

Australia stumbles into a rework of our rights, and leaders refuse to lead the way

When a pizza shop owner feels he has to declare where he stands on vaccine mandates, Australia's leadership is badly lacking. The decision is too important for individual businesses.



(IMAGE: TOM RED/PRIVATE MEDIA)

Into the vaccine-mandate vacuum flows confusion, exemplified by this statement from a Sydney pizza shop owner, as reported — without contradiction — by [The Sydney Morning Herald](#) this week:

I can't be filtering customers based on their status. There are anti-discrimination laws in place that I'd be breaking if I did that.

His main concern was commercial. He said he won't be checking customers for their COVID vaccination status because he can't afford to turn anyone away — but he had a clear legal justification in mind.

It's perfectly understandable that he doesn't know the law, and is taking matters into his own hands accordingly. Unfortunately, so far as the current law goes, he's entirely wrong.

We are rushing headlong towards a fundamental reworking of the balance of our rights, in a vacuum. That's been obvious for a while, since businesses started announcing unilateral decisions around mandatory vaccination for their workforces.

It was underlined by NSW Premier Gladys Berejiklian in her Monday press conference, which one suspects she called in part to scotch a suggestion her deputy had been feeding: that the extra “freedoms” fully vaccinated people have been promised when the state hits 70% double-dose will be available to the unvaccinated as well when it gets to 80%.

Berejiklian was explicit: nobody should make any such assumption. The threat, not subtle, is that if you stay unvaccinated, you may not be getting into the pub any time soon. Maybe ever.

For politicians, it’s sleight of hand. Prime Minister Scott Morrison has been playing the same game, saying we’ll never mandate vaccination while slipping away from questions about the practical realities of a world in which a medical status will be determinative of the exercise of freedoms we used to universally take for granted. Like walking into a shop or taking a seat in a restaurant.

That’s the vacuum. For all businesses and organisations like churches, clubs, sporting associations and so on, there is no choice but to confront the questions: can we and should we place restrictions on how individuals will be allowed to interact with us based on whether or not they’ve been vaccinated?

The law so far as the business-customer relationship is concerned, is clear: there is no law preventing a business from declining to deal with a customer, including by denying them entry to the premises on the basis that they are unvaccinated.

Australia’s anti-discrimination laws are a mish-mash of state and federal legislation, but the basic design is common: discrimination is unlawful only with respect to certain protected attributes, such as gender, race, age, pregnancy, disability. If the reason a person is not vaccinated is because of a protected attribute (such as disability or, in some states, religious conviction), a business might break the law by discriminating against them on that basis. The relevant factor will be the protected attribute, not their vaccination status.

Apart from that, business proprietors can rely on their fundamental common law right to deal with, or not deal with, whoever they choose. So far as they operate physical premises, they have a legal right to exclude anyone from entry.

As freedom warriors like to say, it’s a free country, a point the sovereign citizens insisting on their right to go maskless into Bunnings tend to miss: in Bunnings, they’re in Bunnings’ country.

Some might argue there’s no difference between the mask mandates which, after some initial turmoil, have become no big deal, and a vaccination mandate. But there really is. Ask any anti-vaxxer who keep emailing me wanting to join the class action we will never run.

Crazy or not, a significant proportion of the community will never get vaccinated. That presents a practical problem for each business because there is enormous and constantly growing pressure in line with the manic desire to “open up”, to offer a basic guarantee to the vast majority: you can shop here and everyone you encounter — staff or fellow customers — will have been vaccinated just like you. The freedom to not get COVID has entered our list of assumed human rights, and high up.

The pizza shop owner has indicated his choice, and some religious groups have too — their doors won't be closed to anyone. Other businesses will go the other way, picking up on the broad hints Morrison and Berejiklian have been laying out, requiring us to show our vaccination passports at the door.

If NSW opens up in mid-October on the basis announced — that is with the returned freedoms reserved for those holding a passport — then the mould will have been fully set. I expect most businesses will follow that lead, whether the then-current public health orders require them to or not.

The step we are missing is the conversation about whether this new balance will be the right one for a society living in a COVID world. A responsible government, preferably federal but at least state, would lead that conversation and then change the law to support the outcome it concludes is most desirable.

There is no right answer to the mandatory vaccination question, and it is too important to be left to every pizza seller to come up with on their own.

ABOUT THE AUTHOR

Michael Bradley

CRIKEY COLUMNIST [@MARQUELAWYERS](#)

Michael Bradley is a freelance writer and managing partner at Sydney firm Marque Lawyers, which was created in 2008 with the singular ambition of completely changing the way law is practised.

