

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Sydney Registry

BEATA MANIEWSKA-VILKAS
Applicant

BRADLEY RONALD HAZZARD, MINISTER FOR HEALTH NSW
Respondent

STATEMENT OF GROUNDS

Decision

1. On 26 August 2021, the Respondent Bradley Ronald Hazzard, the Minister for Health in NSW (**the Minister**), gave directions by order entitled *Public Health (Covid-19 Vaccination of Health Care Workers) Order 2021* under section 7 of the *Public Health Act 2010 (NSW)* (**PH Act**) (**the Decision**), a copy of which has been enclosed with the Application for Administrative Review.

Particulars

- i. The Decision is expressed to be made pursuant to section 7 of the PH Act.
- ii. The Explanatory Note states “The object of the Order is to require certain health care workers be vaccinated against Covid-19” (page 1)
- iii. Clause 2 sets out definitions, including “Covid-19 vaccine” and “health care worker”.
- iv. Clause 3 sets out the grounds, stating *inter alia* that “the risk of transmission, including by means of community transmission, of Covid-19 in New South Wales will remain significant and ongoing unless more Covid-19 vaccines are administered” (clause 3(d)).
- v. By clause 4, the Respondent directs health care workers (as defined) to not work as health care workers unless they receive the Covid-19 vaccine by a certain date.
- vi. By clause 5, the Respondent directs persons responsible for health care workers to take all reasonable steps to ensure the health care worker complies with clause 4.

2. The relevant directions are as stated under clauses 4 and 5 of the Decisions (**Directions**).

Particulars

Part 2 Directions concerning vaccination of health care workers

4 Directions of Minister for health care workers to be vaccinated

(1) The Minister directs that a health care worker must not do work as a health care worker unless—

(a) if the work is done on or after 30 September but before 30 November 2021— the worker has received at least 1 dose of a COVID-19 vaccine, or

(b) if the work is done on or after 30 November 2021—the worker has received at least 2 doses of a COVID-19 vaccine.

(2) The Minister directs that a health care worker must, if required to do so by an authorised person on or after the commencement of this Order, provide vaccination evidence for the worker.

(3) Subclauses (1) and (2) do not apply to—

(a) a health practitioner who does work as a health care worker in response to a medical emergency, or

(b) another person who does work as a health care worker in response to a non-medical emergency, for example, a fire, flooding or a gas leak.

5 Direction of Minister for responsible persons for health care workers

The Minister directs that each responsible person for a health care worker must take all reasonable steps to ensure that the health care worker to whom clause 4 applies complies with the directions of the clause.

Authorising provision

3. Section 7 of the PH Act authorises the Minister to give directions by order:
- (a) if he considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health (s 7(1)); and
 - (b) such as he considers necessary in the circumstances to deal with the risk and its possible consequences (s 7(2)).
4. The Ministerial power to make directions by order under s.7(1) is subject to:
- (a) any express limitations in section 7; and

Particulars

- i. Examples given of the kinds of action and decisions under section 7 relate to movement of risk and persons (s 7(3)).
- ii. An order expires after 90 days (s.7(5)).
- iii. Action may not be taken under section 7, and an order has no effect in relation to any part of the State where a state of emergency exists under the *State Emergency and Rescue Management Act 1989 (SERM Act)* (s.7(6)).

(b) any limitations implied by operation of law.

Applicant

5. The Applicant brings this proceeding pursuant to:
 - (a) section 7(7) of the *Public Health Act 2010 (NSW)* (**PH Act**); and
 - (b) section 55 of the *Administrative Decisions Review Act 1997 (NSW)* (**ADR Act**).
6. The Applicant is and was at all material times a health care worker as defined in clause 2 of the Decision.

Respondent

7. The Respondent is and was at all material times the administrator within the meaning of section 8(1) of the ADR Act.

Claims

8. The Respondent should not have given the Directions under section 7(1) and (2) of the PH Act.
 - (a) The Directions cannot be validly given under an order made under section 7 in the circumstances.
 - (b) Alternatively, the Directions cannot be validly given without certain procedural and substantive rights being afforded to each affected person.
 - (c) Further or alternatively, the Directions cannot be validly given on the available facts and evidence.

Directions under section 7

9. The objects of the *Biosecurity Act 2015 (Cth)* (**BSC Act**) include to provide for managing the risks of contagion and spread of listed human diseases, and for human biosecurity emergencies (s 4(a)).
10. Subject to certain exceptions, the BSC Act provides that it does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the BSC Act (s 8) (**Concurrency provision**).
11. As at the date of the Decision, a Commonwealth national human biosecurity emergency declaration (**National emergency**) under part 2 of chapter 8 of the *Biosecurity Act 2015* (**BSC Act**) (**National emergency provisions**) was in effect in relation to Covid-19.

Particulars

- i. Sections 473 to 479 (inclusive) of the BSC Act.
 - ii. *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* as extended by instruments of variation, made pursuant to section 475 of the BSC Act.
12. Pursuant to section 478 of the BSC Act, the Health Minister may give directions during human biosecurity emergency period to prevent or control the spread of a declaration listed disease.
 13. The grounds of the Directions are intended to prevent or control the spread of Covid-19.
 14. A state of emergency (SoE) has not been formally declared in NSW in relation to Covid-19, whether under section 33 of the SERM Act or any other NSW legislation.
 15. As at the date of the Decision, an emergency existed in NSW in relation to Covid-19 within the meaning of section 4(1) of the SERM Act (**SERM Act emergency**).
 16. At the date of the Decision, the Respondent considered Covid-19 to be an emergency.

Particulars

- i. The Respondent or the NSW Department of Health held out to the general public that an emergency situation in relation to Covid-19 existed in NSW (**Emergency representation**).
- ii. NSW Department of Health webpages containing Covid-19 information for the public and media releases include in the header bar a red boxed highlighted caption stating, "Emergency Information".

17. Section 8 of the PH Act provides for the making of orders in situations where an SoE exists, and:
- (a) requires the agreement of the Minister administering the SERM Act (s 8(1)); and
 - (b) includes reference to orders for persons to submit to medical examination (s 8(3)).
18. The Directions are not consistent with:
- (a) the National emergency provisions;
 - (b) the Emergency representation;
 - (c) the existence of a SERM Act emergency; and
 - (d) the kinds of directions that are contemplated under section 7.
19. To be consistent, the Directions should only be given by the Respondent:
- (a) under a declared SoE;
 - (b) pursuant to section 8 of the PH Act, not section 7; and
 - (c) with agreement of the SERM Act minister.
 - (d) if it can be otherwise properly and lawfully made.

Directions – other applicable BSC Act and PH Act provisions

20. Alternatively, if the National emergency provisions do not apply, the Directions must be consistent with applicable provisions of:
- (a) the BSC Act, other than the National emergency provisions; and
 - (b) the PH Act.
21. BSC Act provisions applicable to medical treatment and vaccination of individuals at risk of Covid-19 are set out in Parts 3 and 4 of Chapter 2 (ss.59-116).

Particulars

- i. Human biosecurity control orders (**HBSC Decisions**) containing certain biosecurity measures (**BSC measures**) on individuals are set out in Parts 3 and 4 of Chapter 2 (ss.59-116).
- ii. The BSC measures include a requirement for an individual under a HBSC control order to receive a vaccination (**vaccination measure**) or treatment at a medical facility (s.92).

- iii. A vaccination measure is subject to requirements which include the following.
1. A HBSC control order must be imposed on an individual (s.60(2)) (**personal order**).
 2. A HBSC control order may only be imposed by a suitably qualified officer authorised by the Director of Human Biosecurity (“Director HBSC”) (s.563(1)), or under a State or Territory arrangement (s.564(1)) (**authorised officer**).
 3. The officer must conduct a risk assessment and impose a biosecurity measure suitable for purpose and be satisfied that the BSC measure contributes to managing the risk of contagion or the entry, emergence, establishment or spread of the disease in Australian territory ((s.60(1), s.34(2)) and s.84) (**risk assessment**).
 4. The individual must have signs or symptoms (s.60(2)) (**symptom check**); or the individual has been exposed to the disease or to another individual who has signs or symptoms through physical contact, close proximity and/or direct exposure to infection (s.60(2), s.17) (**contact tracing check**).
 5. The HBSC control order must be in prescribed form and contain prescribed contact information of the individual, including signs and symptoms of the disease, why the measure is required (**reasons for decision**) and rights of review under the BSC Act, the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ss.61, 62) (**external rights of review**).
 6. The individual must not be subject to a HBSC control order for more than 3 months (s.61(1)(f)) (**3 months rule**).
 7. The HBSC control order must be given to the individual (personally served) within 24 hours and its contents read aloud (s.63) (**personal notice and service**).
 8. The individual’s consent must be procured and recorded in writing on the HBSC control order (s.71(2)) (**consent**).
 9. If the individual does not consent, the individual is only required to comply at the direction of the Director HBSC after a review of the

measure is conducted considering the reasons for the individual's refusal to consent and impacts on their health (s. 72(3), 74(3) and (4)) (**internal rights of review**).

10. A biosecurity measure set out in s.92 (vaccination or treatment) or s.93 (medication) must be carried out in a manner consistent with appropriate medical standards (**medical standards**) and/or appropriate other relevant professional standards (s.94) (**professional standards**).

(collectively referred to as the **BSC Act requirements**).

22. NSW statutory requirements for medical treatment of persons at risk of Covid-19 are set out in s.62 of the PH Act (**PH Act requirements**).

Particulars

- i. A public health order must be made by an authorised medical practitioner (s 62(1)).
- ii. A public health order may be made if the person has a Category 4 or 5 condition (s 62(1)(a)).
- iii. "Covid-19 (also known as Novel Coronavirus 2019)" is listed as a Category 4 Condition (Schedule 1).
- iv. A public health order must be served personally, made in writing, specify the revocation date, name the subject and state the grounds (s 62(2)).
- v. Regulation 39 of the *Public Health Regulation 2012* (**PH Regs**) sets out matters to be taken into account by a medical practitioner deciding whether to make a PH order, including alternative options and the effectiveness and likely side effects of the proposed treatment (rr 39(1)(b) and (c)).
- vi. "Treatment" is not defined in the PH Act or PH Regs.
- vii. Vaccination is not mentioned in the PH Act or PH Regs.

23. The Directions must:

- (a) be consistent with the BSC Act requirements, by operation of the Concurrency provision; or
- (b) take into account the PH Act requirements, which specifically provide for the making of public health orders for treatment of persons at risk of Covid-19.

24. The Directions must not deprive the Applicant of rights and protections as provided by:

- (a) the BSC Act requirements; and/or
- (b) the PH Act requirements.

BSC Act requirement – vaccination

25. Specifically, the imposition of any direction for vaccination must be consistent with applicable particular BSC Act provisions other than the National emergency provisions.

- (a) The BSC Act requirements apply.

Particulars

- i. Section 92 deals with vaccination measures.
- ii. Section 94 deals with medical standards and professional standards that apply.

26. The Decision imposes, or has the primary and direct practical effect of imposing, a vaccination requirement on the Applicant.

Particulars

- i. The object of the Decision.
- ii. Clause 4 of the Decision.

27. A vaccination requirement may only be imposed under the BSC Act:

- (a) with the consent of the person; or
- (b) pursuant to a personal order, subject to BSC Act requirements including authorised officer, symptom check, risk assessment, reasons for decision, personal service, internal rights of review and external rights of review.

28. In any event, BSC Act requirements of applicable medical standards and professional standards apply to a vaccination requirement.

Particulars

- i. Australian Government, *Australian Immunisation Handbook, Preparing for Vaccination, Valid Consent (Immunisation Handbook)*, which describes conditions for valid consent.
- ii. ATAGI, *Information for Providers: Covid-19 Vaccination Consent and FAQs*, version 5.1, 17 June 2021, which references the Immunisation Handbook requirements.

- iii. Australian Medical Association, *AMA Code of Ethics 2004. Editorially Revised 2006. Revised 2016.*

29. The applicable medical and professional standards provide that consent is invalid unless voluntary and informed.
30. The Directions must not pre-empt or deprive the Applicant of the capacity for voluntary consent.

Particulars

- i. The Decision in effect requires the Applicant to relinquish her job, livelihood and income should she decline vaccination, thereby placing her under severe economic pressure and/or duress.
31. Further or alternatively, the Directions must not deprive the Applicant of access to information or warnings sufficient to permit a balanced, cautious and informed judgment to be made as to the side effects.
- (a) Insufficient safety information on the Covid-19 vaccines is available because they are new and experimental.

Particulars

- i. The worldwide clinical trials of the Pfizer, Astrazeneca and Moderna vaccines have estimated completion dates of 2 May 2023, 14 February 2023 and 27 October 2022 respectively.
- (b) The nature, severity and likelihood of serious side-effects is not well-known.
 - i. Myocarditis and pericarditis are serious and potentially lethal side effects of the Pfizer vaccine, as acknowledged in the Product Information and Consumer Medical Information published by the Therapeutic Goods Administration (TGA) and the ATAGI advice.
 - ii. Thrombosis and thrombocytopenia are serious and potentially lethal side effects of the Astrazeneca vaccine, as acknowledged in the Product Information, Consumer Medical Information published by the TGA and the ATAGI advice.
 - iii. The serious side effects now acknowledged were not discovered until after market, and so were not identified as safety issues by the TGA in the Australian Public Assessment Reports for the Pfizer vaccine in January 2021 or the Astrazeneca vaccine in February 2021.

- iv. The Commonwealth has published a risk/ benefit model for the Astrazeneca vaccine that tends to show more risk from blood clots than lives saved for persons under 60.
- v. Many and frequent cases of predicted serious safety risks including death, paralysis, anaphylaxis, blood clots and heart inflammation have been reported in Australia and overseas.
- vi. Medium and long term side effects are completely unknown, due to the expedited clinical trials and limited evaluation period of the vaccines.
- vii. Further particulars may be provided in due course.

32. Alternatively, the Directions must be consistent with BSC Act requirements that apply in the event that consent is not required.

Particulars

- i. The particulars at paragraph 20(iii)(1) to (10) except for (8) are repeated.

33. The Directions are therefore invalid to the extent that they require, or have the primary and direct practical effect of requiring, vaccination absent:

- (a) informed and voluntary consent; or
- (b) the other applicable BSC requirements.

Public health impacts

34. Further, or alternatively, the Directions are unreasonable, disproportionate or irrational.

National emergency provisions

35. Further or alternatively, the Directions must be consistent with the National emergency provisions applying to the making of directions.

36. Before the Commonwealth Health Minister gives a direction to prevent or control the spread of a declaration listed disease under the National emergency provisions, he must be satisfied of certain matters as set out in section 478(3)(a) to (d) of the BSC Act (**Proportionality requirements**).

Particulars

The Minister must be satisfied that:

- i. the direction is likely to be effective in, or to contribute to, achieving the purpose for which it is to be given;
- ii. the direction is appropriate and adapted to achieve the purpose for which it is to be given;
- iii. the direction is no more restrictive or intrusive than is required in the circumstances; and
- iv. that the period is only as long as is necessary.

37. Prior to making the Decision, the Respondent was required to be satisfied of the Proportionality requirements (or requirements consistent with the Proportionality requirements), by operation of the Concurrency provision.

38. The Directions are invalid to the extent that the Respondent purported to give the Directions absent his prior satisfaction of the Proportionality Requirements or equivalent requirements.

39. Further, prior to giving the Directions, the Respondent could not reasonably have been satisfied that the Proportionality requirements were met.

40. In order to meet the requisite level of satisfaction, the Respondent required, at a minimum, relevant material and evidence in relation to:

- (a) the degree of the public health risk posed by Covid-19;
- (b) the capability of vaccination of health workers to reduce viral transmission; and
- (c) the degree of risk to the individual posed by the Covid-19 vaccines.

(together, the **Materials**)

41. The Materials show that:

- (a) there is no reliable evidence that SARS-CoV-2 poses a greater public health risk than other common respiratory viruses.

Particulars

- i. The average age of death in Australia for those with and without Covid-19 is not significantly different.
- ii. Covid-19 only presents an appreciable mortality risk for the very ill and the elderly.
- iii. Covid-19 presents as a mild influenza-like illness in approximately 80 percent of cases.

iv. Mass testing is inherently unreliable and has greatly overestimated the number of cases.

(b) There is no reliable evidence that Covid-19 vaccines reduce transmission.

Particulars

- i. Evidence from countries with more advanced Covid-19 mass vaccination programs shows no or limited efficacy of the vaccines against infection or reduction of severity of symptoms.
- ii. Consolidated worldwide data clearly shows that Covid-19-related deaths are increasing despite vaccination.
- iii. The modelling used to predict transmission is inaccurate.

(c) There is no reliable evidence that Covid-19 vaccines are safe.

Particulars

- i. The particulars in relation to paragraph 31 are repeated.

42. Further or alternatively, prior to giving the directions the Respondent had a duty to inquire into the Materials.

43. No reasonable decision maker, having the Materials before them or having made the necessary enquiries, could reasonably have given the directions.

44. The Materials should be taken into account in the Tribunal's decision.

Claim for Relief

1. An order setting aside the Decision.
2. Alternatively, an order varying the Decision so as to include rights and entitlements consistent with the BSC Act requirements and the PH Act Requirements.
3. Costs.
4. Such other orders as the Court deems fit.

20 October 2021

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