*
 - Power under s7 was to deal with short-term emergencies for period not exceeding 90 days.
 - Doubtful that valid use of power to include in an order a provision which would only be effective after its expiry.
 - Date stipulated as deadline for NSW Health workers to have received their second vaccination fell more than 90 days after original order made.
 - However, original order revoked & replaced, & deadline within 90-day operational period of subsequent order.
 - Moreover, even if order was *ultra vires* insofar as purported to be operative after 90 days, offending provision severable, without affecting validity of original order.
 - **Therefore**, although ground arguable, insufficient prospects of ultimate success to justify grant of leave to appeal.

Larter v Hazzard [2022] NSWCA 238 (cont...)

- *Legal unreasonableness*
 - Act confers broad discretion on Minister to manage public health risks - intention to afford maximum flexibility possible to address & counter risks to public health & their potential consequences
 - Any judicial review of Minister’s exercise of power must be undertaken not by reference to what may have been objectively necessary but by reference to whether it was open to Minister, acting reasonably, to “consider” that measures given effect by orders were necessary.
 - As to L’s argument that unreasonable to require a very small number of conscientious objectors within NSW Health to be vaccinated, while not also requiring privately employed general practitioners & pharmacists to be vaccinated, focus must be on what the order required, and not on what more it might have required.
 - Fact that order does not go so far as it might does not mean that it is unreasonable. The order addressed a component of the risks posed by unvaccinated healthcare workers, and it was not unreasonable for the Minister to consider it necessary to deal with the risk.

***Larter v Hazzard* [2022] NSWCA 238 (cont...)**

- * ***Consistency with International Covenant on Civil & Political Rights***
 - Whether ICCPR articles 12, 18 & 19 engaged turns on whether relevant order a “necessary” one. In *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 exercise held valid exercise of power conditioned on Minister considering it “necessary” to deal with risk to public health (upheld on appeal, albeit no reference to ICCPR). No reason to suppose that current Court would now take contrary view.
 - Art 17: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.
 - Orders did not interfere with L’s privacy, family, home or correspondence contrary to Art 17. Even if they did authorise any such interference, such interference not arbitrary or unlawful, but pursuant to a valid exercise of a statutory power.
 - Order does not contravene Art 26 (which prevents discrimination on the grounds of religion, race and sex): it does not attach consequences to adhering to a particular religion, but to unvaccinated status, and does so regardless of religious belief.

Larter v Hazzard [2022] NSWCA 238 (cont...)

- *Whether leave to appeal should be granted*
 - Although issue regarding order's 90-day operational period was arguable, no ground of appeal had sufficient prospects of ultimate success to justify a grant of leave to appeal.
 - No utility in granting leave to appeal, because the orders impugned and their successors have expired and thus no longer have any effect.
 - Moreover, no practical benefit would accrue to the applicant from having the orders declared invalid: neither the professional complaints made against him nor the termination of his employment depends on them, and a declaration that they were invalid would not result in his reinstatement.

Phillips v Chief Health Officer (No 2)[2022] NTSC 72

- Relief sought regarding vaccination Directions made by Northern Territory Chief Health Officer. Case listed for hearing 14 June 22.
- Prior to hearing (27 May), various legislative amendments made to the *Public and Environmental Health Act 2011 (NT)* which validated the Directions challenged in the proceedings.
- Action discontinued at last minute (30 May) after legislative change.
- Costs application. Presumption that party who discontinues must pay costs of party to whom discontinuance relates – Defendants agreed not to make costs application – Plaintiffs sought that defendants pay their costs – Plaintiffs’ case not almost certain to have succeeded – Not otherwise possible to determine prospects of success of P’ case without conducting hypothetical trial – Defendants had not acted unreasonably – P’s application dismissed – Each party to bear own costs.
 - Claim may have influenced legislative amendment - public pressure & high levels of scrutiny around proportionality of government responses may have had more impact than judicial review.

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