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# Can Athletes Successfully Challenge COVID-19 Vaccine Mandates? A Case Study From The Australian Open 2022



Wednesday, 22 December 2021 By [Alexandria Anthony](#), [Jackie Chan](#)

The participation of some of the world's best tennis players at the 2022 Australian Open is uncertain. The Federal government has mandated the COVID-19 vaccine for anyone trying to enter the country, with some limited exceptions.<sup>[1]</sup> As of November 2021,<sup>[2]</sup> it was

estimated that up to 20% of professional tennis players had yet to be vaccinated against COVID-19. Prominent players who have expressed hesitancy in being vaccinated include Novak Djokovic, Daniil Medvedev, Alexander Zverev and Elina Svitolina.<sup>[3]</sup> This is a potential problem for tournament organisers who will want the world's best players to compete in Australia, but who also have an obligation to run a tournament which keeps other players, tournament personnel, and the wider community safe.<sup>[4]</sup>

This article examines whether athletes can successfully challenge a COVID-19 vaccine mandate at an international sporting event, using the 2022 Australian Open as a case study. It first examines the current laws and regulations in Australia relating to COVID-19 vaccines which will apply to the 2022 Australian Open. Finally, it examines the viability of prominent legal arguments against a COVID-19 vaccine mandate. We contend that it is unlikely that any legal argument can successfully overturn a COVID-19 vaccine mandate. Specifically, it looks at:

- Laws and Policies Applicable to the 2022 Australian Open:
  - Federal
  - State
  - Sports organisations
- Challenging COVID-19 Vaccine Mandates:
  - Reasonableness of mandates
  - Constitutional arguments
  - Rights and discrimination arguments
  - Victorian Charter of Human Rights and Responsibilities

## Executive Summary

Vaccine mandates have been applied to some degree at federal and state level in Australia, and many sporting organisations, including Tennis Australia, are either applying or considering applying their own vaccine mandates. There are broadly three categories of arguments available: constitutional arguments, human rights-based arguments and discrimination-based arguments.

In Australia, the Constitution provides limited rights to Australian citizens, and constitutional arguments are unlikely to be successful.

While Australia is a signatory to a number of human rights treaties, these only provide rights to citizens domestically to the extent that the rights have been enacted in domestic law. While there is fairly significant anti-discrimination law in Australia, this is unlikely to be helpful, as discrimination is only unlawful when it relates to a relevant protected attribute. Athletes wishing to challenge a vaccine mandate will need to show that a protected

attribute applies to them and prevents them from being vaccinated, and significantly, they will need to show that the mandate is disproportionate in its effect on them compared to the goal of protecting the broader population against COVID. This is likely to be difficult to show.

Arguably the best potential argument comes up in the context of the Victorian Charter of Human Rights and Responsibilities – the law in this context has not yet been fully tested. However, while there is an arguable case, in the context of Victoria in particular, which has experienced one of the toughest lockdowns in the world due to COVID, it is likely that even if a court were to find that the mandate breaches human rights, a challenge is likely to fail on the basis that the mandate imposes a reasonable restriction on human rights. A challenge is unlikely to succeed within the time required for the player to be able to participate in the 2022 Australian Open.

As will be seen, it is therefore very unlikely that a challenge to vaccine mandates could succeed in the context of international professional sporting events in Australia.

## Case Study: Laws And Policies Applicable To The 2022 Australian Open

### *Federal Laws*

The Australian Federal Government is primarily in charge of implementing Australia's COVID-19 vaccine program,<sup>[5]</sup> and border controls.<sup>[6]</sup> The Australian Constitution also gives it powers over quarantine,<sup>[7]</sup> but this responsibility, in relation to the pandemic, has been largely delegated to the states and territories.<sup>[8]</sup>

The international borders have re-opened to some international visitors from specified countries and visitors with eligible visas.<sup>[9]</sup> An international tennis player would be able to arrive in Australia using a subclass 408 Temporary Activity Visa, which allows visitors to come to Australia if they have been invited to participate in a sporting event.<sup>[10]</sup> However, the *Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 1 December 2021*, section 5(3)(a)(i) (**Biosecurity Determination**) requires entrants and visitors with eligible visas to declare their vaccination status.<sup>[11]</sup> Only international travellers who have been fully vaccinated with a COVID-19 vaccine approved by the Therapeutic Goods Administration (TGA) can enter Australia.<sup>[12]</sup> Seven days must have passed since the final vaccine dose for an individual to be considered fully

vaccinated.<sup>[13]</sup> Generally, only travellers who can prove they cannot be vaccinated,<sup>[14]</sup> and unvaccinated children under the age of 12 years and 3 months will be granted an exemption to enter Australia in the same manner as a fully vaccinated person.<sup>[15]</sup>

## ***State And Territory Laws***

Australian state and territory governments are primarily responsible for quarantine and rolling out the Federal Government's vaccination program.<sup>[16]</sup> The Chief Health Officer (CHO) or equivalent position in each state and territory also makes,<sup>[17]</sup> or advises relevant government officers or Ministers to make,<sup>[18]</sup> public health orders in the interest of the health and wellbeing of the population.

In Victoria, recent changes to the *Public Health and Wellbeing Act 2008* (Vic) have given the power to make pandemic-specific public health orders (**pandemic orders**) to the Health Minister.<sup>[19]</sup> A pandemic order is an order specifying a series of measures which aim to protect public health.<sup>[20]</sup> These pandemic orders may include, but are not limited to, directions which:

1. prevent or limit entry to a pandemic management area;<sup>[21]</sup>
2. prohibit or regulate the carrying on of activities, businesses or undertakings in a pandemic management area;<sup>[22]</sup> and
3. require the provision of information (including information about the identity of any person), the production of documents or the keeping of records.<sup>[23]</sup>

The Health Minister must consult the CHO prior to the prospective making of a pandemic order.<sup>[24]</sup>

Currently all states and territories have public health orders in place applicable to certain workers to prevent the transmission of COVID-19 in their populations.<sup>[25]</sup>

In Victoria, one of the pandemic orders currently in place is a vaccine mandate which applies to specified workers within certain industries. These workers include "*professional sports, high performance sports or racing persons*". Furthermore, "*professional sports, high-performance sports, or racing persons*" is defined to mean a person who "*performs a sporting activity in an open-aged...international competition (at the highest level as identified by the recognised national body)*". Therefore, if professional tennis players would like to compete at the Australian Open, they must be fully vaccinated.

## ***Sports Organisations' Policies***

Currently many major professional sports organisations in Australia are not mandating COVID-19 vaccines, but are recommending that their athletes be inoculated. This includes National Basketball League,<sup>[29]</sup> and the A-League.<sup>[30]</sup> However, the Australian Football League became the first major sports organisation in the country to mandate the COVID-19 vaccines for all of its players (both women and men) and all football program staff.<sup>[31]</sup> Furthermore, in Victoria, the vaccine mandate for specified workers means any athletes participating in sports which take place in Victoria will need to be vaccinated.<sup>[32]</sup> This will override any policies which any individual sport may have.

Internationally, some major international sports organisations have expressed stricter rules but fallen short of a vaccine mandate.

In the US, the National Football League has expressed its wish to mandate the COVID-19 vaccine for all of its athletes,<sup>[33]</sup> but has yet to do so.<sup>[34]</sup> The National Basketball Association has no vaccine mandate, but unvaccinated players will miss out on match payments if they cannot perform in a state with a vaccine mandate.<sup>[35]</sup> The National Hockey League has also not mandated the vaccine,<sup>[36]</sup> but close to 100 per cent of its players are vaccinated.<sup>[37]</sup> This should all be viewed in the context of the Biden administration's widespread mandate for all employees of US employers with over 100 staff to either be vaccinated or submit to weekly COVID-19 testing.<sup>[38]</sup>

In the UK, the English Premier League is not subject to a vaccine mandate.<sup>[39]</sup> Reportedly, players of only seven of its 20 clubs are over 50 per cent fully vaccinated as at September 2021.<sup>[40]</sup>

Meanwhile, Tennis Australia has announced that all prospective Australian Open participants must be fully vaccinated for COVID-19.<sup>[41]</sup> Consequently, the Australian Open will be the first grand slam tournament to mandate the COVID-19 vaccine for players.<sup>[42]</sup> A couple of tennis stars, including Pierre-Hugues Herbert and Olivia Gadecki,<sup>[43]</sup> have recently withdrawn due to the mandate.

However, a player may apply for an exemption if they cannot be vaccinated for medical reasons.<sup>[44]</sup> Applications for a medical exemption will first be assessed by an expert panel of doctors specialising in immunology, infectious diseases and general practice.<sup>[45]</sup> Applications which meet the national guidelines set by the Australian Technical Advisory Group on Immunisation (**ATAGI**) will then be reviewed a second time.<sup>[46]</sup> This second review will be conducted by an expert panel appointed by the government known as the independent Medical Exemption Review Panel (**IMERP**).<sup>[47]</sup> If IMERP deems that the application meets the ATAGI guidelines, it will be successfully submitted to the Australian Immunisation Register and the player is cleared to play.<sup>[48]</sup>

# A Global Comparison: Challenging COVID-19 Vaccine Mandates

Many of tennis' best players have so far expressed their hesitation at being vaccinated against COVID-19. This section of the article will examine whether they have any valid argument against the likely vaccine mandate at the 2022 Australian Open.

## *Reasonableness of vaccine mandates*

Generally, in determining whether a mandate is reasonable, the courts may consider the view of the World Health Organisation (WHO) that mandatory vaccination is not justified.<sup>[49]</sup> In October 2021, the WHO extended its recommendation that State Parties not require proof of vaccination for international travel.<sup>[50]</sup> In light of the new Omicron variant for COVID-19, the justification for not allowing unvaccinated individuals into Australia may be stronger, assuming that vaccination is found to be effective against the Omicron variant. However, in its advice following the announcement of the Omicron variant issued on 30 November 2021,<sup>[51]</sup> the WHO recommended continuing to follow the recommendations issued in October, despite the emergence of Omicron.

Players hoping to challenge the Australian government's imposition of laws requiring proof of vaccination could refer to the WHO recommendations to challenge the reasonableness of mandatory vaccination. However, the basis for the WHO opposition to requirements of proof of vaccination was the "limited global access and inequitable distribution of COVID-19 vaccines".<sup>[52]</sup> An international tennis player is unlikely to be able to rely upon not having access to vaccination as a basis for challenging a vaccine mandate.

## *Constitutional Arguments*

### **Section 51(XxiiiA): Prohibition Of Civil Conscription**

Section 51(xxiiiA) of the Constitution states that Federal Parliament may legislate on medical and dental services but "*not so as to authorize any form of civil conscription*".<sup>[53]</sup>

An unvaccinated tennis player may argue that any vaccine mandate which prohibits them from competing at the 2022 Australian Open is unconstitutional because the mandates are a form of civil conscription as they force civilians to be vaccinated. However, this argument is flawed in a number of different ways, but particularly because:

1. Section 51(xxiiiA) relates only to the legislative powers of the Federal Parliament. It has no bearing on State or Territory parliaments, where almost all vaccine mandates have

been legislated or enshrined in public health orders.

2. Section 51(xxiiiA) has been interpreted to prevent the Federal Parliament from legislating to force doctors, nurses or other health care professionals to provide specific medical and dental services against their will. In *Kassam v Hazzard*, Chief Justice Beech-Jones held that section 51(xxiiiA) is only directed to “compulsive service in the provision of medical services”.<sup>[54]</sup> In essence, it prevents the making of laws which legally or practically compel or coerce medical service providers to carry out work or provide services for the Commonwealth or third parties.<sup>[55]</sup> Therefore, an argument which suggests that a vaccine mandate is civil conscription because it compels civilians to be vaccinated is plainly incorrect because section 51(xxiiiA) does not cover the acquisition of a medical service. An argument that a vaccine mandate is civil conscription because it compels medical service providers to provide COVID-19 vaccines to civilians is also unlikely to succeed as the vaccine mandate does not coerce a medical service provider to vaccinate anyone.

In *Kassam v Hazzard*,<sup>[56]</sup> the challengers of New South Wales’ vaccine mandate also argued that vaccine mandates constituted civil conscription because a medical service was being provided by a person who received a COVID-19 vaccine. It was argued that by taking a COVID-19 vaccine, a person would be providing a medical service by contributing to the establishment of herd immunity. Therefore, a person “compelled” to be vaccinated has been civilly conscripted to provide a medical service. Chief Justice Beech-Jones rejected this argument as contributing to herd immunity could not be considered providing a medical service and civil conscription did not cover the acquisition of a medical service.<sup>[57]</sup>

For these reasons, it is unlikely that an argument that a vaccine mandate is unconstitutional for a violation of section 51(xxiiiA) will be effective in court.

## Section 116: Freedom Of Religion

Although rare, there are some religions which oppose or discourage vaccinations.<sup>[58]</sup> An international tennis player who believes in one of those religions may argue that vaccine mandates are a violation of section 116 of the Australian Constitution, and therefore, their right to freedom of religion. This section states:<sup>[59]</sup>

*“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”*

This only binds the Commonwealth, so could not apply to vaccine mandates made by a state government.

The High Court of Australia has interpreted the words “[t]he Commonwealth shall not make any law for ... prohibiting the free exercise of any religion” to mean that the Federal Parliament is prohibited from passing laws which prohibit the practice of religion, that is “the doing of acts which are done in the practise of religion”.<sup>[60]</sup> In *Kruger v Commonwealth* (1997),<sup>[61]</sup> the majority of the High Court held that section 116 was directed at the purpose of a law - that it prohibits the Commonwealth from making laws which have the purpose of restricting religion. This undermines an argument against a Federal government vaccine mandate as the Court will more than likely find that a vaccine mandate is primarily for the purpose of public health. It is unlikely that the mandate was made for the purpose of restricting the practice of any religion.

Even if this section is interpreted more broadly as prohibiting any laws that prevent a person from practising their religion, this is still unlikely to be effective against the vaccine mandate from the Federal Government. The mandate only prevents individuals from entering into Australia without being fully vaccinated. It is unlikely that the Court would interpret a vaccine mandate on entry into Australia as preventing a person from practising their religion on the basis that the vaccine mandate “forces” them to take a vaccine against their religious beliefs. The argument is perhaps strongest when the person is an Australian citizen seeking to return home. However, there is no reason why an international tennis player that did not want to be vaccinated for religious reasons would also be required to enter Australia to practice their religion, and therefore the mandate is not prohibiting them from freely practising their religion. Therefore section 116 of the Constitution is unlikely to assist an international tennis player seeking to challenge vaccine mandates that might apply to them in Australia.

## ***Rights And Discrimination Arguments***

### **International Treaties**

A tennis player may wish to challenge the vaccine mandate on the basis that it breaches his or her human rights. Australia is a signatory to a number of human rights treaties, including most relevantly the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>[62]</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>[63]</sup> and the Convention on the Rights of Persons with Disabilities (CERD)<sup>[64]</sup>. These treaties impose obligations on States to protect certain human rights.

### **Freedom From Medical Experimentation**



The player may seek to rely upon the Article 7 of the ICCPR, which prohibits subjecting individuals to “medical or scientific experimentation” without their “free consent”.<sup>[65]</sup> It is arguable that the COVID-19 vaccine could be said to involve “medical or scientific experimentation”, although this will be a difficult case to make given that the WHO has endorsed the safety and effectiveness of a number of COVID-19 vaccines, all of which have been rigorously tested and studied.<sup>[66]</sup>

A further issue is whether a requirement to be vaccinated before travelling to Australia is subjecting people to vaccination without their free consent. Consent will usually not be free when it is affected by coercion, so an individual may say that because their choices are so limited, they are being coerced. In the context of a challenge to Victorian laws in relation to vaccine mandates for workers under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), discussed further below in part 3(c) of this article, a judge of the Supreme Court of Victoria found that there was a “serious question to be tried” as to whether the mandate was inconsistent with “full, free and informed consent” as referred to in the Charter.<sup>[67]</sup> While the language is slightly different in Article 10, the concepts are likely to be treated the same way by the courts. Therefore there is a possible argument available that a vaccine mandate may breach Article 7.

There is also a Universal Declaration on Bioethics and Human Rights (UDBHR),<sup>[68]</sup> which provides in Article 6:

*Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. ... .*

However, while Australia has agreed to be bound by the ICCPR and ICESCR, these treaties do not form part of Australia’s domestic law unless the treaties have been specifically incorporated into Australian law through legislation.<sup>[69]</sup> Nor does the UDBHR. Therefore, while Australia is bound by these agreements at international law, in terms of its domestic law, any rights under international human rights treaties generally cannot be enforced unless specifically provided for in domestic legislation.<sup>[70]</sup> Article 7 of the ICCPR has not been incorporated into law at the federal level, and therefore is unlikely to be effective against Commonwealth laws in relation international travel. Nor has Article 6 of the UDBHR.<sup>[71]</sup> However, a broader variation on Article 7 has been enacted in section 10(c) of the Charter which will be discussed further below in part 3(c) of this article.

## **Discrimination In Work**

Alternatively, the player may seek to rely upon article 6 of the ICESCR relating to the right to work. Article 6(1) states:

1. *The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Article 2(2) of the ICESCR requires State Parties to ensure that the rights protected by the ICESCR are exercised without discrimination as to certain protected attributes, including, amongst other things, religion, political or other opinion, and “other status”. In theory, “other status” could include vaccination status.

It is not entirely clear what is meant by “recogni[sing] the right to work” in article 6(1); it evidently requires that people cannot be forced to work in a job not of their choosing, but it cannot be the case that States must provide people with the opportunity to work in the specific job of their choosing, regardless of merit or need, as this would be entirely impracticable. Read together, articles 6(1) and 2(2) could be interpreted as requiring State Parties to ensure that people cannot be prevented from working in the job of their choosing on the basis of such protected attributes – i.e. where there is a job available and the person would be selected for the job if it were not for their protected attribute, they cannot be discriminated against on the basis of that protected attribute. Therefore, tennis players could seek to rely upon articles 6(1) and 2(2) together to argue that they cannot be discriminated against on the basis of their vaccination status, or alternatively, on the basis of their political opinion or religion. Again, this will only be relevant to the extent it is part of Australian domestic law.

## **Anti-Discrimination Law In Australia**

In Australia, the key piece of legislation dealing with workers’ rights is the *Fair Work Act 2009* (Cth) (**FW Act**). The FW Act deals with workplace relations laws, and provides protection in limited circumstances against adverse actions that might be taken by principals against contractors. It prohibits discrimination against employees or potential employees on the basis of, amongst other things, their religion or political opinion, but this protection does not extend to contractors.<sup>[72]</sup> As tennis players wanting to participate in the Australian Open are independent contractors and not employees,<sup>[73]</sup> this protection would not apply to them.

At a federal level there are also separate anti-discrimination acts currently in place, but currently none of these deal with political opinion, religion or vaccination status. The current federal government is seeking to pass the *Religious Discrimination Bill 2021* (Cth) (**Bill**) to deal with discrimination on the ground of religious belief or activity. There is also a *Disability Discrimination Act 1992* (Cth) (**Disability Act**).

As the Australian Open is played in Melbourne, Victoria, and the *Equal Opportunity Act 2010* (Vic) (EO Act) also applies. It deals with discrimination on the basis of political belief or activity, religious belief or activity and disability.

The Bill, the Disability Act and the EO Act all prohibit discrimination in sport by excluding the person.<sup>[74]</sup> The EO Act and the Disability Act prohibit discrimination against contractors in not allowing them to work,<sup>[75]</sup> and based on the definition of employment,<sup>[76]</sup> the Bill does too.<sup>[77]</sup>

No legislation in Australia protects against discrimination specifically on the basis of vaccination status.

## Religious Discrimination

Even if the Bill in its current form becomes law in time before the Australia Open, it will be difficult to rely upon the Bill or the EO Act laws to challenge vaccine mandates.

The type of discrimination that could be alleged under either the Bill or the EO Act is indirect discrimination, which means discrimination against a person who holds a particular religious belief as a result of imposing a condition or requirement (e.g. a vaccine mandate) which is likely to disadvantage people who hold that religious belief.<sup>[78]</sup> Indirect discrimination will only constitute discrimination if the condition or requirement is “not reasonable”,<sup>[79]</sup> which requires considering all relevant circumstances, including whether the disadvantage is proportionate to the result sought by the person imposing the condition or requirement.<sup>[80]</sup>

Neither the Bill nor the EO Act deal with discrimination in regards to border controls. Even if they did, a court considering a challenge would therefore have to take into account the risks to public health from allowing an unvaccinated person into the country, as compared to the detriment such a person with those religious beliefs would experience as a result of not being allowed into the country.

A further issue is that conduct which is in direct compliance with a provision of a law of the Commonwealth, or of an instrument under such a law, will not constitute discrimination under the Bill.<sup>[81]</sup> It is likely that the Biosecurity Determination which is the source of the law requiring entrants to Australia to disclose their vaccination status would be considered to be an “instrument” made under the *Biosecurity Act 2015* (Cth) (**Biosecurity Act**), as the Biosecurity Act sub-section 477(2) states that determinations made under section 477(1) are legislative instruments. Therefore, it is very unlikely the proposed legislation could be relied upon to challenge the Federal Government’s vaccination declaration requirements

under the Biosecurity Determination. There is currently no instrument implementing the mandatory vaccination requirement for entry into Australia, but should this be implemented, it would not be challengeable under the proposed legislation.

Further, a similar exemption applies in relation to the EO Act where the discrimination is necessary to comply with, or is authorised by, a provision of the EO Act or some other Act or an “enactment”.<sup>[82]</sup> An “enactment” is defined in the EO Act to include “a rule, regulation, by-law, local law... proclamation or other instrument of a legislative character”.<sup>[83]</sup> The vaccination directions of the Chief Health Officer are likely to fall within the meaning of an “enactment”, although there is some debate about their characterisation as legislative instruments, and it is therefore possible that they may not fall within the meaning of an enactment.<sup>[84]</sup>

Regardless of whether these exemptions apply, it may be difficult to demonstrate that a person’s religion actually prevents them from being vaccinated, and therefore this argument will be of limited effectiveness, and would not be likely to apply in relation to the federal government border controls nor in relation to the Victorian Government and Tennis Australia mandates.

## **Disability Discrimination**

A further argument that could be made against the vaccine mandates is that where an individual has a medical condition that prevents them from being able to be safely vaccinated, to the extent that the mandates do not allow them to compete in the Australian Open if they are unvaccinated, this constitutes discrimination on the basis of a disability.

Discrimination in this context can include situations where the discriminator requires the person to comply with a requirement or condition (such as vaccination), and the person cannot comply with the requirement or condition, or can only do so if reasonable adjustments are made and they are not.<sup>[85]</sup> Therefore, an athlete who because of a medical condition is unable to be vaccinated, should be reasonably accommodated. Reasonable accommodations could include allowing the athlete to provide information to verify their medical condition, and if they provide that verifying information, allowing them to compete and come to Australia on the condition of performing regular COVID-19 tests. It appears that such exemptions will be in place, but only for a very small number of medical conditions.

To the extent that exemptions are not in place for an athlete’s particular condition, or where the athlete’s medical condition is not recognised as a basis for exemption, the athlete would have a reasonable basis for challenging the vaccine mandate if their medical condition genuinely prevents them from being vaccinated.

## Discrimination Based On Political Belief Or Activity

Alternatively, tennis players may consider that their preference not to be vaccinated is based upon their political beliefs. For example, they may believe that vaccine mandates cannot be justified, or like Novak Djokovic,<sup>[86]</sup> they may believe that people should not be required to reveal their vaccination status. Players could argue that their political beliefs require them not to get vaccinated, or not to reveal their vaccination status, or alternatively, they could argue that not doing either of these things is a political activity. They could then argue that a vaccine mandate discriminates against them on the basis of their political belief or activity. This argument may be difficult to make as it would require “political belief” or “political activity” to be understood very broadly.

As mentioned previously, Commonwealth law does not specifically protect against discrimination based on political belief or activity.<sup>[87]</sup> The EO Act prohibits discrimination against contract workers by not allowing the contract worker to work or continue to work on the grounds of, amongst other things, political belief or activity.<sup>[88]</sup> It also prohibits discrimination on the basis of political belief or activity against a person by excluding the other person from participating in a sporting activity.<sup>[89]</sup> However, the issues with this argument in the context of the EO Act include that the exemption is arguably allowed under a legislative instrument and it may also be difficult to demonstrate that the requirement or condition is not reasonable and proportionate. In regards to proportionality, it will also be necessary to consider the same types of reasonable adjustments that are relevant in relation to people with a medical issue, and whether these could be applied as an alternative to a vaccine mandate.

## *Victorian Charter of Human Rights and Responsibilities*

A tennis player may also challenge a prospective Victorian vaccine mandate by reference to the Charter. The Charter is not a bill of rights but a legislative instrument which primarily guides the interpretation and drafting of laws to ensure their compliance with human rights.<sup>[90]</sup> A tennis player could therefore argue that a vaccine mandate violates the Charter as it is incompatible with the human rights in the Charter, and there had not been proper consideration of human rights when the mandate was made.

Section 38(1) of the Charter states that:<sup>[91]</sup>

*“...it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.”*

In the case of *Harding v Sutton* [2021] VSC 741,<sup>[92]</sup> challengers of Victoria's vaccine mandate attempted to obtain an injunction to prevent the operation of the vaccine mandate on employees in certain industries which prevented them from working unless they were vaccinated for COVID-19.<sup>[93]</sup> They argued that they should receive an injunction pending a trial on their challenge against the vaccine mandate. For their case against the vaccine mandate,<sup>[94]</sup> the challengers argued that the CHO had violated section 38(1) of the Charter as he had not given proper consideration to human rights when making the mandate,<sup>[95]</sup> and had acted in a way incompatible with human rights.<sup>[96]</sup> They claimed that the CHO had violated a number of different human rights under the Charter.<sup>[97]</sup> They particularly emphasised that there had been a violation of the following sections of the charter:

- Section 10(c),<sup>[98]</sup> which states that:

*"A person must not be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent."*<sup>[99]</sup>

The challengers' argument is that the vaccine mandate has prevented them from attending their workplace and threatened them with loss of employment unless they are vaccinated. They argue that this amounts to coercion to submit to vaccination. Therefore, their consent cannot be considered "full, free and informed".<sup>[100]</sup>

- Section 13(a),<sup>[101]</sup> which states that:

*"A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with..."*<sup>[102]</sup>

The challengers' argument is that because the vaccine mandate required employers and operators of certain facilities to collect, record and hold vaccination information about employees, that this would constitute an interference with their privacy. They argue that this interference is both unlawful and arbitrary.<sup>[103]</sup>

In response, the representatives of the CHO argued that section 38(1) does not apply to the vaccine mandates.<sup>[104]</sup> They cited the case of *Kerrison v Melbourne City Council* [2014] FCAFC 130 as authority for the proposition that the making of a subordinate instrument by a public authority is not covered by the phrase "to act in a way" in section 38(1).<sup>[105]</sup> They argued that the vaccine mandates are subordinate instruments because they are of a legislative character.<sup>[106]</sup> Therefore, they argued that section 38(1) does not apply to vaccine mandates and there is no such obligation for the CHO to have acted in a way that is compatible with the human rights under the Charter.

With regards to the argument that the CHO had acted incompatibly with human rights by making the vaccine mandate, Justice Richards found that there was a question to be tried.

[107] Her Honour stated that the question of whether the *Kerrison* decision was accepted and applied in the manner the CHO's representatives have argued was a question of law to be determined at trial. Her Honour emphasised that the *Kerrison* decision also did not consider whether the proper consideration of relevant rights is relevant to subordinate instruments for the purposes of section 38(1). [108] It was further noted that the challengers did not accept that the vaccine mandate was a subordinate instrument, and that there was a serious question to be tried on whether section 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) can be used for a legislative purpose. [109] All of these points provide some hope to the viability of any potential challenges of Victorian vaccine mandates by tennis players.

However, this hope should be tempered by the fact that there are limitations on human rights contained within the charter. Section 7(2) of the Charter states that:

*"A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—*

- *the nature of the right; and*
- *the importance of the purpose of the limitation; and*
- *the nature and extent of the limitation; and*
- *the relationship between the limitation and its purpose; and*
- *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."* [110]

Therefore, it is arguable that it is justifiable for a vaccine mandate to limit the human rights which a tennis player may argue are being limited given its primary purpose is to limit the transmission of COVID-19 among the players, staff and public. [111] COVID-19 is potentially a serious disease, [112] and as of 2 December 2021, 1,346 Victorians have died from the disease. [113] Therefore, as much as the vaccine mandate may limit the rights of some, it is helping preserve the right to life for every person.

The vaccine mandate would likely also only limit the human rights of tennis players in so far as they are unable to compete in a sporting competition, but they would not be restrained from doing anything else.

It is arguable that there are not any less restrictive means available to achieve the purpose of the vaccine mandate. While a 14-day hard quarantine system, as used for the 2021 Australian Open, [114] could be an alternative to a vaccine mandate, this alternative may be

even more restrictive on players' human rights than a vaccine mandate. This is because a hard quarantine system would involve the deprivation of players' liberty and freedom of movement. There is also a risk to Australian's managing quarantine through exposure to unvaccinated travellers.

With regards to the argument that the CHO had not given proper consideration to human rights by making the vaccine mandate, Justice Richards held that there was no question to be tried as the challengers had not provided evidence in support of their argument.<sup>[115]</sup> The injunction was ultimately not granted as it was held that judges could not suspend decisions made under the *Public Health and Wellbeing Act 2008* (Vic).<sup>[116]</sup> This presents a serious problem for any tennis player seeking to challenge the laws given how close the start of the Australian Open is at this point in time, and the length of time it would take to reach a final determination.

## Conclusion

A challenge to vaccine mandates in Australia faces significant barriers, although the outcome of the *Harding v Sutton* case is a potential game-changer in this context, if the complainants in that case are successful. However, the result in that case would only be relevant to sporting events occurring in Victoria, not in other states. The case will also not be decided in time for the Australian Open, so tennis players wishing to challenge the mandate would have to bring their own challenge on an urgent basis and would still be unlikely to receive a decision in time. Moreover, if a tennis player did seek to challenge the Victorian government mandate on the basis of the Charter or discrimination law, the player would also still be faced with the vaccine mandate on travel imposed by the Federal government.

The Federal Government border controls are unlikely to be able to be challenged on a legal basis. The best approach for an unvaccinated international tennis player seeking to play in Australia would be to seek an exemption from the vaccination requirements. While it is possible that an exemption may be granted, the player would likely still be required to quarantine in Australia for 14 days, which would place them at a significant disadvantage in comparison to other players. If they successfully challenged the Victorian Government mandate, they would also likely be subject to significant obligations in terms of testing and social distancing requirements throughout the tournament. Therefore, while a successful challenge is possible (but unlikely), especially in Victoria given the Charter, it may not be worthwhile pursuing given the significant limitations that would reasonably be applied to an international tennis player that refused to be vaccinated.

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[108] Ibid [210].

[109] Ibid. We note that references to s 200 of the *Public Health and Wellbeing Act 2008* (Vic) is a reference to the previous pandemic management regime in Victoria. This section gave the Victorian CHO the power to make public health orders. The equivalent (or similar) section under the new laws is s 165A1 which gives the Health Minister the power to make pandemic orders.

[110] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2)

<https://content.legislation.vic.gov.au/sites/default/files/2020-04/06-43aa014%20authorised.pdf>

[111] *COVID-19 Mandatory Vaccination (General Workers) Directions (No 3)* <https://www.dhhs.vic.gov.au/sites/default/files/documents/202110/COVID-19-Mandatory-Vaccination-%28Workers%29-Directions-%28No-3%29.pdf>; *COVID-19 Mandatory Vaccination (Workers) Directions (No 8)* <https://www.health.vic.gov.au/sites/default/files/2021-11/covid-19-mandatory-vaccination-workers-directions-no-8-pdf.pdf>; *COVID-19 Mandatory Vaccination (Specified Facilities) Directions (No 13)* <https://www.health.vic.gov.au/sites/default/files/2021-11/covid-19-mandatory-vaccination-specified-facilities-directions-no-13-pdf.pdf>

[112] 'Coronavirus disease (COVID-19)', in *World Health Organisation*, viewed on 2 December 2021, <https://www.who.int/health-topics/coronavirus>

[113] 'Victorian COVID-19 data', in *Coronavirus Victoria*, published 2 December 2021, viewed on 2 December 2021, <https://www.coronavirus.vic.gov.au/victorian-coronavirus-covid-19-data>

[114] '2021 Australian Open: 14-day quarantine for players confirmed', in *ESPN*, published 19 December 2020, viewed on 2 December 2021, [https://www.espn.com.au/tennis/story/\\_/id/30549408/14-day-quarantine-2021-australian-open-players-confirmed](https://www.espn.com.au/tennis/story/_/id/30549408/14-day-quarantine-2021-australian-open-players-confirmed)

[115] *Harding v Sutton* [2021] VSC 741, [170] <https://www.supremecourt.vic.gov.au/sites/default/files/2021-11/20211111%20Harding%20v%20Sutton%20%5B2021%5D%20VSC%20741.pdf>

[116] *Ibid* [145]. See also footnote 103.

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