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# **Preparing your organisation for the COVID-19 Vaccine rollout**

## **Discussion Paper**

# The Mindful Risk Group



The Mindful Risk Group is a Risk Research and Advisory firm specialising in Risk Management services to organisations in highly regulated sectors such as Mining, Indigenous Affairs, Insolvency, Charities, and Health/Aged Care. Founders James Ritchie and Bronwyn Smart have more than 40 years of combined operational and executive experience in the Mining and Banking sectors and are supported by a hand-selected team of analysts, designers, and legal professionals to deliver outcomes to organisations in these sectors.

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# Christopher McCourt



Christopher is a recognised figure within the insurance industry with more than 20 years of experience. He has been a member of the Hicksons workers compensation team since 2019. Christopher manages complex common law and work injury damages matters involving multiple parties, dual insurance motor accident, occupier's liability, and indemnity issues.

He specializes in issues that arise from psychological claims and is proactive in working with clients to produce practical guidance and creating valuable solutions for our clients. With a unique background in the broader insurance market Christopher is able to provide tailored advice to clients, which addresses general issues within their business and claims-specific strategies.

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### **Authors**

James Ritchie FGIA  
Bronwyn Smart CAHRI, FGIA  
Christopher McCourt

# Introduction

There is significant speculation about the COVID-19 Vaccine rollout in Australia and specifically what this will mean for organisations in many sectors across the nation.

While at the moment it appears unlikely that the Australian Government will mandate vaccination for most workers (with the exception of a number of specific high risk sectors), organisations should adopt a risk based approach to developing a defensible organisational position in relation to the COVID-19 Vaccine, to demonstrate compliance with Work Health and Safety and other relevant legislation as well as demonstrating a contemporary approach to organisational governance.

This process should be completed in accordance with relevant legislation, standards and codes of practice including the Code of Practice : How to Manage Work Health and Safety Risks (as relevant to your state or territory jurisdiction) as well as international standards such as ISO31000 2018 Risk Management: Guidelines and the recently published ISO45005 General Guidelines for safe working during the COVID-19 Pandemic.

In practical terms, a risk based approach should be founded on the following three principles:

1. Risk Assessment to create defensibility
2. Effective consultation with stakeholders
3. Documented systems implemented and monitored

By adopting a principles based approach, organisations can gain clear support from stakeholders including customers and the general public (especially if the organisation operates across national or international jurisdictions) as well as demonstrating to regulators, unions and the community that the organisation is role modelling best practice governance.

**Consider each of these principles in relation to your organisation, then complete our essential recipe for COVID-19 Vaccine Success which is contained as an appendix.**

## **The Legal Context for the COVID-19 Vaccine**

This discussion paper recognises the Australian Government COVID-19 Vaccination Strategy is currently being implemented and as a result will not discuss the legal context for this strategy, rather it will discuss the possible legal implications for organisations in Australia, including a brief discussion on some of the current questions most organisations will have in relation to the COVID-19 Vaccine.

Employers are bound by work health and safety legislation which requires the employer to provide reasonable directions to an employee for their safety in the workplace and the safety of colleagues, customers and the general public.

While what constitutes a reasonable direction will vary depending on the specific circumstances of employment, factors that should be considered are:

- (a) The industry work is conducted in;
- (b) The nature of the work performed by the employee;
- (c) Risk mitigation strategies the employer has established in relation to COVID- 19; and
- (d) The existing expectations in the business relating to COVID-19.

This will assist the organisation in understanding the organisational context as it prepares to implement a risk based approach to the COVID-19 Vaccine, underpinned by the three principle approach.

While current decisions and precedents in law are yet to materialise for the COVID-19 Vaccine, it would be appropriate for organisations to consider *Arnold v Goodstart Early Learning Limited* [2020] FWC 6083 in relation to an employer's ability to enforce vaccinations in the workplace.

## The Fair Work Commission stated:



*" ... it is my view that it is at least equally arguable that the Respondent's policy requiring mandatory vaccination is lawful and reasonable in the context of its operations which principally involve the care of children, including children who are too young to be vaccinated or unable to be vaccinated for a valid health reason. Prima facie the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants." (Asbury DP)*

Key points for organisations to consider from the decision:

- (a) The employment industry was an active consideration;
- (b) The employer had a policy concerning vaccination for influenza;
- (c) The employer followed their policy for vaccination for influenza;
- (d) Duty of care to customers was deemed an inherent requirement of the role;
- (e) The role was not able to be modified to remove the risk; and
- (f) The employee did not provide a medical basis for the refusal to be vaccinated.

This matter naturally raises the question;



## What is the employer's liability for an employee being vaccinated?

An injury under workers compensation legislation in New South Wales arises out of or in the course of employment[1]. Injury can include a disease contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease[2]. For compensation to be paid for an injury, employment must be to be a substantial contributing factor to the injury[3].

The 1987 Act was amended in 2020 to insert **section 19B** in direct response to the COVID-19 pandemic. The legislation now states that a worker is considered to have **caught a disease** at work if they are working in a prescribed employment category.

The definition of injury is broad enough to contemplate that the contraction of COVID-19 fits in this category and could be an **injury**, both because COVID-19 may be considered a disease in accordance with **section 4(b)(ii)** of the 1987 Act (on the assumption that the main contributing factor to the disease is the fact it was contracted while the employee attended to work-related tasks), or otherwise, is a disease deemed by the operation of **section 19B**.

The worker may also have a right of recovery against the third party administering the vaccination or the manufacturer themselves depending on the individual circumstances of the injury.

Ultimately, until a valid precedent is established, this remains speculative. However, quality risk management considers all foreseeable risks, this scenario should be considered by organisations as part of their overall risk based approach to the COVID-19 Vaccine.



A second question which arises in relation to the legal context is;



## **Can an employee insist on only working with other team members who have been vaccinated?**

Matters related to privacy and record keeping are complex and difficult to navigate. This discussion paper provides a broad discussion on the most significant issues to consider. However professional and independent legal advice should be sought by organisations looking to establish a position on this question.

The proactive consideration is to review policies in relation to how employee information is shared within the business. Organisations should consider a policy that has addressed the following employee information:

- (g) Clarity with employees on why the information is being collected;
- (h) Informing employees how the information is going to be used; and
- (i) Informing employees what information may be required to disclose to who and why.





## **Why are Policies and Procedures related to COVID-19 (including the COVID-19 Vaccine) so important ?**

Having clear policies and procedures that are followed are critical for an employer to be able to demonstrate clear lines of communication with their workforce. Additional and specific guidance on this process are discussed in Principle three: Documented Systems Implemented and Monitored.

The case of Shannon Green v Lincon Logistics Pty Ltd T/A Lincon Hire & Sales (2017) FWC 4916 highlights this fact clearly. Green was dismissed for refusing to undertake a second drug test, which was a blood test. The Commission found the employers policy on Drugs and Alcohol was inadequate and did not include the requirement to undertake a blood test. The Commission found that requesting Green to have a blood test did not follow the policies and procedures and accordingly the Commission considered Green was unfairly dismissed.

The key points for organisations to consider from this case include;

- Policies and procedures need to provide clarity to employees, it is not good enough to merely have a policy in place to deal with a situation
- The policy must be clear on actions and responsibilities, further the policy must also be followed.

By considering the legal context of the COVID-19 Vaccine, organisations will be able more effectively implement a risk based approach to the COVID-19 Vaccine in order to create a defensible position for the organisation that enables the organisation to effectively create a safe working environment that is free from the impacts of COVID-19.

**The**  **Principle  
Approach**

# Principle #1

## **Risk Assessment to create defensibility**

*There is every chance that if you are reading this discussion paper, that your organisation is asking itself these questions;*

- In the absence of a government health directive for our sector and workforce, what position will the organisation take?
- Will we implement a mandatory vaccine program and if so what are the implications?
- Will we implement a voluntary vaccination program and if so what are the implications?
- Will we require all our suppliers, clients, customers and/or visitors to demonstrate evidence of vaccination in order to enter our premises and if so what are the implications?



Now that the appropriate legal context has been established, this paper will now discuss the practical step that an organisation can take to establish a position and strategy for the organisation in relation to the COVID-19 Vaccine.

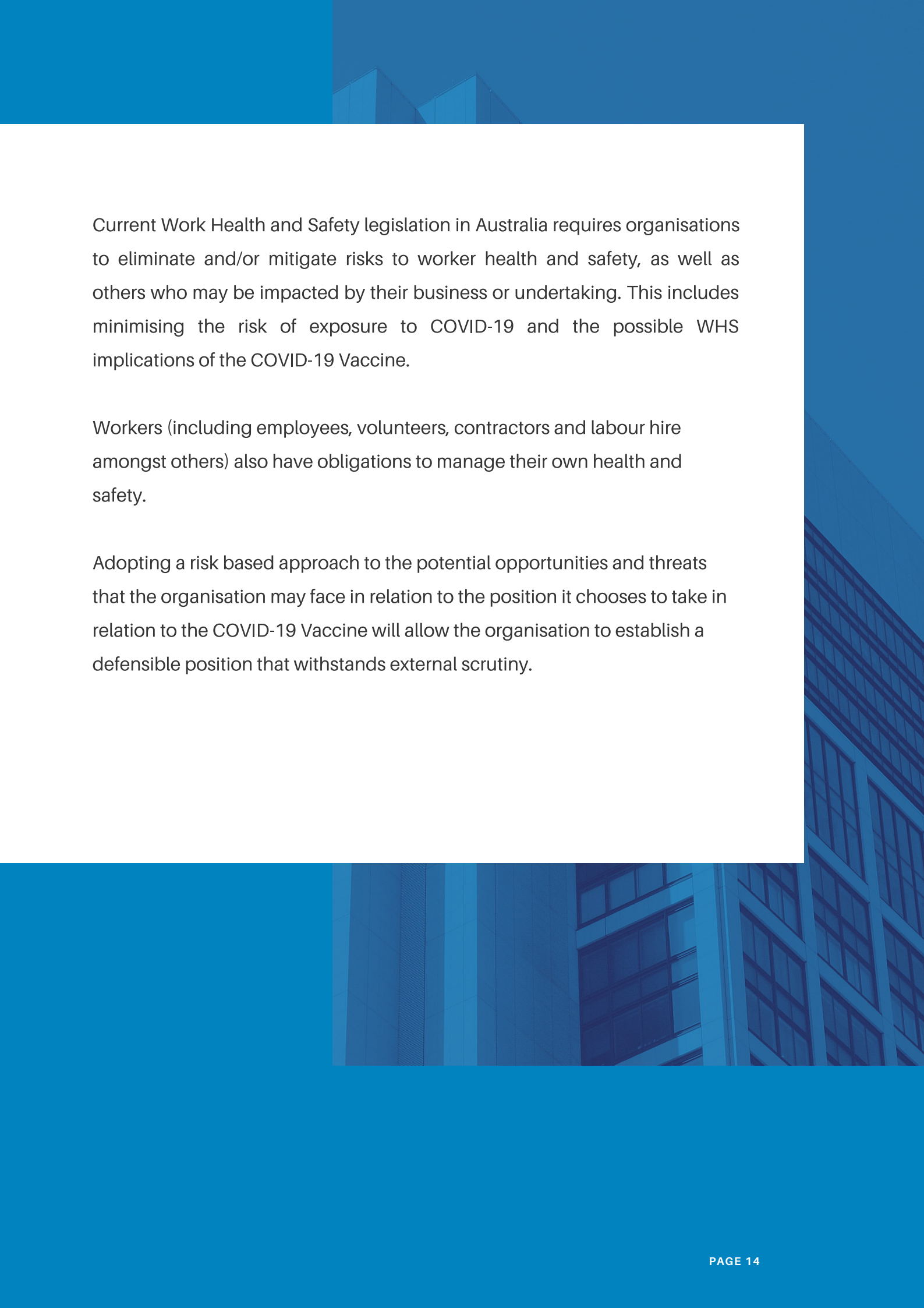
The most effective and defensible tool that an organisation can use to answer these questions and no doubt many others that will arise in 2021 is to adopt a risk based approach, specifically an approach where the organisation considers the opportunities and threats related to the COVID-19 Vaccine and documents risk controls and actions to respond. This risk assessment also acts as the foundation for developing organisational systems and frameworks (including policies) to determine the behaviours and outcomes the organisation expects workers to follow in relation to this position.

Organisations can utilise numerous methods and types of risk management tools that be deployed to facilitate this process, we recommend that organisations should adopt a tool that is commensurate with the size and complexity of the organisation as well as one that is considered appropriate best practice for the sector and size of organisation.

Most importantly it should be a recognised method or technique in accordance with relevant standards and Codes of Practice relevant to state and territory jurisdictions and regulators including the recently published ISO45005 General Guidelines for safe working during the COVID-19 Pandemic.

Organisations that determine through risk assessment that they will adopt a mandatory COVID-19 Vaccine program irrespective of government health directives should obtain appropriate external legal advice as part of this process of implementing principle one.





Current Work Health and Safety legislation in Australia requires organisations to eliminate and/or mitigate risks to worker health and safety, as well as others who may be impacted by their business or undertaking. This includes minimising the risk of exposure to COVID-19 and the possible WHS implications of the COVID-19 Vaccine.

Workers (including employees, volunteers, contractors and labour hire amongst others) also have obligations to manage their own health and safety.

Adopting a risk based approach to the potential opportunities and threats that the organisation may face in relation to the position it chooses to take in relation to the COVID-19 Vaccine will allow the organisation to establish a defensible position that withstands external scrutiny.

## **Legal and Compliance risk**

There are many legal complexities to manage with the vaccine rollout posing a myriad of issues, including whether or not it is lawful and reasonable for an employer to direct a worker to undergo vaccination. In terms of compliance, it is unclear at this point if any public health orders, The Fair Work Act, Anti-Discrimination Laws, or other WHS legislative instruments will be amended as a result of the vaccine rollout, although the federal government has indicated it will not be mandating the vaccine. Organisations should give consideration to the potential for litigation associated with the vaccine rollout and workplace implementation.

This could be as a result of mandating vaccinations, actions taken if workers refuse any required vaccination or any workplace transmission that could occur during a time when workers will fit into the national rollout timetable at differing stages, particularly given that there may be circumstances where some workers will receive it earlier than others. Consideration of this risk will also apply to any contractors or other third parties your organisations may be working or partnering with.

## **Insurance related risk**

This could be risk associated with your workers compensation insurance (for either physical or psychological injury or illness) or it may be that you hold organisational travel insurance. Engage with your insurance provider to understand any risk exposure your organisation may have related to coverage, changes and premiums for your insurance arrangements. There may be circumstances in which your insurance provider will request evidence of the vaccine uptake. You may also need to ensure your insurance coverage includes emergency arrangements if your workers are caught up in any lockdown and/or quarantining arrangements as a result of work-related travel, either domestically or internationally.

## **Human resource and industrial relations risk**

Some professions have employment contracts that require workers to be vaccinated and maintain those vaccinations (including in health care, aged care and child care). These industries are more likely to be able to mandate the COVID-19 vaccination for their workers. It may be that if your organisation requires workers to travel on work-related business. This is particularly relevant if this involves international travel as your workers may be required to be vaccinated prior to travel. You may also have workers that move around from client to client on a regular basis (salespeople) or work in frontline customer facing roles (retail, hospitality). If there are circumstance in which your organisation will require workers to be vaccinated, this position should be clearly explained and included in contracts, policies and procedures. You will need to ensure you have clearly explained why the vaccination will be required for the person to be able to successfully complete the inherent requirements of their role. Proactive engagement and consultation with workers, unions and other workers representatives will assist in successfully navigating risk in this category.

## **Diversity, Discrimination and inclusion related risk**

Organisations should give consideration to arrangements where health/medical, disability or religious circumstances may prevent a worker from undertaking the COVID-19 vaccination. Reasonable adjustments may be required in your workplace to accommodate these workers. For example, if a worker has a medical exemption from the vaccine, you should consider how you are going to reasonably accommodate this worker. If your organisation is adopting a position of refusing entry to unvaccinated persons, you will need to ensure that this does not breach anti-discrimination requirements.

## **Work Health and Safety Risk (including psychological elements)**

During the rollout phase (and possibly beyond) it will be appropriate to continue to manage the arrangements your organisation has in place for COVID-19. This will include the management of remote workers and working from home arrangements as well as any hybrid approach you may be adopting regarding returning to the workplace. This should also include continuing with social distancing, rostering, PPE requirements, sanitising and cleaning arrangements.



These arrangements will support safety during the vaccine rollout and would be considered reasonable and practicable for an organisation to continue to undertake in order to manage the exposure of COVID-19. As you will no doubt have workers, contractors and volunteers all being vaccinated at different phases of the national rollout program, it will be important that these arrangements are maintained. Work Health and Safety programs regarding the vaccine rollout should also consider any arrangements currently in place regarding workplace voluntary vaccination programs including influenza vaccinations. Advice should be sought regarding any interdependencies or timing (sequential or otherwise) requirements regarding workers completing both these types of programs and how they may relate to the COVID-19 vaccine.

## **Privacy related risk**

As discussed in the section of this paper on legal context, this risk primarily results from a health records perspective and how your organisation may be managing and storing records, with systems and procedures that restrict access to such worker records. You should ensure that workers are assured regarding the ongoing privacy of their personnel records and that your IT system supports and manages intrusions and any attempted hacking of records. Process and procedures should be updated to include any additional requirements supported by any training requirements.

## **Financial related risk**

This relates mainly to the additional cost associated with this vaccination program and ongoing requirements, as well as the provisioning of funds for any future developments or legal/insurance considerations. Allocation of funds will be required for this financial year and beyond.

## **Reputational Risk**

With positive organisational reputation being an intangible but invaluable asset for all organisations to manage and maintain on a regular and ongoing basis, the implementation of the COVID-19 vaccine will be no different. Organisations should

ensure risk-based thinking forms an important role in organisational strategy formation – a strategy and process adopted that is then clearly and proactively communicated to all stakeholders. Stakeholders should be identified early in the process with good engagement established, ensuring that as best as possible, there are “no surprises” for anyone and that roadblocks are identified early. The vaccination rollout in organisations presents an opportunity to enhance and promote the organisations' reputation.

Lastly, organisations should track regular updates provided by the Commonwealth, State and Territory Health Departments, Regulators, Industry bodies and other credible factual information sources. Social media content of questionable credibility proliferates around COVID-19 and the vaccine roll out will amplify this further.

# Principle

## #2

### **Effective consultation with stakeholders**

*Current Work Health and Safety legislation in Australian jurisdictions requires organisations to consult with stakeholders in relation to issues which have the potential to affect their health, safety and wellbeing. Typically these stakeholders would include:*

- In the absence of a government health directive for our sector and workforce, what position will the organisation take?
- Workers and any workers representatives (HSRs)
- Volunteers
- Contractors including labour hire and trainees
- Unions

Stakeholders should be consulted early in the process and any potential roadblocks should be identified.

Consultation should be meaningful and constructive as it is in the best interests of the community in general that the risks associated with COVID-19, including the Vaccine achieve the objective of keeping the community and workers in organisations safe from the adverse impacts of the COVID-19 virus. Organisations that may choose to adopt a mandatory COVID-19 Vaccine position irrespective of government health directives should obtain appropriate external legal advice as part of completing Principle One and should include relevant information from this advice and part of completing principle two.

# Principle

## #3

### **Documented systems implemented and monitored**

The processes, systems and frameworks that organisations develop through the process of implementing Principle One and principle Two should be reflected in concise, plain English systems for the organisation. These systems must be effectively implemented throughout the organisation through appropriate training and communication programs for workers and other relevant counterparties (such as contractors, suppliers, visitors and volunteers) so that everyone understands what actions need to be taken. Furthermore, processes to monitor, validate and assure these new processes need to be in place. Many organisations rushed to implement COVID-19 Management Plans in the early days of the Pandemic, with little consideration of either the practicality of implementing these plans or a system to check these new documented systems are in place and functioning. The same latent risk exists regarding the COVID-19 Vaccine.

Most importantly the systems and processes that your organisation develops as it shapes the position it chooses to take need to be documented in a manner that aligns to broader organisational governance frameworks, be compliant to relevant legislation and be achievable for the organisation as it is critically important that organisations “walk the talk”. This will include identifying any existing policies and documents that may need to be updated, and the drafting of new policies that may be required. This should also include appropriate consideration of assurance processes so that the organisation can validate the performance of these new risk controls and processes.

**Having considered the three principles, complete our recipe for COVID-19 Vaccine success, provided as an appendix.**

**The recipe contains thirteen essential ingredients to position your organisation to pro-actively prepare a defensible position for your organisation so that you can achieve competitive advantage through risk management.**

# The Mindful Risk /Hicksons Lawyers Recipe for COVID-19 Vaccine Success



Combine these thirteen essential ingredients to create a defensible, risk based position for your organisation in relation to the COVID-19 Vaccine.

Essential Ingredient	Tick once complete
1. Establish a working group of key organisational stakeholders - who needs a “seat at the table” on this? Work together on your organisation’s implementation plan.	<input type="checkbox"/>
2. Consult with management/senior leaders - establish your organisations position and consider questions such as: Are you adhering to govt mandatory only or going beyond this? Are you treating all staff/all roles the same or do different parts of your organisation need to be managed differently?	<input type="checkbox"/>
3. Consult with your legal provider and industrial relations team - get them involved early	<input type="checkbox"/>
4. Consult with any relevant unions - get them onside with your approach, seek any feedback from them on potential roadblocks	<input type="checkbox"/>
5. Consult with your insurers - workers comp or other - travel insurance provider - what impacts might they see?	<input type="checkbox"/>
6. Identify any impacts regarding your volunteers, contractors, labour hire workers, your work experience or intern program, members of the public - others that regularly interact with your teams	<input type="checkbox"/>
7. Develop a communications plan - keep your staff updated and informed as this change and your program gets underway	<input type="checkbox"/>
8. Identify your policies and procedures that might be impacted or effected - will they need to be updated?	<input type="checkbox"/>
9. Think about the logistics of your program - are you running it like a flu vac program (on work premises during work time) or are workers being vaccinated via their own medical provider? Do they have a choice of which vaccine they are opting for?	<input type="checkbox"/>
10. Consider your Record Keeping processes- are you storing any vaccination records? This could also link to your Privacy Policy. Talk with your IT representative regarding security of records.	<input type="checkbox"/>
11. Are there any additional training requirements for staff, managers, supervisors? What about your induction programs?	<input type="checkbox"/>
12. Identify if there might be any additional requirements or impacts on your provider of your Employee Assistance/ Counselling Program? Are they resourced for any spike in take up?	<input type="checkbox"/>
13. Financial impacts - have you allocated budget for any financial impacts on the organisation?	<input type="checkbox"/>

# References

1. *NSW Workers Compensation Act 1987*
2. *NSW Workplace Injury Management and Workers Compensation Act 1998*
3. *NSW Work Health and Safety Act 2011 & Regulation 2017*
4. *NSW Work Health and Safety (Mines and Petroleum Sites) Act 2013 & Regulation 2014*
5. *ISO31000: 2018 Risk Management (Guidelines)*
6. *ISO 31000: Guides and Handbooks*