DATE

NAME OF EMPLOYER
ADDRESS OF EMPLOYER

Dear NAME OF EMPLOYER,

**For your urgent attention: Mandating Covid-19 Vaccination in the absence of a Public Health Order**

I write with respect to your “direction” dated DATE which says that I must have received a Covid-19 vaccination by DATE in order to continue work with your company (**Direction**).

On **DATE**, I expressed to you that I do not wish to receive a Covid-19 vaccination (alternatively, you can let them know about this here).

The purpose of this letter is threefold:

1. To put you on notice that your Direction suggests a misinterpretation of Work Health and Safety laws in NSW, and, subsequently, if you take action against employees who do not comply with this Direction, you are likely to breach these laws; and
2. To alert you to the implications of your Direction with respect to breaches of discrimination law, privacy law and bullying and victimisation; and
3. To present reputable science and data which, apart from the lack of a lawful basis for the direction, suggests that there is no factual basis for it either.
4. **Your Direction misinterprets WHS laws, and you are at risk of breaching them**

 *Where does the authority to mandate vaccination come from?*

The primary public health legislation in New South Wales is the *Public Health Act 2010* (**the PHA**).

The objects of the PHA are;

to promote, protect and improve public health;

to control the risks to public health;

to promote the control of infectious diseases;

to prevent the spread of infectious diseases;

to recognise the role of local government in protecting public health; and

to monitor diseases and conditions affecting public health.

As is necessary, the PHA is comprehensive and exhaustive. As the primary piece of public health legislation in NSW, it is clearly drafted with an intention to cover the field.

Division 4 of the PHA deals with “Public Health Orders for Category 4 and 5 conditions” (which Covid-19 is defined as). Under s62 of the PHA, an ‘Authorised Medical Practitioner’ can require a person to “undergo specified treatment…a specified kind of medical examination or test”.

Therefore, the primary piece of public health legislation in NSW specifically makes allowance for the power to vaccinate, but only subject to several checks and balances, and only in the context of a determination made by an “Authorised Medical Practitioner”. The implication here is that the requirement for a citizen to undergo medical intervention, including vaccination, against their will, is one that can only be made by an expert, and that it is, in general, an extraordinary requirement.

*My Employment Contract and Enterprise Agreement*

There is no clause in my employment contract, nor my enterprise agreement, which says that I must comply with directions made by you with respect to my medical status (CHECK IF THIS IS ACCURATE).

*WHS Laws - What do the Act and Regulations Actually Authorise?*

The Work Health and Safety Act 2011 NSW (**the WHS Act**) and the Work Health and Safety Regulation 2017 (**the WHS Regulations**) form the statutory framework which govern the safety obligations for employers and employees in our state.

Like the PHA in the realm of public health, the Act and Regulations are also comprehensive and exhaustive when it comes to work health and safety laws. They are also clearly intended to cover the field with respect to these obligations.

S19 of the Act creates a “Primary duty of care” for employers as follows:

19   Primary duty of care

(1)  A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—

(a)  workers engaged, or caused to be engaged by the person, and

(b)  workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

(2)  A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3)  Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable—

(a)  the provision and maintenance of a work environment without risks to health and safety, and

(b)  the provision and maintenance of safe plant and structures, and

(c)  the provision and maintenance of safe systems of work, and

(d)  the safe use, handling, and storage of plant, structures and substances, and

(e)  the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities, and

(f)  the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking, and

(g)  that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

(collectively, the **Primary Duty of Care**)

Your Direction seems to interpret this Primary Duty of Care as one with obligates, or requires, you to mandate vaccination for your staff. The WHS Act clearly does require you to ensure the safety of your workers so far as is reasonable practicable, and also requires workers to obey reasonable directions and take steps to ensure their own safety and that of others, including co-workers and members of the public.

In saying that, the WHS Act and Regulations are also clear on the nature and extent of the “control measures” which can be implemented by employers in order to mitigate risk, and fulfill their statutory duties.

Specifically, Part 3.1, Section 36 of the Regulations refers to a “hierarchy of control measures”. This hierarchy is **clearly intended to be exhaustive**. The definition of ‘hierarchy’ necessitates this interpretation. It would be nonsensical for measures to be ranked or ordered (which is what a hierarchy is) if there were other measures, external to the hierarchy, to be included. So, this hierarchy **only** includes the following measures:

**36**   **Hierarchy of control measures**

(1)  This clause applies if it is not reasonably practicable for a duty holder to eliminate risks to health and safety.

(2)  A duty holder, in minimising risks to health and safety, must implement risk control measures in accordance with this clause.

(3)  The duty holder must minimise risks, so far as is reasonably practicable, by doing 1 or more of the following—

(a)  substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk,

(b)  isolating the hazard from any person exposed to it,

(c)  implementing engineering controls.

(4)  If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls.

(5)  If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment.

**Note—**

A combination of the controls set out in this clause may be used to minimise risks, so far as is reasonably practicable, if a single control is not sufficient for the purpose.

So, a proper interpretation of the “hierarchy of control measures” within the Regulations results in an obligation to implement, so far as practicable, “risk control measures in accordance with this clause” (and nothing, therefore, outside of the ambit of this clause).

This firstly includes substituting the hazard with something which gives a rise to a lesser risk or isolating the hazard from any person exposed to it, measures which I accept are not practicable or feasible in the case of a virus. In that case, where “a risk still remains”, as it does here, “administrative controls” and/or “engineering controls” are to be implemented. If the risk then **still** remains, the employer must provide the use of suitable personal protective equipment to employees. Not only does this form the **absolute** **extent** of the employer’s obligation to its staff, but it also forms the **absolute extent** of what employees could lawfully and reasonably be directed to comply with as a condition of their employment.

The definition of “administrative controls” and particularly, “engineering controls”, are clearly not intended to include the mandating of medical intervention, or any form of personal medical procedure, for employees.

The idea that vaccination can be lawfully instituted pursuant to WHS legislation is **not** consistent with the Act and Regulations, nor is it consistent with the common law precedent in terms of what is “practicable”, as well as what could be considered a “measure”.

The definition of “engineering control” within the Regulations is “a control measure that is physical in nature, including a mechanical device or process”. The requirement for staff to undergo a vaccination is a medical intervention, not a physical control measure, and obviously is not analogous to the examples given within the definition (“a mechanical device or process”). In the case law, implementations of engineering controls have included measures such as dual-acting counterbalance valves, blocking spool valves, slack wire switches and emergency stop buttons.[[1]](#footnote-1) As should be obvious, “engineering controls” have everything to do with “engineering”, and nothing to do with medicine.

I am not pointing this out to be rude to you or to trivialise a serious situation. I believe that you have implemented this Direction with good intentions. However, good intentions do not negate the fact that you have asserted that the legislation authorises a direction to mandate a medical procedure to your staff when medical procedures clearly do not fall within the ambit of a measure under those laws. Instead, such a direction is clearly within the ambit of the PHA, particularly in the context of a public health emergency. **Given that there is no public health order made under the PHA mandating vaccination for your staff, there is no lawful basis for you, as an employer, to mandate it.**

Your Direction is therefore not only unjust, but unlawful, and you are opening yourself up to significant legal liability if you take disciplinary action against employees who do not comply with it. Arguably, and in addition, your Direction and its erroneous referral to vaccination as an “control measure” (CHECK WHAT IT WAS REFERRED TO AS) could be said to constitute “Misrepresentation” under Section 109 of the WHS Act. I note that there is a maximum penalty of 1,155 ($127,050) penalty units for individuals, and 5,770 ($634,700) for body corporates, for such an offence.

*You don’t need to do everything to protect your employees against everything*

I also note that your Direction suggests that you have a legal obligation which is actually more stringent than the law provides. You do not have a duty to ensure your staff are immunised against viruses, or that your employees do not transmit viruses to the wider community. This would be an inappropriate burden for an employer to bear, given employers don’t have any medical expertise to determine the practicability of such solutions,[[2]](#footnote-2) and given the nature of virology generally. I think that you’ll agree that it is inappropriate for an employer to stand in the shoes of either a medical body, or an enforcer of public health legislation, by requiring the vaccination of its employees in the absence of lawful authority or appropriate medical training.

Finally, I draw your attention to Section 47 of the WHS Act which creates a duty for employers to consult with workers regarding matters relating to work health or safety. The imposition of this Direction without said consultation, in the form stipulated in Section 48 of the same Act, leaves you liable for significant penalty under that section (DELETE IF NOT ACCURATE).

1. **Discrimination, Privacy and Bullying**

Apart from the legality of the Direction itself, if you do not immediately withdraw it, it is possible that you will be subject to a large number of complaints for discrimination, breach of privacy and bullying and harassment.

*Discrimination and Victimisation*

Your Direction potentiates liability for actions in discrimination and victimisation.

Although your Direction provides for those who present a medical contraindication certificate to be excluded from it (DELETE IF NOT RELEVANT), I note that both 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 have not met the requirements for a medical contraindication certificate in the form approved by NSW Health, but who still are unwilling to receive a Covid-19 vaccination, and are treated differently to vaccinated staff as a result, could fall within these definitions.

By way of example, I draw your attention to the definition of “disability” within the ADA:

disability means—

…

**(b) the presence in a person’s body of organisms causing or capable of causing disease or illness**

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 causing or capable of causing disease or illness”, they may have a valid claim of disability discrimination under the NSW discrimination statute. The federal discrimination statute has an equivalent definition.[[3]](#footnote-3)

As you may know, the *Anti-Discrimination Board* and the *Australian Human Rights Commission* each offer no-cost forums for the resolution of complaints of discrimination. It is a citizens right to explore such means of dispute resolution.

I 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.

As a result of this Division, 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. I also encourage you to review Sections 107 and 108 of the same Act which prohibit coercion, inducement and other forms of duress against employees. It is quite clear that a direction to receive a medical procedure at risk of “management action” is a form of economic duress.

*Privacy*

I strongly encourage you to consider the interplay of your Direction with the *Privacy Act 1988*. 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, I question whether it is lawful for you to collect your employees’ private medical information (their vaccination status) in circumstances where neither the WHS Act or Regulations include vaccination or any other form of medical procedure within their ambit. Again, you are not a medical body, nor a proxy for Government public health laws (particularly when there hasn’t even been a government issued mandate for me to receive a vaccination).

With regards to whether it is “reasonably necessary” for you to collect your employees’ vaccination status, our workplace has fulfilled its duties throughout the pandemic thus far without mandating vaccination. There have been 0 cases of Covid-19 so far in our workforce. It is therefore difficult to argue that enforcing vaccination is “reasonably necessary” for me to continue the job I have 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*

I also put you on notice that a mandatory direction to 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.

*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.

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

“Informed Consent” is referred to and defined as follows in various policies and regulations, issued primarily by regulatory bodies.

**The Australian Law Reform Commission** states**:**

‘Informed consent’ refers to consent to medical treatment and the requirement to warn of material risk prior to treatment. As part of their duty of care, health professionals must provide such information as is necessary for the patient to give consent to treatment, including information on all material risks of the proposed treatment. Failure to do so may lead to civil liability for an adverse outcome, even if the treatment itself was not negligent.[[4]](#footnote-4)

**The *Health Care Complaints Commission* in NSW** states that**:[[5]](#footnote-5)**

Medical and dental treatment requires valid consent from the patient. Informed consent means a patient will be given clear information about what is involved in any proposed treatment and their treatment options. Health care providers need to obtain valid consent from a patient before examining or treating them. If a patient lacks capacity, consent should be sought from the person with the proper authority, except in situations where the treatment is urgent and necessary to save a person’s life or prevent serious damage to their health.

For consent to be valid the provider needs to ensure that the patient has:

* the capacity to provide consent.
* a good understanding of any side-effects, risks, benefits and alternatives regarding the proposed treatment.
* been informed about the fees involved
* given consent voluntarily, without being pressured.

…

**The NSW Department of Health** has a “Consent to Medical and Healthcare Treatment Manual” which has a section titled “Requirements for Consent”[[6]](#footnote-6). It says:

Adults with capacity have a right to decide what happens to their own bodies. This means that they have the right to consent to treatment, refuse to consent to treatment for any reason, or withdraw their consent, even if refusal or withdrawal of treatment is likely to lead to serious injury or death. These principles are reflected in the law that governs consent to medical treatment. As a general rule, no operation, procedure or treatment may be undertaken without prior consent from the patient or, if the patient lacks capacity, from the patient’s substituted decision maker.

The only exceptions are:

in an emergency when the patient lacks capacity and the patient’s express wishes are unknown; or

where the law otherwise allows or requires treatment to be given without consent.

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. 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”; [[7]](#footnote-7),[[8]](#footnote-8)

“the approval is subject to certain strict conditions, such as the requirement for Pfizer to continue providing information to the TGA on longer term efficacy and safety from ongoing clinical trials and post-market assessment…the provisional approval pathway provides a formal and transparent mechanism for speeding up the registration of promising new medicines with preliminary clinical data”.

It is difficult for me to comply with your Direction in circumstances where I am concerned about the long term safety implications of the vaccines, when the TGA itself notes the same concerns, and when you yourself, as the mandator, do not have the expertise or training to reassure me. This is particularly problematic given you have not indemnified me for any adverse reaction I might suffer from the vaccines.

1. **There is no evidence to suggest that the vaccines would be an effective control measure in any event**

The purpose of vaccination, generally, is to produce immunity in an individual. COVID-19 vaccinations do not produce sterilising immunity. They may provide protection in preventing the severity of infection (though real world data on this is limited). However, vaccinated individuals are just as likely to spread the SARS-CoV-2 delta variant as unvaccinated individuals. Therefore, it is absolutely incorrect for you to purport that the COVID-19 vaccinations are required to manage the risk of transmission. It remains true, as it was yesterday, that staying home when symptomatic is the gold standard for managing the risk of transmission. This will not change with the vaccine.

The options currently available for the vaccines have raised many concerns in relation to their safety and efficacy profiles, particularly noting the technologies used, notably m-RNA and vector based technologies. I also note the unethical, if not criminal histories, of the vaccine companies involved. In contrast, Novavax, a vaccine currently under consideration by the TGA (<https://www.tga.gov.au/covid-19-vaccines-undergoing-evaluation>) uses synthetic targeted protein technology which is not associated with many adverse events as well as the fact that the company does not have a criminal past. I should be allowed time to consider my options, specifically the options that do not expose me to any risks.

In May 2020, virologists Sorenson, Susrud and Dalgleish published a paper, setting out the longer-term risks of non-targeted vaccine technologies which increase the likelihood of Antibody Dependent Enhancement occurring and/or fail to mitigate its effects. Briefly, a neutralising or binding antibody contains epitopes, which are groups of amino acids produced to match and neutralise the epitopes on the virus. Epitopes are recognised by the immune system. If the peptide amino acids on the spike protein of the virus are closely matched to that of humans, the epitopes on the antibodies produced may not neutralise the peptides on the spike protein fully if it does not recognise the entire protein as a foreign invader. The resultant partial binding can create havoc later, through the mechanism of ADE, when the virus returns in a mutated form and partial binding occurs leading to the body producing non-binding antibodies and facilitating entry of the virus into human cells, increasing infectivity.

I have enclosed the published peer reviewed study here: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7468800/>

I also suggest that the Rapid Saliva Testing instead of vaccinations (which do not even stop Covid transmission anyway), are a better way of keeping Covid out of workplaces, schools and hospitals.  Both the vaxxed and unvaxxed could be tested, so there is no need for discriminatory and unlawful policies to be considered when this safe, fast, inexpensive and reliable method is available.

**Escalation**

The impending deadline of INSERT DEADLINE which your Direction purports to implement has created a significant degree of urgency in this matter. I am now under economic duress to receive a vaccine which:

* you do not have any lawful authority to mandate;
* is not proven to slow the spread of the Delta variant; and
* can not be said with any scientific basis to be safe long term.

As a result, I urgently request that you **withdraw this Direction with immediate effect.** If you do not, I will explore my legal options.

I look forward to your urgent response.

NAME
DATE

1. See, for example, Linnane (NSW Department of Planning and Environment) v Cummings [2020] NSWDC 587, SafeWork NSW v DIC Australia Pty Limited [2021] NSWDC 143 and other cases involving “engineering controls”. [↑](#footnote-ref-1)
2. The cases make clear that what is "practicable" in any given context is dependent on the “state of knowledge” that employers have about the risk of injury or harm to health from the hazard. Given employers cannot be said to have expert or specialised knowledge in medicine, virology or vaccinology, it is clearly not a “practicable” measure for employers to mandate vaccination in the absence of public health order authorising it. [↑](#footnote-ref-2)
3. *Disability Discrimination Act 1992* (Cth), s4 [↑](#footnote-ref-3)
4. <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/10-review-of-state-and-territory-legislation/informed-consent-to-medical-treatment/> [↑](#footnote-ref-4)
5. <https://www.hccc.nsw.gov.au/health-consumers/frequently-asked-questions-health-consumers/consent-for-treatment> [↑](#footnote-ref-5)
6. *Consent to Medical and Healthcare Treatment Manual*, NSW Department of Health, <https://www.health.nsw.gov.au/policies/manuals/Documents/consent-section-4.pdf> [↑](#footnote-ref-6)
7. <https://www.tga.gov.au/covid-19-vaccines-undergoing-evaluation> [↑](#footnote-ref-7)
8. https://www.tga.gov.au/covid-19-vaccine-pfizer-australia-comirnaty-bnt162b2-mrna-approved-use-individuals-12-years-and-older [↑](#footnote-ref-8)