

Victorian Workplace COVID-19 Pandemic Orders

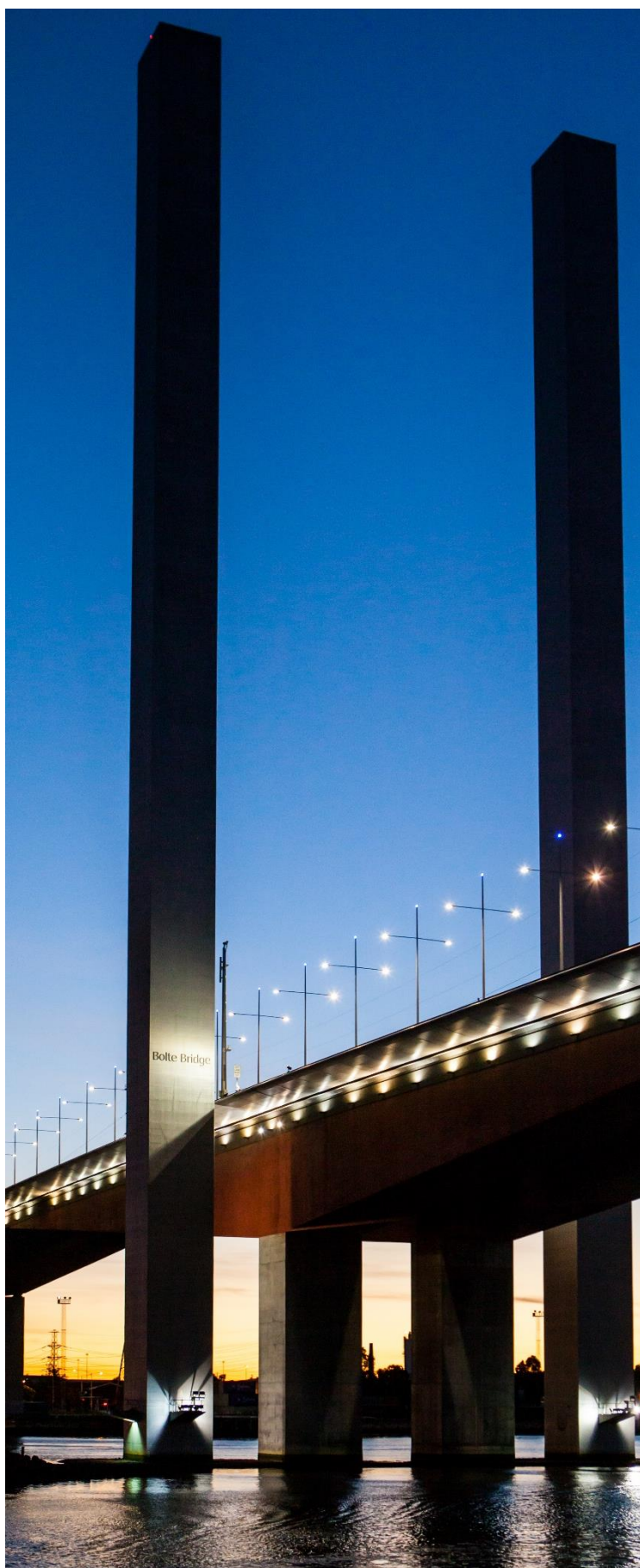
Employer Guidance

Helping employers navigate and understand the Victorian COVID-19 Pandemic Orders

Edition 1

Current as at 27 June 2022





Contents

Introduction	03
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A. Summary of current Victorian pandemic orders	04
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B. General obligations for Employers	10
---	-----------

C. Communicating with Employees	12
--	-----------

D. Mandating vaccinations in the workplace under a pandemic order	13
--	-----------

E. Implementing a mandatory vaccination policy – important additional considerations	16
---	-----------

F. Asking & collecting information about an employee's vaccination status	17
--	-----------

G. Workplace disputes regarding vaccination	19
--	-----------

H. Vaccinations and employer liability	21
---	-----------

Who and where to contact for further assistance	22
--	-----------

Schedule 1 – Specified Worker Category Definitions	23
---	-----------

Schedule 2 - Facility definitions	24
--	-----------

Introduction

COVID-19 vaccination plays a vital role in protecting the health and wellbeing of people in Australia. Vaccination is both a means to manage and protect health systems from being overwhelmed and allow business to return.

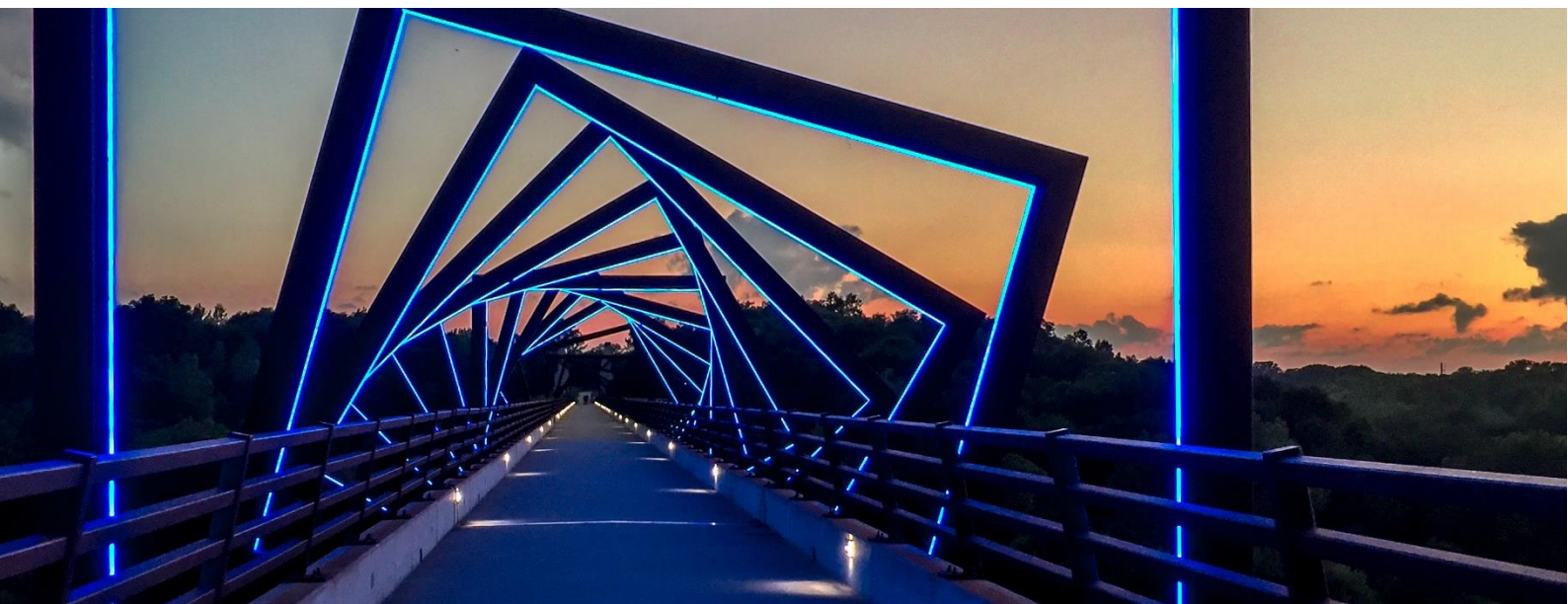
The Victorian Government introduced a framework to manage pandemic which is contained in the Public Health and Wellbeing Act 2008. In line with the framework, when a pandemic is declared, the Minister for Health can make pandemic orders to protect public health. Pandemic orders are published on the [Pandemic Order Register](#).

At 11.59pm on 24 June 2022, the Workplace Order (No.9) 2022 took effect.

This guide aims to help you understand and digest your obligations, as well as the proactive steps you can to ensure you comply and can manage employment issues related to vaccinations as and when they arise.

It is businesses that are responsible for gathering information to ensure mandates are complied with. Business are also responsible for communicating vaccination requirements to relevant staff and workers to ensure as many people as possible are vaccinated within the relevant timeframes.

The content of this guide has been prepared based on material and information available to date (27 June 2022). The information in this paper is of a general nature and does not constitute legal advice and should not be relied upon as such. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. Some information contained in this publication has been obtained from external sources, and its accuracy or currency cannot be guaranteed.



A. VICTORIAN PANDEMIC ORDERS MANDATING THE VACCINE IN THE WORKPALCE

Summary

Throughout September and October 2021, the Victorian Government introduced a range of COVID-19 vaccination mandates through a number of differing public health order or “directions”. Each of the public health directions operated differently and placed differing obligations on employers, workers and site operators. The orders have now been replaced with pandemic orders made by the Minister for Health.

It is important that employers ensure they apply the correct pandemic orders in their workplaces, as each of the orders have differing applications and relevant dates. The orders are continuing to change and evolve based on public health advice, so employers should continue to monitor and stay across any relevant changes.

Current Victorian Pandemic Orders

	Type	Official title	Brief Summary	Commenced
1	WORKERS ORDER	Pandemic Workplace Order No.9 2022	Imposes mandatory vaccination obligations on specified and facility workers working outside of their place of residence.	24 Jun 2022
2	Public Safety Order	Pandemic (Public Safety) Order No.2 2022	Imposes requirements across the state of Victoria in respect of face coverings and restricted access to care facilities .	24 Jun 2022
3	Quarantine, Isolation and Testing Order	Pandemic Quarantine Isolation and Testing Order No.9 2022	Imposes obligations to limit the spread of COVID-19 including self-isolation and requirements for those living with a person diagnosed as having COVID-19.	24 Jun 2022

WORKERS ORDER

The Minister for Health has issued an order confirming regulated employers must take steps to collect, record and hold information concerning the vaccination status of employees and workers and must not permit them to work anywhere other than their home unless the worker is fully vaccinated or an excepted person.

Who does the Worker Order apply to?

The order applies to:

- a) **'Specified Workers'**; and
- b) **'Facility Workers'**

A **Specified Worker** includes:

1. Custodial workers
2. Disability workers
3. Emergency services workers

A **Facility Worker** includes a worker performing duties at:

1. A Healthcare Facility
2. A Residential Aged Care Facility
3. A Specialist School Facility

For definitions, please see Schedules 1 and 2.

What are the vaccination requirements for Specified and Facility Workers?

Under 18 years old: Fully vaccinated or an excepted person

18 years old or older: Fully vaccinated (boosted) or an excepted person

What obligations are imposed on an employer of a Specified Worker?

An employer of a Specified Worker must:

Collect, Record and Hold information concerning vaccination status

Where a Specified Worker is working outside their place of residence, an employer must, collect, record and hold:

If the worker is under 18 years old:

- Whether the worker is fully vaccinated; and
- If the worker is fully vaccinated, the date the worker became fully vaccinated.

If the worker is 18 years old or older:

- Whether the worker is fully vaccinated (boosted); and

- If the worker is fully vaccinated (boosted), the date the worker became fully vaccinated (boosted).

Notification requirements

If the employer of a Specified Worker has not already notified workers of vaccination requirements under revoked Pandemic (Workplace) Orders, and/or does not hold the requirement information, the employer must as soon as practicable inform each Specified Worker (including new workers) scheduled to perform work outside their place of residence:

- As a Specified Employer, they are required to collect, record and hold information concerning vaccination status;
- Clause 26(1) of the Workplace Order requires the Specified Employer not to permit a Specified Worker under 18 years old to work outside their place of residence unless they are fully vaccinated or an excepted person; and
- Clause 26(2) of the Workplace Order required the Specified Employer not to permit a Specified Worker aged 18 or over to work outside their place of residence unless they are fully vaccinated (boosted) or an excepted person.

What obligations are imposed on the operator of a Facility?

The Operator of a Facility must:

Collect, Record and Hold information concerning vaccination status

Where a Facility Worker is working outside their place of resident, the Operator must, collect, record and hold:

If the worker is under 18 years old:

- Whether the worker is fully vaccinated; and
- If the worker is fully vaccinated, the date the worker became fully vaccinated

If the worker is 18 years old or older:

- Whether the worker is fully vaccinated (boosted); and
- If the worker is fully vaccinated (boosted), the date the worker became fully vaccinated (boosted)

Notification requirements

If the Operator has not already notified workers of vaccination requirements under revoked Pandemic (Workplace) Orders, and does not hold the requirement information, the Operator must as soon as practicable inform each Facility Worker (including new workers) scheduled to perform work outside their place of residence:

- As a Facility Operator, they are required to collect, record and hold information concerning vaccination status;

- Clause 27(1) of the Workplace Order requires the Facility Operator to take all reasonable steps to prevent a Facility Worker under 18 years old from entering or remaining on the premises unless they are fully vaccinated or an excepted person; and
- Clause 27(2) of the Workplace Order required the Facility Operator to take all reasonable steps to prevent a Facility Worker aged 18 years old or older from entering or remaining on the premises unless they are fully vaccinated (boosted) or an excepted person.

How does a worker prove they are vaccinated?

Workers can provide their vaccination status information through a variety of documents, such as:

- a letter from a medical practitioner,
- a certificate of immunisation; or
- an immunisation history statement obtained from the Australian Immunisation Register.

Who is considered an unvaccinated person under the Workers Order?

A person is considered unvaccinated if they **have not** received one dose of a one dose COVID-19 vaccine or two doses of a two dose COVID-19 vaccine including two different types of two dose COVID-19 vaccines.

What does fully vaccinated and fully vaccinated (boosted) mean?

Fully vaccinated:	If a person is required to be fully vaccinated, they must have received one dose of a one dose COVID-19 vaccine or two doses of a two dose COVID-19 vaccine.
Fully vaccinated (boosted):	If a person is required to be fully vaccinated (boosted), they must have received one dose of a one dose COVID-19 vaccine or two doses of a two dose COVID-19 vaccine, and a booster dose.

How does a worker prove they cannot be vaccinated?

The order confirms an excepted person must hold “acceptable certification” that the person is unable to receive a dose, or further dose, of any COVID-19 vaccine that is available in Australia due to a medical contraindication or an acute illness.

Acceptable certification includes:

- a current COVID-19 digital certificate issued by Services Australia and displayed through the Medicare App, Services Victoria App or equivalent smartphone wallet, that states the person is unable to receive a dose or further dose; or
- a printed version of the COVID-19 digital certificate

What about employees who refuse to disclosure if they are vaccinated or not?

Under the order, a Specified Worker for whom an employer does not hold a COVID-19 vaccine record, or a Facility Worker for whom the Facility Operator does not hold a COVID-19 vaccine record, whether by reason of refusal or otherwise, is to be **treated as unvaccinated** and must not work outside their ordinary place of residence.

Who is an 'excepted person'?

A person is an **excepted person** if the person:

1. holds acceptable certification that the person is unable to receive a dose, or a further dose, of any COVID-19 vaccine that is available in Australia due to:
 - a. a medical contraindication;
 - b. an acute medical illness (including where the person has been diagnosed with COVID-19); or
 - c. the person is under 12 years and 2 months of age.

'medical contraindication' means one of the following contraindications to the administration of a COVID-19 vaccine:

- a. anaphylaxis after a previous dose;
- b. anaphylaxis to any component of the vaccine, including polysorbate or polyethylene glycol;
 - in relation to AstraZeneca;
 - history of capillary leak syndrome; or
- c. thrombosis with thrombocytopenia occurring after a previous dose;
- d. in relation to Comirnaty or Spikevax, myocarditis or pericarditis attributed to a previous dose of either Comirnaty or Spikevax;
- e. where a person is in the process of completing a Federal Department of Health approved COVID-19 vaccine clinical trial;
- f. the occurrence of any other serious adverse event that has:
 - been attributed to a previous dose of a COVID-19 vaccine by an experienced immunisation provider or medical specialist (and not attributed to any another identifiable cause); and
 - been reported to State adverse event programs and/or the Therapeutic Goods Administration;

Are there any exemptions?

Yes.

A Specified Worker or Facility Worker may be permitted to work if they are a **recent international arrival** and can demonstrate:

- They are fully vaccinated; and
- They are an international arrival arriving in Australia in the previous 4-week period; and
- Have booked to receive a booster dose within 4 weeks;
- Have evidence of the booster booking.

If a Specified Worker or Facility Worker has been **diagnosed with COVID-19 or was a probable case**, they may be permitted to work provided:

- They produce evidence of the diagnosis of probable cause within the previous 4-month period;
- Once the 4-month period after self-isolation has passed, they must be boosted.

There are other exceptions where there are emergency circumstances.

Who will monitor compliance with the Workers Order?

Authorised officers (under the Public Health and Wellbeing Act 2008) may request an employer to produce vaccination information about their workers. Employers must comply with any request or may face penalties.

What are the penalties for failure to comply with the mandatory vaccination Workers Order?

- Penalties of up to **\$21,808** for individuals and **\$109,044** for a body corporate for a failure to comply with pandemic orders, including any failure to collect, record and hold vaccination information or allowing an unvaccinated person into a workplace / to work outside their place of residence.
- Penalties of up to **\$10,904** for individuals and **\$54,522** for a body corporate for providing false information, giving false statement or producing false or misleading documents to an authorised officer.

B. GENERAL OBLIGATION OF EMPLOYERS

In addition to vaccination requirements, the Workplace Order imposes a number of obligations on employers. These obligations apply, regardless of whether the employer is a Facility Operator or engages Specified Workers. The obligations concern the steps to be taken to mitigate risk and respond to positive COVID-19 diagnosis and probable cause.

The Workplace Order is a reminder that all employers and businesses must ensure they maintain knowledge of the changing requirements.

What obligations does this order impose on employers?

The Workplace Order requires all employers take reasonable steps to ensure workers comply with face covering requirements and respond appropriately if there is a symptomatic person or confirmed case in the workplace.

Are workplaces required to have a COVIDSafe plan?

Yes. The Workplace Order confirms a COVIDSafe Plan must be in place. The plan must detail:

1. The process for implementing record keeping (if applicable)
2. The appropriate level of PPE
3. The actions taken to mitigate the risk of COVID-19 being introduced to the workplace
4. The process in place to respond to symptomatic or confirmed cases.

For more information, please contact the Victorian Chamber's [Health, Safety and Wellbeing Team](#).

How does an employer respond to a symptomatic worker?

An employer must not require a worker to perform work at a work premises if the worker is symptomatic.

As soon as practicable, after becoming aware a symptomatic person attended a work premises in the 48 hours prior to the onset of symptoms, an employer must:

- Advise the worker they must comply with the relevant Testing Requirements Policy issued by the Secretary to the Department of Health, and where applicable follow the rapid antigen test procedure;
- Ensure records are taken to support contact tracing if the symptomatic person becomes a confirmed or probable case. This will include maintaining rosters or records of who the person came in to contact with; and
- Inform all workers to be vigilant about the onset of COVID-19 symptoms and to comply with testing procedures.

How does an employer respond to a confirmed or probable case of COVID-19?

As soon as practicable after becoming aware of a diagnosis or probable cause attending the workplace in their infectious period:

- Direct the person not to attend the workplace and to self-isolate immediately in compliance with the Quarantine, Isolation and Testing Order.

If the person is in the workplace:

- Direct the person to travel immediately to their residence and to self-isolate in compliance with the Quarantine, Isolation and Testing Order.

- If the person is unable to do so, direct the person to isolate in the workplace, wear a face mask and to maintain a distance of 1.5 metres from others until they are able to isolate at home.

In both circumstances:

- Take reasonable steps to notify workers who attended the workplace during the infectious period
- Inform all workers to be vigilant about the onset of symptoms and comply with testing requirements.
- If the number of confirmed cases attending the workplace within a 7 day period reaches the workplace outbreak threshold under the [Case Contact and Outbreak Management Policy](#) notify the Department and follow any further directions provided.

C. COMMUNCIATING WITH STAFF



When complying with the mandatory vaccination orders it is important that employers, and operators:

- Comply with the notification requirements for all current and new staff;
- Communicate How workers can provide with the employer about vaccination records or exemptions;
- The need for exempt workers to provide medical evidence; and
- How information about vaccination status will be handled.

THE IMPORTANT LEGAL STUFF YOU NEED TO KNOW WHEN COMMUNICATING ABOUT COVID-19 VACCINATIONS WITH EMPLOYEES/WORKERS

The Therapeutic Good Administration (TGA) in recognition of the importance of responsible communication regarding the COVID-19 vaccination has given legal permission that allows businesses (and others) to communicate about vaccinations so long as that communication:

Is consistent with current Commonwealth health messaging regarding the national COVID-19 vaccination program, including content found on the Australian Government Department of Health website; and

Does not contain:



- any reference to the trade name, sponsor name or active ingredient or any other information that would identify specific vaccine brands (e.g. Pfizer or AstraZeneca);
- any statement, or implication comparing different COVID-19 vaccines (or comparing vaccines with treatments such as medicines);



- statements to the effect that COVID-19 vaccines cannot cause harm or have no side effects; or
- any statement regarding COVID-19 vaccines that is false or misleading.

It is also important to remember that obligations under other laws, such as the Australian Consumer Law which includes the obligation not to mislead, continue to apply when communicating about vaccines.



D. MANDATING VACCINATIONS IN THE WORKPLACE UNDER A PUBLIC HEALTH ORDER

Can employers require workers to be vaccinated against COVID-19 in order to work under a public health order?

An employer can direct employees to be vaccinated where:

- they have written permission to do so (such as under an employment contract or enterprise agreement which requires an employee to have the COVID-19 vaccination OR
- the direction to be vaccinated is considered a “lawful and reasonable direction”. Employers can require workers who are employees to be vaccinated in the following instances:

LAWFUL AND REASONABLE DIRECTIONS

“Reasonable”

Typically, the coronavirus pandemic doesn’t automatically make it reasonable for employers to direct employees to be vaccinated against the virus, reasonableness is a question of fact to be determined in each workplace by weighing up a range of factors to determine whether on balance it would be reasonable or not to mandate vaccination in that workplace for certain employees.

However, where an employer directs an employee to get the vaccine as a result of a public health order/direction requiring vaccination, then an employer direction is likely to be considered reasonable in circumstances where having a COVID-19 vaccination becomes an inherent requirement of the job at law or is required for the employee to be able to attend their place of work to perform their job under the directions/order.

Recent Case Example:

In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818, the Fair Work Commission found a flu vaccination policy implemented as a result of a NSW Public Health Order was a lawful and reasonable direction. An employee who could not attend work because of a refusal to receive a flu vaccine in compliance with the PHO, could not perform the inherent requirements of her role and was lawfully dismissed. On 27 September 2021, the Full Bench of the Fair Work Commission refused Ms Kimber permission to appeal on the basis that Ms Kimber was not able to demonstrate a medical contraindication to the influenza vaccine.

Workers Directions

Important considerations when considering reasonableness under the Workers Vaccination Mandate:

- Firstly, the Workers Order only mandates that an employer not allow an unvaccinated worker to attend the workplace (to work outside of their ordinary place of residence).
- This means where a worker can continue to perform their job from their place of residence then it will currently be unlikely that a direction an employee in such circumstances to be vaccinated to attend the workplace will be reasonable because:
 - of the existence of the other workplace orders which state that if a worker can work from home they must/should work from home; and
 - because of the current temporary nature of such health orders.

Please note that both of these factors which currently weigh against reasonableness of directing vaccination may in the near future change/no longer exist.

- However, where an employee in order to perform their job must attend the workplace, it will be more likely that a direction to the employee to be vaccinated in order to attend the workplace under the pandemic order, so they that can perform their job will be considered a reasonable direction.

“Lawful”

An employer direction to get the COVID-19 vaccination will be lawful if:

- it does not breach any terms of the employment contract, any applicable award or enterprise agreement; and
- it does not breach any applicable Commonwealth, state or territory law (for example, anti-discrimination laws – see below), that apply to the employees.

Under Australian anti-discrimination law, it is unlawful to treat a person less favourably on the basis of protected attributes, including gender, race, religion, disability or age.

Mandating vaccination will not result in “direct discrimination” as an employee’s decision to refuse vaccination is not an attribute protected by any Australian discrimination laws.

However, “indirect discrimination” is also prohibited by discrimination laws and could arise in certain circumstances.

Indirect Discrimination

This is where a rule or policy that is the same for everyone but has a disproportionate effect on a group of people who share a particular protected attribute and persons from that group cannot comply with the requirement. Whether indirect discrimination will be unlawful in the context of mandatory vaccinations will depend on:

- whether groups of employees with a particular attribute are in fact less likely to be able to comply with the requirement imposed by the employer than the broader population. For instance, persons with some disabilities may simply be unable to obtain vaccination safely; AND
- whether the requirement imposed is reasonable in the circumstances.

Whether a court considers it ‘reasonable’ for an employer to mandate COVID-19 vaccinations in the context of indirect discrimination laws is likely to be highly fact dependent, considering workplace and employees’ individual circumstances. However in instances where a public health order applies (and does not provide for an exception to vaccination for the relevant type of worker), employer direction is likely to be considered reasonable in the circumstances.

Health or Medical exemptions

Where an employee seeks to be treated as an ‘excepted person’ under the various orders on medical grounds, the employee should provide appropriate medical evidence that they have obtained certification from a medical practitioner that they are unable, due to medical contraindication to receive a dose or further doses of the COVID-19 vaccine.

Can employers mandate that contractors in their workplace get the vaccine?

The ability of employers to direct a contractor to receive the COVID-19 vaccination will largely depend upon the terms of the agreement between the employer and the contractor. For all new contractors it is suggested that employers consider making this an express term of the contract going forward where necessary.

In order to implement a vaccination requirement for contractors and consultants, it would be necessary to consider the existing contractual arrangements with these parties, and whether they would support enforcing a vaccination policy, or whether contractual variations would be required.

Can employers make it a job requirement that all new employees they hire be vaccinated?

Employers can introduce into any new contracts a requirement that a prospective employee be vaccinated.

However, despite being a legitimate term of employment in a contract, such a requirement can still enliven discrimination claims if the prospective employee cannot comply due to an attribute protected by discrimination law and is subsequently not offered employment.

The “indirect discrimination” principles discussed above will apply to refusing employment to prospective employees. Importantly though, in instances where a public health order applies (and does not provide an exception to vaccination for the relevant type of worker), the requirement to become vaccinated will likely become an inherent requirement of the job. This provides a separate defence against any claim of unlawful discrimination, unless there are adjustments that can be made to the role to enable the employee to perform it without imposing ‘unjustifiable hardship’ on the employer (for example, adjustments to allow the employee to work from home pending the lifting of the orders).



E. IMPLEMENTING A MANDATORY VACCINATION POLICY – IMPORTANT ADDITIONAL CONSIDERATIONS

Before introducing a mandatory vaccination policy, even as a result of a pandemic order, it is important employers consider the following matters.

CONSULTATION OBLIGATIONS

Need to comply with Work Health and Safety Consultation Obligations

Employers must consult with their employees (workers) and any health and safety representatives (if their workplace has one) when implementing a vaccine policy (whether written, formal or informal).

In conducting such consultations employers must give workers an opportunity to express their views and raise any concerns so that they can contribute to the decision-making process relating to the introduction of the vaccination policy. Employers must take employees views into account before finalising any policy.

Consultation must occur using the established consultation procedures in the workplace. Otherwise, consultation may occur broadly, for example, through staff messaging or more directly, through small group discussions, depending on the size and nature of your business.

If workers are represented by a work health and safety representative (a union or otherwise), the consultation must involve that representative.

Need to comply with any consultation obligations in any applicable Modern Awards, Enterprise Agreements or employment contracts

Employers should review any applicable modern awards, enterprise agreements or contractual obligations to ensure that they fulfil any obligations under these documents to consult employees. Consultation should be genuine and not perfunctory, and follow prescribed or agreed procedures.

REFUSALS

Determine a process for managing refusals

Consider the likelihood of employees refusing vaccination or refusing to provide proof of vaccination and the process you will take to respond to this, e.g. including discrimination considerations and assessing the potential impact on an employee's ability to carry out the key requirements of their role.

In all communications regarding the vaccination policy, employers should also make sure to clearly outline any potential consequences for workers refusing to comply with the policy.

RECORDKEEPING AND THE PRIVACY ACT

Determine how to manage recordkeeping and privacy

Employers need to consider their privacy policy as well as the Privacy Act in relation to vaccinations, including how you will handle any collection, use or disclosure of vaccination information. See *Section E on Asking & Collecting information about an employee's vaccination status* for further detail on the interaction between privacy law and vaccinations in the workplace.

F. ASKING & COLLECTING INFORMATION ABOUT AN EMPLOYEE'S VACCINATION STATUS

ASKING EMPLOYEES ABOUT THEIR VACCINATION STATUS

Can employers who have mandated vaccination in the workplace because of a public health order ask or require their employees to disclose their vaccination status?

There is no legal prohibition on an employer asking an employee to voluntarily disclose their vaccination status.

Where an employer imposes a requirement for employees to be vaccinated because of a public health order, any subsequent employer direction requiring employee's to provide confirmation or evidence that this has occurred will be extremely likely to also be considered a reasonable and lawful direction.

What about in instances where the mandate applies to an Operator of a specific facility and not to the direct employer of the worker?

In such instances it is firstly important for the Operator to have requested that the worker provide confirmation or evidence to them under the relevant public health order of their vaccination status.

After the Operator has requested the information from the worker, it will then be extremely likely a request for the employee to comply with the request from the Operator under the relevant public health order will be a lawful and reasonable direction from their employer.

Note: It is important that the employer in this situation does not direct the employee to provide them with confirmation or evidence of the employee's vaccination status, but the employer does direct their employee to comply with a request under the public health order from the Operator of the facility.

COLLECTING INFORMATION ABOUT AN EMPLOYEE'S VACCINATION STATUS

Collecting information/evidence about an employee's vaccination status and the privacy act

Vaccines and employee privacy is governed by the Privacy Act. This covers private sector organisations (as well as Australian government agencies). Some small business operators (organisations with an annual turnover of \$3 million or less) are exempt under the Privacy Act. However, it would be prudent for those employers to also take note of the below information in determining their approach to the collection of employee vaccination status information.

Businesses with an annual turnover of more than \$3 million

The Privacy Act applies to businesses with an annual turnover of more than \$3 million, as well as to certain other types of businesses regardless of turnover (such as public sector agencies).

Where the Privacy Act applies, vaccination records are a type of medical record that constitute 'sensitive information', and are afforded a higher degree of protection under the Privacy Act, and therefore stringent requirements apply to the collection and use of such information.

Under the Australia Privacy Principles an employer is however authorised to collect an employee's vaccination record (without their express consent) where they are required to do so by law (such as under a public health order).

Once an employee's vaccination record information is lawfully collected by an employer, the employee records exemption will apply in many instances. This means that the remainder of the Privacy Principles will not apply to the handling of the vaccination record information, once it has been collected and held as an employee record, where it is directly related to the employment relationship.

The employee records exemption will likely however **not arise** where the Operator of a worksite (aged care, hospital, construction, education) who in many instances will not be the direct employer of the employee whose records are being collected.

The employee records exemption also **does not** apply to prospective employees, contractors, sub-contractors and volunteers.

Where the employee records exemption does not apply, employers must comply with the remainder of the Privacy Principles under the Privacy Act when dealing with the personal information of these individuals ensuring that they:

- Accurately record the information that they collect, keep it up-to-date and store it securely.
- Limit the use and disclosure of employee vaccination status information to what is necessary to prevent and manage COVID-19. Employers should not disclose vaccination status unless they have a legitimate and compelling reason to do so.
- Regularly review whether they still need to retain vaccine status information.



G. WORKPLACE DISPUTES REGARDING VACCINATION

Employers should approach with caution disputes regarding the COVID-19 vaccine / vaccination and should try to avoid 'jumping the gun' particularly on the issues covered below, as being too quick to take action could mean a very costly personal grievance win for an employee in the Fair Work Commission.

EMPLOYEE REFUSAL

Managing employees subject to a Public Health Orders who refuse to be vaccinated or won't disclose their vaccination status

As a first step, if an employee refuses to be vaccinated, contrary to a public health order, employers should ask the employee to explain their reasons for refusing the vaccination.

Some grounds for refusing the vaccination may include:

- Persons with a medical contraindication to vaccination (e.g. people with a history of severe allergic reactions, immunocompromised individuals, persons whose medical conditions mean that vaccination may be harmful for them);
- Persons with a religious, political or conscientious objection;
- Refusal for no given reason – “I simply don't want to”.

Whether a refusal is based on legitimate grounds and reasonable accommodation should be made will to some extent be fact specific, will depend upon the individual employee's circumstances and any exemptions provided under applicable public health orders, such as those applying to persons with medical contraindications (excepted persons).

Where an employee disobeys a reasonable and lawful direction properly given (see: *Mandating vaccination in the workplace under a public health order*) subject to a public health order to be vaccinated without providing a legitimate reason or without being subject to a recognised exception in the health order then he/she may legitimately be the subject of disciplinary action including termination of employment.

Disciplinary action (particularly termination of employment) in such instances will in most instance be considered defensible:

1. to the extent that the original direction to be vaccinated was reasonable and lawful as a result of a public health order; and
2. provided that, at the time of the dismissal, there is no known foreseeable prospect that the health order will be lifting in the imminent or very near future.

Where dismissal may be the outcome of a disciplinary process it is vital the process is fair and reasonable affording the employee procedural fairness. A failure to do so, may render the dismissal unfair despite having a valid reason.

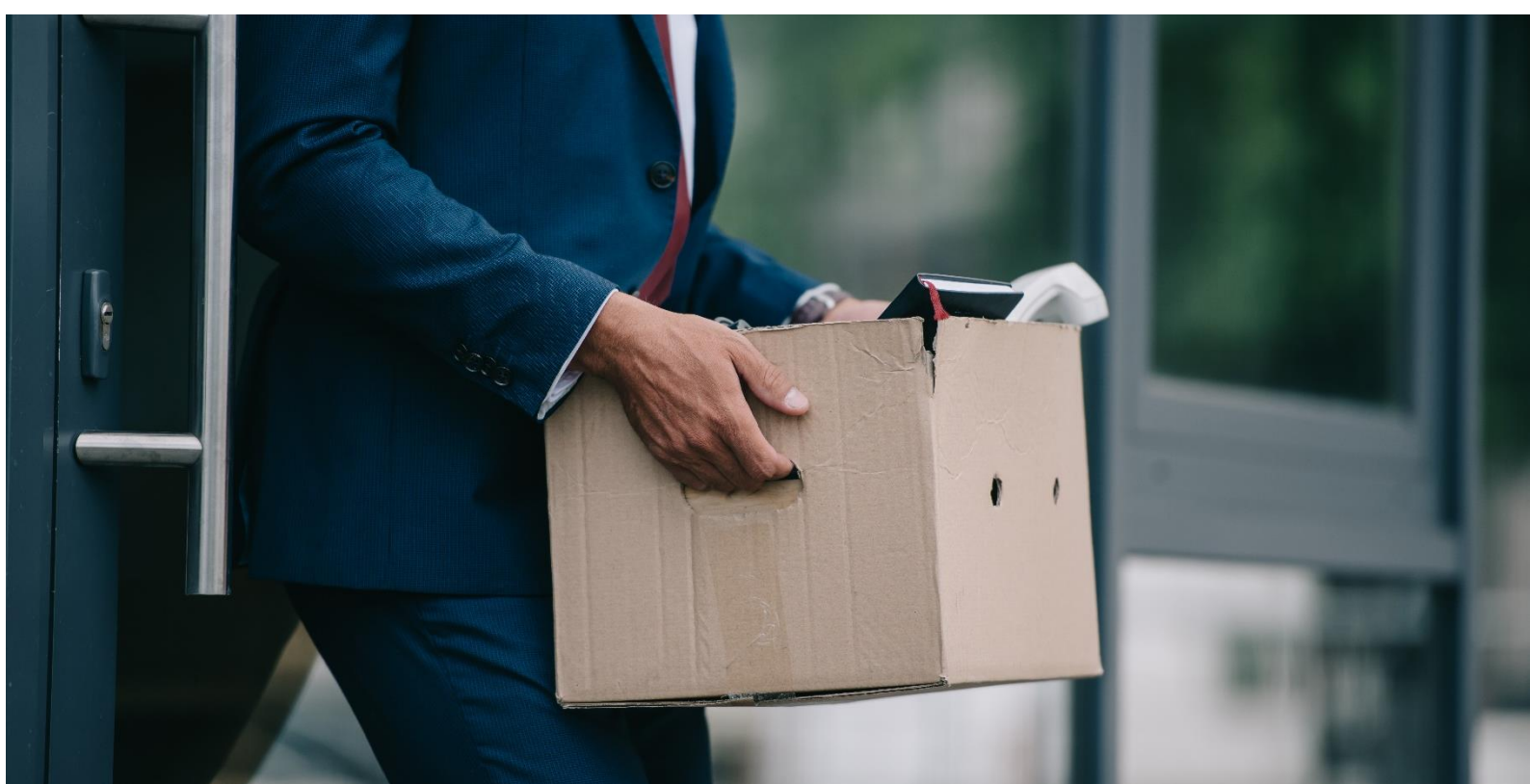


Managing unvaccinated employees who are prohibited from attending the workplace under Pandemic orders

If an employee is required to be vaccinated under a Pandemic Order in order to attend a worksite/workplace, and needs to attend the worksite/workplace in order to perform their role but is not vaccinated by the required date (and is not exempt), a range of possible courses of action may arise:

- Employers may need to consider how best to manage such employees employment so that they can continue to remain in employment for example employers could consider whether the employee be redeployed to another role that is not located at the worksite, where the employee could take leave without pay or access any accrued annual or long service leave entitlements they might have.
- Employers can direct the employee to become vaccinated in order to work. Where the employee fails to comply with this lawful and reasonable direction, the employees can be disciplined or ultimately have their employment terminated if they are unable to work because they have failed to comply with the direction (see discussion at section F.1 above)
- Employers may be able to withhold pay until the employee becomes vaccinated. This is because as a result of their vaccination status, the employee cannot enter the work premises to commence work, there are therefore likely to be good grounds to withhold pay on the basis that the employee simply cannot present for work. If the employee cannot present for work, the obligation to pay does not ordinarily arise for most employers.

As circumstance in each workplace can differ significantly, employers are strongly advised to seek legal advice before taking either of these actions to ensure they are not exposure to costly and expensive employee workplace claims.



H. VACCINATIONS AND EMPLOYER LIABILITY

Can employers be liable for any adverse reactions to the vaccine suffered by employees, when subject to a mandate to get vaccinated under a public health order?

The various COVID-19 vaccinations are not without some risk and it is possible an employee may have an adverse reaction to receiving the vaccine, though extreme adverse reactions are rare.

An employee may be entitled to workers compensation if they sustain an injury due to the COVID-19 vaccine and the injury occurred out of or in the course of employment.

The vaccine may be considered to have occurred 'out of' or 'in the course' of employment if they work in an industry where an employer mandated the vaccine, and the employer has;

- recommended or organised the vaccination onsite or at another location; or
- subsidized the vaccination.

According to Work Safe Victoria under Victorian legislation:

- Only a significant reaction to the vaccine may be considered an injury. More significant reactions could include severe fever, blood clots, allergic reactions (anaphylaxis), seizure, or stroke.
- Workers are not be entitled to compensation if they suffer only mild symptoms due to the vaccine, such as feeling tired, headache, nausea, dizziness, or redness where the injection was given.

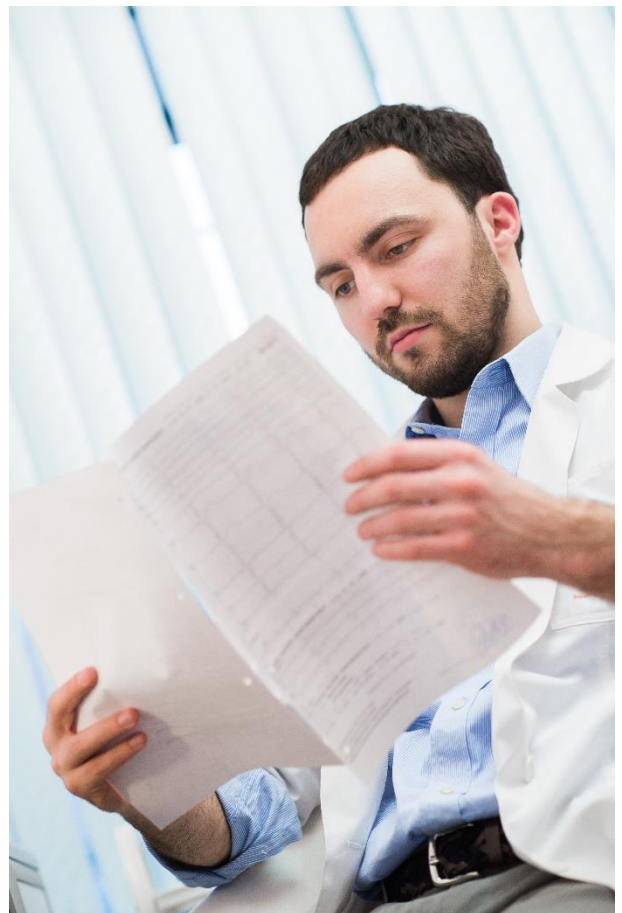
NO FAULT COVID-19 INDEMNITY SCHEME

On 6 September, the Commonwealth Government introduced a No Fault COVID-19 Indemnity Scheme. Under the scheme workers who suffer injury or loss of income due to the administration of a COVID-19 Vaccine or due to an adverse event that is considered to be caused by a COVID-19 Vaccine, will be able to register their intent to claim from the Scheme.

The Scheme will cover the costs of injuries above \$5,000 due to a proven adverse reaction to a COVID-19 Vaccine. The TGA will provide guidance on recognised adverse reactions as part of their established surveillance program, and claims will be assessed by independent experts, with compensation paid based on their recommendations.

The Scheme will be backdated to 22 February 2021 and will be administered by Services Australia.

Whilst potential claimants who access the Scheme will still have the option of pursuing action through a court judgement if that is their preference, the Scheme reduces the commercial risk involved with employers mandating COVID-19 vaccinations in the workplace, particularly as a result of public health orders.



Who and where to contact for further assistance?

KEY CONTACTS

Have a question, looking for a letter template or dealing with a situation that isn't covered by this guide? The Victorian Chamber of Commerce and Industry is here to help and answer any questions you might have. Members can call the Workplace Relations Advice Line on (03) 8662 5222.

Not a member but interested in learning more? Contact our customer service team on (03) 8662 5333

The Victorian Chamber has a dedicated team of Health, Safety and Wellbeing Consultants able to assist and advise in respect of any health and safety issues or concerns. For more information visit [the Victorian Chamber website](https://www.victorianchamber.com.au).

www.victorianchamber.com.au

KEY RESOURCES

The following are links to government websites and information on the mandatory vaccine public health orders.

Pandemic Order Register

DHHS – Coronavirus (COVID-19) Victoria

Fair Work Ombudsman – Coronavirus and Australian workplace law

Work Safe Victoria – COVID-19 vaccinations in workplaces

Therapeutic Goods Administration – COVID-19 vaccines

Office of the Australian Information Commissioner - COVID-19: Vaccinations and my privacy rights
- COVID-19 Vaccinations: Understanding your privacy obligations to your staff

Schedule 1: Specified Worker definitions

Worker category	Definition
Custodial worker	<p>A person who works at or in connection with a: custodial facility that is a facility used for the detention of persons, including but not limited to a:</p> <ul style="list-style-type: none"> • prison; • remand centre; • youth residential centre; • youth justice centre; • residential facilities; or • residential treatment facilities. <p>prison has the same meaning as in the Corrections Act 1986;</p> <p>remand centre has the same meaning as in the Children, Youth and Families Act 2005;</p> <p>residential facility has the same meaning as Serious Offenders Act 2018;</p> <p>residential treatment facility has the same meaning as Serious Offenders Act 2018, and includes the Maribyrnong Community Residential Facility;</p> <p>youth residential centre has the same meaning as in the Children, Youth and Families Act 2005;</p> <p>youth justice centre has the same meaning as in the Children, Youth and Families Act 2005.</p>
Disability worker	<p>A disability worker includes:</p> <p>an accommodation worker; or agricultural and forestry worker; or airport worker; or ancillary, support and welfare worker; or authorised officer; or care worker; or community worker; or creative arts worker; or custodial worker; or emergency service worker; or entertainment and function worker; or food distribution worker; or funeral worker; or higher education worker; or justice worker; or manufacturing worker; or marriage celebrant; or meat and seafood processing worker; or media and film production worker; or mining worker; or physical recreation worker; or port or freight worker; or professional sports, high performance sports or racing person; or professional services worker; or</p>

	<p>public sector worker; or quarantine accommodation worker; or real estate worker; or religious worker; or repair and maintenance worker; or retail worker; or science and technology worker; or social and community service worker; or transport worker; or utility and urban worker; or veterinary and pet/animal care worker,</p> <p>who:</p> <p>directly provides a disability service to a person with a disability; or supervises or manages another person who directly provides a disability service to a person with a disability,</p> <p>but does not include a person who:</p> <p style="padding-left: 40px;">is a family member of a person with a disability, and provides disability services to the person with a disability and does not receive a fee or reward for providing those disability services; or</p> <p style="padding-left: 40px;">voluntarily provides disability services, unless the person provides the disability services on behalf of an organisation or agency.</p>
Emergency service worker	<p>A person who works in connection with emergency services including but not limited to:</p> <ul style="list-style-type: none"> • the Victoria State Emergency Services; • Fire Rescue Victoria, the Country Fire Authority or any other firefighting services; • the Emergency Services Telecommunications Authority; • aquatic safety services, including life saving services and marine search and rescue services; • paramedical services; • ambulance and paramedics services; • air ambulance and medical retrieval services (including Royal Flying Doctor Service); • Victoria Police, protective services and police custody services; or • essential infrastructure and essential services that are required to maintain or protect human health, safety and wellbeing (whether provided by a public or private undertaking), and including maintenance and repair of such infrastructure.

Schedule 2: Facility definitions

Healthcare Facility	<p>A healthcare facility means each of the following premises:</p> <ul style="list-style-type: none"> (a) hospitals, including outpatient settings and in reach services; (b) ambulance and patient transport services vehicles; (c) community health centres including mental health, child and maternity, and drug and alcohol counselling services centres; (d) general practices; (e) COVID-19 related healthcare sites, including testing sites, vaccination centres and hotel quarantine premises; (f) dental surgeries and practices; (g) day procedure centres; (h) health clinics, including medical specialist and allied health professional operated clinics; (i) pharmacies; (j) diagnostic and medical imaging centres; (k) premises at which mobile health services are provided; (l) premises at which blood donation services are provided; (m) premises at which healthcare students undertake placement, registration or internships; (n) premises at which health services within government agencies are provided, including the Victorian Department of Justice and Community Services – Victorian Institute of Forensic Medicine, but excluding an education facility; (o) Coroner’s Court; (p) any retail or other premises operating within a healthcare facility, including cafes, newsagents and florists; <p>healthcare operator means a person who operates a healthcare facility whether public, private or denominational;</p> <p>healthcare worker means a person who is employed or engaged as a contractor by a healthcare operator to perform at a healthcare facility any of the following:</p> <ul style="list-style-type: none"> (a) healthcare services including: (b) medical practitioners, dental professionals, nurses and midwives; (c) allied health professionals (including those that work within a discipline classified by the Victorian Department of Health as allied health, or are registered with the Australian Health Practitioner Regulation Agency); (d) palliative care workers; (e) personal care attendants; (f) phlebotomists and pathology workers; (g) coroners; (h) lifestyle and social therapists; (i) formal language and interpretation services; (j) students; (k) volunteers; (l) administrative or ancillary roles, including: (m) an administrative, clerical and managerial worker, and each of their assistants’ delegates;
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	<ul style="list-style-type: none"> (n) food preparation, cleaning and laundry services; (o) patient service assistants and porters; (p) operating theatre technicians; (q) security, maintenance and repair and information technology, gardening and landscaping; (r) ambulance and patient transport services; (s) work at a retail business operating within a healthcare facility, including cafes, restaurants, newsagents and florists.
Residential Aged Care Facility	<p>An approved provider has the same meaning as in the Aged Care Quality and Safety Commission Act 2018 of the Commonwealth;</p> <p>A residential aged care facility means the premises at which accommodation and personal care or nursing care or both are provided to a person in respect of whom a residential care subsidy or a flexible care subsidy is payable under the Aged Care Act 1997 of the Commonwealth;</p> <p>An aged care facility worker means a person (including a volunteer) that is: employed, or engaged as a contractor, by an operator that operates a residential aged care facility to perform work at the residential aged care facility including:</p> <ul style="list-style-type: none"> (a) direct care workforce including nurses, personal care workers, allied health professionals, and allied health assistants; (b) administration staff including reception and management staff; (c) ancillary staff including food preparation, cleaning, laundry, gardening and general maintenance staff; (d) dental practitioners; (e) phlebotomists (pathology nurses); (f) lifestyle and social staff, such as those delivering music or art therapy; (g) transport drivers who are responsible for collecting and transporting residents to and from the residential aged care facility for outings; (h) volunteers engaged by the residential aged care facility to undertake duties at the facility; (i) students on placement; (j) medical practitioners and allied health professionals who attend the residential aged care facility to provide care to residents of the facility; (k) a medical practitioner, dental practitioner or allied health professional who is employed or engaged by a resident of a residential aged care facility to provide care to the resident; <p>residential care subsidy has the same meaning as in the Aged Care Act 1997 of the Commonwealth.</p>
Specialist School Facility	<p>registered school has the same meaning as in the Education and Training Reform Act 2006;</p> <p>specialist school facility means a registered school established for the main purpose of providing instruction for students with a disability,</p>

Note: where a multi-campus school includes a campus the main purpose of which is to provide instruction for students with a disability, a reference to "specialist school" is taken to be a reference to that campus and not other campuses of the school that are established for other purposes.

specialist school operator means a person who operates a specialist school facility;

specialist education worker means:

- (a) any person who is employed by a specialist school operator to work in a specialist school facility (including teachers, early childhood educators and educational support staff);
- (b) a person contracted to work at a specialist school facility and who will or may be in close proximity to children, students or staff, whether or not engaged by the specialist school operator including casual relief teachers, Breakfast Club suppliers, IT personnel, NDIS providers and auditors, (but does not include delivery personnel);
- (c) staff of the Department of Education and Training who attend a specialist school facility (such as allied health personnel or Authorised Officers);
- (d) staff of any other entity who attends a specialist school facility;
- (e) volunteers that attend a specialist school facility and that work in close proximity to children, students or staff (including parent helpers);
- (f) students on placements at a specialist school facility;
- (g) a person providing healthcare services at a specialist school facility,

but does not include:

- (a) a person attending a specialist school facility outside of the specialist school facility's normal operating hours, where the facility is hired, leased, operated or controlled by a community group; or

Example: workers attending a specialist school facility for community sporting activities outside of normal operating hours.

- (b) a person attending a specialist school facility outside of the specialist school facility's normal operating hours for the purposes of polling activities for an election conducted by the Australian Electoral Commission or Victorian Electoral Commission, provided no children or students that attend the specialist school facility are present.

Example: a candidate for a state or federal election attending a specialist school facility for a site visit outside of normal operating hours.

