The Civil Conscription Argument – Section 51(xxiiiA

This pseudo legal myth has been circulating the internet for several years now, beginning I think with the *No jab/No play* policies in relation to children not up-to-date with the Childhood Vaccine Schedule attending Childcare Centres, and the *No jab/No pay* policies in which the Childcare Subsidy and a portion of Family Tax Benefit were withheld from Centrelink payments for families with children not up-to-date with the Childhood Vaccine Schedule.

Since the pandemic in 2020, the same argument has now been applied to possible restrictions for people without proof of Covid-19 vaccination, and vaccine mandates in general. The argument was widely disseminated online during the pandemic, including by Great Australian Party legal adviser ***Darren Dickson***:

https://freemandelusion.com/darren-dickson-section-51xxiiia-mp4/

Pauline Hanson's speech introducing the *"COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2021":*

https://freemandelusion.com/pauline-hanson-speech-mp4/

Numerous lawyers including ***Serene Teffaha*** (AdvocateMe) and ***Nathan Buckley*** (G&B Lawyers) perpetuated the theory, and even Professors ***Gabriël Moens*** and ***Augusto Zimmermann*** wrote widely about it:

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Mandatory jabs and bans on the unvaccinated? Try getting that past the High Court

Gabriël A Moens AM and Augusto Zimmermann

National Museum of Australia

Gabriël A Moens AM and Augusto Zimmermann
11 August 2021
4:00 AM

In a provocative article published last weekend, Joe Hildebrand argued that "We are fast approaching a point where anyone who refuses whatever vaccine they are eligible for can no longer consider themselves a truly decent member of society."

Australian health authorities, supporting Hildebrand's bold claim, now try to achieve the goal of full vaccination by scaring and threatening people. For example, a dozen health officials signed a letter, published in *The Australian* last week in which they pleaded with people to get vaccinated, warning that the "only options" are being vaccinated or dying from a Covid infection.

The Prime Minister, Scott Morrison, speaking to the press last Thursday, foreshadowed that people who are unvaccinated "will face more restrictions". This potentially means that the unvaccinated may no longer have unrestricted access to travel, or may not be allowed to attend football matches, concerts, and festivals. The Prime Minister believes that his comment describes a "common sense" approach — that those who pose a 'greater health risk' to others for not being vaccinated should not be allowed to enjoy the same level of rights and freedoms.

In this context, Associate Professor Ron Levy from the Australian National University, who specialises in constitutional law, opined that any constitutional challenge to restricting the unvaccinated would face an uphill battle in the courts. He said the High Court would likely be averse to preventing governments acting on public health matters. "There isn't too much that can be done, constitutionally speaking," he said.

Although Levy's assessment may be correct with regards to what the High Court might do, it is not necessarily the same as to what it should do if it were called upon to consider the constitutionality of mandatory vaccinations. Accordingly, any assessment of the constitutionality of vaccination directives should consider that the purpose of the Australian Constitution was to establish an institutional arrangement capable of restricting arbitrary power and ensuring limited government. The Australian governments should act within, and in conformity with, these legal-institutional limitations.

This classical liberal tradition of constitutionalism laid the basis for representative democratic government and the legal protection of citizens against the exercise of arbitrary political power. Under this tradition, to be under the rule of law presupposes the existence of rules and principles serving as an effective check on such political power.

A failure to effectively protect the constitutional framework would transform the Constitution into a less reliable document when it comes to restricting political power and ensuring the proper operation of constitutional government. In this context, Giovanni Sartori, an Italian political scientist, would properly describe such a constitution as no more than a "façade". Specifically, this would be the case if the mechanisms for limiting the power of government appears to be considerably disregarded at least in their most essential features.

One of the most remarkable characteristics of the Australian Constitution is its express limitation on governmental powers. In drafting the Constitution, the framers sought to design an instrument of government intended to distribute and limit the powers of the state. This distribution of, and limitation upon, governmental powers was deliberately chosen because of the proper understanding that unrestrained power is always inimical to the achievement of human freedom and happiness.

Accordingly, the Constitution allocates the areas of legislative power to the Commonwealth primarily in sections 51 and 52, with these powers being variously exclusive or concurrent with the Australian states.

The Constitution was amended in a referendum in 1946 to include section 51(xxiiiA). This provision determines that the Commonwealth parliament, among others, can make laws with respect to: "the provision of … pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances."

This provision allows for the granting of various services by the federal government but not to the extent of authorising any form of civil conscription. The prohibition of such conscription is directed particularly to the provision of medical services.

The idea, that constitutional provisions protect fundamental legal rights, plays a prominent role in an understanding of these express limitations and, indeed, of the implied constitutional limitations derived from them.

The "no conscription" requirement to be found in that constitutional provision amounts to an explicit limitation on mandating the provision of medical services, for example, compulsory vaccination, which remains governed by the contractual relationship between patients and doctors. Section 51(xxiiiA) could thus also be regarded as an implied constitutional right of individual patients to refuse vaccinations.

The concept of "civil conscription" was first considered by the High Court in 1949 *in British Medical Association v Commonwealth*.6 Legislation which required that medical practitioners use a particular Commonwealth prescription form as part of a scheme to provide pharmaceutical benefits was declared invalid as a form of civil conscription. In the opinion of Latham CJ, civil conscription included not only legal compulsion to engage in particular conduct, but also the imposition of a duty to perform work in a particular way. Williams J, in his judgment, stated that "the expression invalidates all legislation which compels medical practitioners or dentists to provide any form of medical service".

Hence, if the medical profession were directed by the Federal Government to mandatorily vaccinate people, such direction would constitute unconstitutional civil conscription. Such direction would interfere with the relationship between the doctor and the patient – a relationship which is based on contract and trust.

Of course, a doctor who freely performs his or her medical service does not create conscription. However, as Justice Webb explicitly mentioned: "When Parliament comes between patient and doctor and makes the lawful continuance of their relationship as such depend upon a condition, enforceable by fine, that the doctor shall render the patient a special service, unless that service is waived by the patient, it creates a situation that amounts to a form of civil conscription."

Accordingly, any legislation that requires medical practitioners to prescribe government-mandated medical services, such as vaccinations, constitutes a form of civil conscription that is constitutionally invalid. Webb J's statement also indicates that, even if the doctor were compelled to provide a service, the patient would have the right to waive that service. In other words, the Commonwealth parliament is not constitutionally authorised to force or compel any individual to accept vaccination or a medical procedure against his or her own will.

In 2009, in *Wong v Commonwealth; Selim v Professional Services Review Committee*, French CJ and Gummow J held that civil conscription is a "compulsion or coercion in the legal and practical sense, to carry out work or provide [medical] services". Kirby J opined that the purpose of prohibiting civil conscription was to ensure that the relationship between medical practitioner and patient was governed by contract where that is the intention of the parties. For him the test whether civil conscription has been imposed is "whether the impugned regulation, by its details and burdens, intrudes impermissibly into the private consensual arrangements between the providers of medical and dental services and the individual recipients of such services."

This view is also supported by the *Nuremberg Code* – an ethics code – relied upon during the Nazi doctors' trials in Nuremberg. This Code has as its first principle the willingness and informed consent by the individual to receive medical treatment or to participate in an experiment. Hence, people's refusal to be vaccinated may be based on the ground that the Covid vaccines are still experimental and their long-term effects and safety on its recipients are largely unknown. The unvaccinated, in relying on health implications for the purpose of refusing the vaccine, may thus ironically invoke the same argument used by proponents of vaccinations, who also rely on health grounds to promote the vaccine.

Importantly, the jurisprudence of the High Court indicates that the prohibition of civil conscription must be construed widely to invalidate any law requiring such conscription expressly or by practical implication. In other words, no law in Australia can impose limitations on the rights of citizens that directly or indirectly amount to a form of civil conscription.

Moreover, if unvaccinated Australians were to face serious restrictions of rights and freedoms – as suggested by medical officers and the Prime Minister – these restrictions would violate the democratic principle of equality before the law. In *Leeth v Commonwealth*, Deane and Toohey JJ referred to the Preamble to the Constitution to support their view that the principle of equality is embedded impliedly in the Constitution. They said that "the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government."

The flagged exclusion of unvaccinated Australian citizens from participation in certain activities discriminates against them on the ground of vaccine status. Of course, vaccine status is not one of the accepted grounds in any anti-discrimination legislation and, therefore, it would be possible for governments to defeat a claim that compulsory vaccination violates the equality principle. However, reliance on vaccine status would still create an apartheid-type situation since benefits would be conferred and burdens imposed on this ground. But, more importantly, the making of coercive statements to force people to get vaccinated would effectively amount to an indirect form of mandatory vaccination, the constitutionality of which is doubtful at best. Indeed, from a constitutional point of view, the jurisprudence of the High Court indicates that what cannot be done directly, cannot be achieved indirectly without violating s. 51 of the Constitution.

Additionally, compulsory vaccination adversely affects the dignity and privacy of people. Governments should be fearful of relying on the *parens patriae* doctrine according to which government will decide what is good for people: it would be a textbook example of the operation of the Nanny State. If governments cannot constitutionally force everyone to be vaccinated, they certainly cannot indirectly create a situation whereby everybody would be forced to take the vaccine.

This point is also addressed in a comment of Webb J in *British Medical Association v Commonwealth*: "If Parliament cannot lawfully do this directly by legal means it cannot lawfully do it indirectly by creating a situation, as distinct from merely taking advantage of one, in which the individual is left no real choice but compliance".

To conclude: the Australian Constitution explicitly prohibits any form of compulsion upon the citizens to take any form of medical or pharmaceutical service, including vaccination.

On this view, unvaccinated Australians still remain decent members of society and they cannot be treated as second class citizens.

In reality, the provision has nothing to do with mandatory vaccination nor reductions in Centrelink payments, as the various High Court authorities show. Section 51(xxiiiA) provides:

> *51 "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:…*
>
> *(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;"*

Who's conscripted?

The prohibition on conscription does not apply to the patient, but to the health provider. It does not create justiciable rights for individuals, but for dentists, doctors, and other health providers, to avoid conscription, and the associated socialization of medical and dental services.

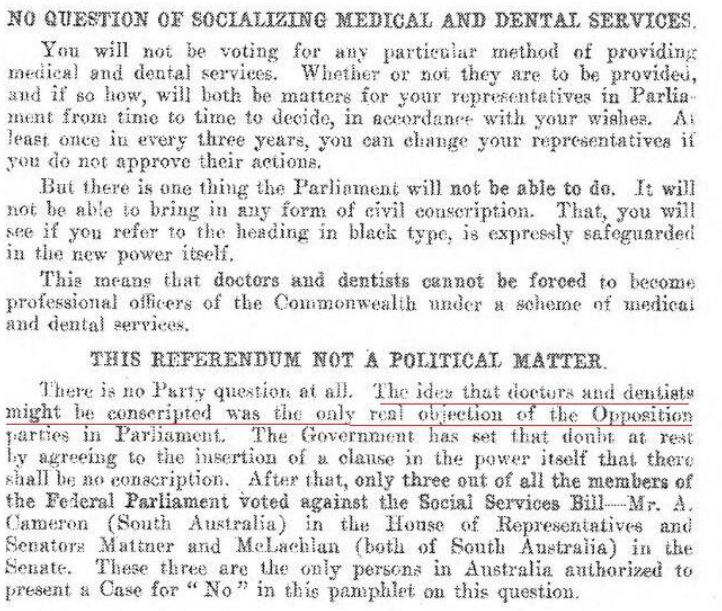
Wong v Commonwealth of Australia [2009] HCA 3: French CJ and Gummow J (at 44-46):

*"Thereafter at a referendum conducted on 28 September 1946 the majorities of electors required by s 128 of the Constitution approved a proposed law to alter s 51 of the Constitution by inserting par (xxiiiA). **The "YES" case** for the proposed law under the heading "No question of socializing medical and dental services" stated:*

> *"You will not be voting for any particular method of providing medical and dental services. Whether or not they are to be provided, and if so how, will both be matters for your representatives in Parliament from time to time to decide, in accordance with your wishes. At least once in every three years, you can change your representatives if you do not approve their actions. But there is one thing the Parliament will not be able to do. It will not be able to bring in any form of civil conscription. That, you will see if you refer to the heading in black type, is expressly safeguarded in the new power itself. This means that doctors and dentists cannot be forced to become professional officers of the Commonwealth under a scheme of medical and dental services."*

Under the heading "This referendum not a political matter", the "YES" case said:

> *"There is no Party question at all. The idea that doctors and dentists might be conscripted was the only real objection of the Opposition parties in Parliament. The Government has set that doubt at rest by agreeing to the insertion of a clause in the power itself that there shall be no conscription."*



NO QUESTION OF SOCIALIZING MEDICAL AND DENTAL SERVICES.

You will not be voting for any particular method of providing medical and dental services. Whether or not they are to be provided, and if so how, will both be matters for your representatives in Parliament from time to time to decide, in accordance with your wishes. At least once in every three years, you can change your representatives if you do not approve their actions.

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THIS REFERENDUM NOT A POLITICAL MATTER.

There is no Party question at all. The idea that doctors and dentists might be conscripted was the only real objection of the Opposition parties in Parliament. The Government has set that doubt at rest by agreeing to the insertion of a clause in the power itself that there shall be no conscription. After that, only three out of all the members of the Federal Parliament voted against the Social Services Bill—Mr. A. Cameron (South Australia) in the House of Representatives and Senators Mattner and McLachlan (both of South Australia) in the Senate. These three are the only persons in Australia authorized to present a Case for "No" in this pamphlet on this question.

French CJ and Gummow J (at 60):

> *“The legislative history and the genesis of s 51(xxiiiA) supports a construction of the phrase “(but not so as to authorize any form of civil conscription)” which treats “civil conscription” as involving some form of compulsion or coercion, in a legal or practical sense, to carry out work or provide services; the work or services may be for the Commonwealth itself or a statutory body which is created by the Parliament for purposes of the Commonwealth; it also may be for the benefit of third parties, if at the direction of the Commonwealth."*

Hayne, Crennan and Kiefel JJ (at 226):

> *"To adopt and adapt what Dixon J said in British Medical Association v The Commonwealth (1949) 79 CLR 201: "[t]here is no compulsion to serve as a medical [practitioner], to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently".*

Heydon J said (at 263):

> *"...among the things which in 1946 were seen as examples of “industrial conscription” were the following:*
> *(a) a law compelling an individual to work;*
> *(b) a law compelling a worker to work in a particular industry;*
> *(c) a law compelling a worker to work for a particular employer, or compelling a particular employer to accept a particular worker;*
> *(d) a law compelling a worker to work in a particular place; and*
> *(e) a law preventing a worker from leaving his employment (ie a law compelling a worker not to leave his current employment).*
> *This is unlikely to be an exhaustive list…"*

The conscription aspect doesn't apply to anyone but the providers of such services. As Kirby J. stated (at 124):

> *"A further feature, derived from the text, that lends support to the foregoing propositions is that the protection afforded by the words in brackets is special, limited and necessarily restricted to those involved in the provision of "medical and dental services". Such persons comprise the healthcare professionals who provide the designated services."*

Kirby J. then goes on to describe how this protects the patient, by preventing such conscription of their provider. (at 126):

> *"It is designed to ensure the continuance in Australia of the individual provision of such services, as against their provision, say, entirely by a government-employed (or government controlled) healthcare profession."*

Should medical and dental providers be conscripted, it would affect the patients in their care, as the SUPPLY of such services, otherwise than by private contract, would indeed be forced upon them without their consent. All it offers for the patient, is protection from their provider being conscripted, and

without their provider being conscripted, they maintain that "contractual" relationship referred to by Kirby J. (at 125).

It has nothing to do with treatments being forced upon people, (such as mandatory vaccination) but the provision of socialized medical and dental services, such as exists in the UK.

The meaning and intention of civil conscription is also highlighted in the Parliamentary Report regarding the ***Dying with Dignity Bill 2014***, in relation to the constitutionality of the Bill.

Meaning of 'civil conscription'

3.21 Subsection 51(xxiiiA) contains an express prohibition on the use of the medical services power 'to authorize any form of civil conscription'.

3.22 The submission of Catholic Health Australia provided a helpful description of the events that led to the inclusion of subsection 51(xxiiiA) in 1946,[40] which included the explanation that the prohibition on civil conscription was inserted to allay fears that 'the proposed amendment would grant the Commonwealth the power to nationalise medical and dental services'.[41]

3.23 The prohibition on civil conscription has been described as referring to:

> ...any sort of compulsion to engage in practice as a doctor or a dentist or to perform particular medical or dental services. However, in its natural meaning it does not refer to compulsion to do, in a particular way, some act in the course of carrying on practice or performing a service, when there is no compulsion to carry on the practice or perform the service.[42]

3.24 Importantly, the prohibition on civil conscription only applies to the provision of 'medical and dental services' and not to the other elements of subsection 51(xxiiiA).[43]

https://freemandelusion.com/wp-content/uploads/2020/11/wong-v-commonwealth-of-australia-2009-hca-3.pdf

Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320 was a challenge against COVID-19 vaccine mandates for certain workers in New South Wales, which included the contention that section 51(xxiiiA) of the *Constitution* prevents any parliament from passing laws in respect of mandatory vaccination. In summary, section 51(xxiiiA) does not prevent mandatory vaccination, it prevents the nationalization of medical and dental services, in this situation, doctors being forced to administer a vaccine against their will, as employees of the Commonwealth. It is regarding the provision of services by the doctor, not the acquisition of services by the patient. Secondly, it only applies to the Commonwealth, not the States:

> **MEANING OF SECTION 51(xxiiiA)** at 272: *"Nothing in any part of Order (No 2) or the PHA involves any element of coercion on a doctor or other medical provider to vaccinate anyone. Otherwise, this submission simply repeats the wrong assertion that s 51(xxiiiA) operates on the acquisition of a medical service as opposed to its provision."*
>
> **APPLICABILITY TO STATES** at 275-276: *"Section 51 of the Constitution, of which s 51(xxiiiA) is part, is directed to the legislative power of the Commonwealth not the states. ... Even if the impugned orders imposed a form of civil conscription, which they do not, they would not be rendered invalid by the operation of s 51(xxiiiA)."*

Full extract (from 261):

Constitutional Ground - Civil Conscription

The Kassam plaintiffs contend that Order (No 2) creates a form of civil conscription referred to in s 51(xxiiiA) of the Constitution which they contend applies to State laws. In the alternative, if s 51(xxiiiA) is held not to apply to State laws, then the Kassam plaintiffs contend that Order (No 2) was made in furtherance of a joint scheme between New South Wales and the Commonwealth "which had the effect of imposing a civil conscription on State citizens".

Both the State parties and the Commonwealth of Australia contended that nothing in Order (No 2) involves a form of civil conscription referred to in s 51(xxiiiA), no such restriction on imposing civil conscription applies to the States, that, even if Order (No 2) did impose a form of civil conscription the limitation would only be infringed if the Commonwealth required the States to conscript persons and even if the Commonwealth did, it would not invalidate Order (No 2). [156]

Civil Conscription

Section 51(xxiiiA) of the Constitution confers on the Federal Parliament legislative power to make laws for the peace, order and good government of the Commonwealth with respect to:

"[t]he provision of maternity allowances, widows pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription, benefits to students and family allowances; …" (emphasis added)

This legislative power was inserted into s 51 with effect from 19 December 1946 by the Constitution Alteration (Social Services) Act 1946 following its passage in a referendum. The historical events that lead to the passage of this provision in this particular form are described in Wong v The Commonwealth (2009) 236 CLR 573; [2009] HCA 3 at [18] to [55] per French CJ and Gummow J, at [174] to [191] per Hayne, Crennan and Kiefel JJ and, to an extent, by Heydon J at [271] to [277] ("Wong"). It suffices to note two matters about that history.

First, the phrase "civil conscription" has its origins in the debate about whether "industrial conscription", that is, the use of compulsory civilian labour, would or would not be deployed in the war effort, as it eventually was (Wong at [31] to [40]; see Reid v Sinderberry (1944) 68 CLR 504).

Second, the carve out from the referendum proposing the grant of legislative power so as to not authorise any form of civil conscription was suggested by the then opposition and agreed to by then government (Wong at [50] to [51]) and no doubt helped secure its passage. It stands in contrast to the nationalisation of medical services that took place in the United Kingdom around the same time (Wong at [274]). Thus, the phrase "civil conscription" was deployed so as to preclude compulsory service by medical professionals which might not answer the description "industrial conscription" (Wong at [50]).

Bearing that in mind, two aspects of the concept of civil conscription of s 51(xxiiiA) should be noted. First, the preclusion on authorising civil conscription only qualifies a (Commonwealth) law for the "provision" of "medical or dental services" (the BMA Case at 254 per Rich J, at 261 per

Dixon J, at 282 per McTiernan J, at 286 per Williams J, contra per Latham CJ at 253 and Webb J not deciding at 292; Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth (1987) 162 CLR 271 at 279; [1986] HCA 6; "Alexandra").

Second, civil conscription is directed to compulsive service in the provision of medical services. In the BMA Case a majority, Latham CJ, Rich, Williams and Webb JJ, Dixon and McTiernan JJ dissenting, upheld a challenge to the validity of a legislative requirement for pharmacists to write scripts for medicines on a particular form regardless of whether the medicine was to be obtained for free by the patient under the Pharmaceutical Benefits Scheme. The widest reading of the majority's conclusion was that the prohibition on civil conscription in relation to medical and dental services strikes down any "compulsion of law requiring that men … perform work in a particular way" (at 249 per Latham CJ). Dixon J in dissent concluded that nothing in the impugned provision compelled the rendering of medical services to patients in any capacity whether regularly, occasionally, for a short period or intermittently (at 278). His Honour's approach was effectively adopted in the General Practitioner's Case (1980) 145 CLR 532 at 556-557 per Gibbs J. at 563 per Stephen J, at 564 per Mason J and 571 to 572 per Wilson J; Wong at [195]).

In Wong, Hayne, Crennan and Kiefel JJ also applied the approach of Dixon J in the BMA Case while accepting that civil conscription can arise from the practical and not just legal effect of a legislative provision (at [209]). Even so, their Honours concluded that the practical effect of the scheme for the payment of medical benefits in the Health Insurance Act did not amount to civil conscription in that it did not compel a medical practitioner, legally or practically, to provide a service on behalf of the Commonwealth or at all to treat any patient or particular patient ([id]). Their Honours also concluded that, accepting that the practical effect of the Health Insurance Act was to require doctors who wish to practise to participate in the Medicare scheme (at [224]), a requirement to comply with a standard of practice is not a form of civil conscription (at [226]).

Similarly, after reviewing the history of s 51(xxiiiA), French CJ and Gummow J in Wong reached the same conclusion. In so doing, their Honours described the meaning of "civil conscription" in s 51(xxiiiA) as follows (at [60]):

"The legislative history and the genesis of s 51(xxiiiA) supports a construction of the phrase "(but not so as to authorize any form of civil conscription)" which treats "civil conscription" as involving some form of compulsion or coercion, in a legal or practical sense, to carry out work or provide services; the work or services may be for the Commonwealth itself or a statutory body which is created by the Parliament for purposes of the Commonwealth … it also may be for the benefit of third parties, if at the direction of the Commonwealth." (emphasis added)

The effect of the Kassam plaintiffs' written submissions was that Order (No 2) effected a form of civil conscription because it effectively required unvaccinated persons to obtain a COVID-19 vaccine. [157] This wrongly assumed that s 51(xxiiiA) proscribes the compulsory acquisition of medical services which it does not. In oral submissions, counsel for the Kassam plaintiffs, Mr King, was pressed on how any doctors or any other medical professional was compelled to provide a medical or dental service. He contended that [158]

"…the effect of the order is what is critical in our respectful submission, and the effect of that order is to conscript both patients and doctors, their doctors, to obtain a double vaccination, or in

relation to the earlier orders a single vaccination, as the price of giving up their employment and their right to protect and look after their families."

This contention was repeated in a written submission filed on 4 October 2021. [159] Nothing in any part of Order (No 2) or the PHA involves any element of coercion on a doctor or other medical provider to vaccinate anyone. Otherwise, this submission simply repeats the wrong assertion that s 51(xxiiiA) operates on the acquisition of a medical service as opposed to its provision.

In his submissions, Dr Harkess contended that a medical or dental service was provided by a person who received a COVID-19 vaccine because they contribute to the eventual establishment of "herd immunity". He submitted that it follows that those who were "compelled" to be vaccinated were civilly conscripted to provide dental and medical services. [160] It suffices to state that contributing to the general health of the community by adding to herd immunity is not providing a medical service.

Wong establishes that s 51(xxiiiA) is to be interpreted according to its historical purpose as explained above. On any sensible reading of the authorities the impugned orders do not impose any form of civil conscription as referred to in s 51(xxiiiA).

No Application to the States

Section 51 of the Constitution, of which s 51(xxiiiA) is part, is directed to the legislative power of the Commonwealth not the states. The reference in s 51(xxiiiA) to the provision of the benefits is confined to the provision of those benefits by the Commonwealth (Alexandra at 279; the BMA Case at 244 per Latham CJ, at 254 per Rich J, at 260 per Dixon J and at 279 to 280 per McTiernan J and 292 per Webb J). The Kassam plaintiffs sought to rely on a statement by Williams J in the BMA Case that the "expression invalidates all legislation which compels medical practitioners or dentists to provide any form of medical or dental service" (at 287). However, that statement came at the conclusion of a passage that commenced "[t]he expression [ie, civil conscription] is a prohibition upon the exercise of the legislative powers of the Commonwealth" (at 287.2). The Kassam plaintiffs also referred to the judgment of Kirby J in Wong who construed s 51(xxiiiA) by reference to "emerging norms of fundamental human rights as expressed in international law" (Wong at [133]). None of the other judgments in Wong endorsed his Honour's approach. In any event, his Honour made it clear that what was being addressed was a restriction on "federal law" (at [145]).

The Kassam plaintiffs sought to extend the proscription on civil conscription in the provision of medical and dental services to the States by contending that it gives rise to an "an implied constitutional right of individual patients to reject unless consented to vaccination[s]" binding on the states. [161] Nothing in the text or structure of the Constitution supports any such implication. The express words of s 51(xxiiiA) suggests to the contrary as do the cases just noted. If s 51(xxxi) does not bind the States (Pye v Renshaw (1951) 84 CLR 58 at 83; [1951] HCA 8) then there is no possible justification for s 51(xxiiiA) doing so.

Even if the impugned orders imposed a form of civil conscription, which they do not, they would not be rendered invalid by the operation of s 51(xxiiiA).

Alleged Joint Scheme

On the assumption that Order (No 2) does effect a scheme of civil conscription, but that the proscription on civil conscription in s 51(xxiiiA) does not bind the States, the Kassam Plaintiffs contended that the evidence demonstrates that there was a "joint scheme or ... a co-operative arrangement [between NSW and the Commonwealth] to bring about a civil conscription and that the provisions of Order (No 2), being part of and made in furtherance of the scheme, are for that reason invalid". [162]

This contention seeks to rely on the decisions in P J Magennis Pty Ltd v Commonwealth (1949) 80 CLR 382; [1949] HCA 6 ("Magennis") and ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140; [2009] HCA 51 ("ICM"). In Magennis a majority of the High Court held the Commonwealth exceeded its powers by entering into an intergovernmental agreement with NSW that provided for an infringement of the just terms guarantee in s 51(xxxi). The NSW legislation which effected an acquisition on other than just terms was construed as depending for its operation upon the existence of a valid law of the Commonwealth. The Commonwealth law giving effect to the agreement was held invalid, but the NSW law was only held to be inoperative (at 403 to 404 per Latham CJ; 424 to 425 per Williams J and at 406 per Rich J agreeing). Later the NSW legislation was "decoupled" from the agreement with the federal government and upheld in Pye (see ICM at [39] per French CJ, Gummow and Crennan JJ). A similar result followed in Tunnock v Victoria (1951) 84 CLR 42. The premise of Magennis that s 51(xxxi) qualifies the Commonwealth's power to make financial grants to the States under s 96 of the Constitution was reaffirmed by French CJ, Gummow and Crennan JJ in ICM (at [46]) as well as by Heydon J (at [174]).

One matter that was not expressly determined by either Magennis or the majority in ICM is whether some restriction that only applies to the Commonwealth, such as s 51(xxxi) or the civil conscription component of s 51(xxiiiA), is engaged by some informal agreement, arrangement or understanding between the Commonwealth and a State that either requires or contemplates the latter legislating to acquire property other than on just terms or effect civil conscription of the providers of medical or dental services as the case may be. This was addressed by Griffiths and Rangiah JJ in Spencer v Commonwealth (2018) 262 FCR 344; [2018] FCAFC 17 at [210] ("Spencer") as follows:

"As we have said, where it is alleged that the State has effected an acquisition of property, s 51(xxxi) will not apply unless the State is required under an intergovernmental agreement with the Commonwealth to acquire the property on other than just terms. Assuming that an informal agreement is sufficient, there can be no lesser requirement where the agreement is an informal one. Latham CJ used the expression 'joint action' in the context of the specific facts of the case in Magennis where the terms and conditions of an agreement required the State to acquire property. There is no Constitutional principle that any action that can be described as 'joint action' that has the effect of acquiring property enlivens s 51(xxxi) of the Constitution. The expression cannot be understood as some free-standing criterion for the engagement of the provision." (emphasis added)

Having regard to these principles and bearing in mind that the reference to "civil conscription" in the Kassam plaintiffs' submission is to some form of mandatory vaccination, how do they seek to

factually support their argument that there was a joint scheme? The Kassam plaintiffs' submissions made reference to numerous documents recording various joint efforts between the Commonwealth and the State to address the pandemic commencing from February to March 2020 which in turn invoked pandemic planning documents prepared prior to then. [163] The main focus of its submissions was the "National Plan to Transition Australian National Covid-19 Response" published on 6 August 2021 (the "National Plan"). [164] The National Plan was issued after statements by the Prime Minister on 9 July 2021, 30 July 2021, 2 August 2021 and 6 August 2021 following meetings of the body described as "National Cabinet". [165]

Save for one topic, none of these documents or any other document referred to by the Kassam plaintiffs evidences any joint agreement, understanding or consensus between the Commonwealth and NSW to mandate vaccines for COVID-19 much less any requirement imposed by the Commonwealth to do so.

The one exception concerns aged care workers. Thus, in his statement on 9 July 2021 the Prime Minister stated [166] :

"National Cabinet reaffirmed the commitment to implement the decision to mandate vaccination of aged care workers by mid- September 2021, with limited exceptions. All states and territories will work towards implementing this decision using state public health orders or similar state and territory instruments and will provide an indication of timing when it is available. This is consistent with the approach taken for mandating influenza vaccinations for aged care workers."

This statement is consistent with the correspondence noted in [121].

However, all this of this material takes the matter nowhere for two reasons. First, there is nothing in any of the materials relied on, including the material concerning aged care workers, to support the contention that NSW was required under some agreement to mandate vaccines to anyone (cf Spencer at [210]). Second, even if they were, there is nothing in Order (No 2) or the PHA to suggest that any aspect of their operation or validity is dependent on the existence of any agreement with the Commonwealth to require them to mandate vaccines which on the authority of Magennis might render them inoperative. As for the Commonwealth, there is not a skerrick of a suggestion that any legislation of the Commonwealth gives effect to any such agreement so as to justify some relief being sought against it, which there was not.

Conclusion on s 51(xxiiiA) Contention

Lastly on this topic I note that the Kassam plaintiffs referred the Court to an article by two legal academics recently published in a magazine of political commentary concerning the unconstitutionality of vaccine orders (Augusto Zimmerman and Gabriel Moens, "Emergency Measures and the Rule of Law", (2021) 64(10) Quadrant Magazine). The reliance on the article was misconceived because in fairness to the authors of the article they did not purport to address the state of the authorities on s 51(xxiiiA) and their applications to orders made under s 7(2) of the PHA or similar legislation. Hence, at the commencement of the article, the authors state that is not "feasible to predict what the Australian High Court might do if it were called upon to consider the constitutionality of vaccination orders and emergency declaration directions" but stated that they "it is still possible to determine what it should do". This Court's task does not

involve any determination of what the High Court "might do" much less what it "should" do. Instead, its function is to apply the what the High Court has decided in relation to s 51(xxiiiA).

A consideration of the authorities in relation to s 51(xxiiiA) of the Constitution confirms that the contention that it renders any part of Order (No 2) invalid was completely untenable. I reject this ground."

Comments on Civil Conscription in the Court of Appeals in ***Kassam v Hazzard; Henry v Hazzard [2021] NSWCA 299***.

(at 10): *"Order (No 2) did not effect any form of civil conscription as referred to in s 51(xxiiiA) of the Constitution and, even if it did, the prohibition on civil conscription does not apply to laws made by the State of NSW: PJ [11(iv)]. The primary judge described this aspect of the constitutional argument as "completely untenable": PJ [286]. His Honour also rejected an argument based upon PJ Magennis Proprietary Limited v Commonwealth (1949) 80 CLR 382; [1949] HCA 66 (Magennis) to the effect that there was a joint scheme between the Commonwealth and the State which engaged s 51(xxiiiA): PJ [284]."*

(at 38): *"In relation to the constitutional arguments sought to be raised by the Kassam Applicants (grounds 6 and 9, noting that ground 7 was not pressed), I agree with the primary judge's assessment that the argument based upon s 51(xxiiiA) of the Constitution was completely untenable. As his Honour noted at PJ [267], that placitum "only qualifies a (Commonwealth) law for the 'provision' of 'medical or dental services'." Moreover, as his Honour outlined at PJ [268], "civil conscription is directed to compulsive service in the provision of medical services", not their receipt. As the primary judge observed at PJ [272], "[n]othing in any part of Order (No 2) or the [Public Health Act] involves any element of coercion on a doctor or other medical provider to vaccinate anyone."*

Additionally, s 51(xxiiiA) of the Constitution is not a constraint on State power. Ground 9 of the Kassam Appeal relates to the attempt to circumvent the fact that s 51(xxiiiA) does not purport to constrain State power and is bound up with the unsuccessful argument put at first instance based on Magennis. This was only one of the objections to the s 51(xxiiiA) argument. In any event, as the primary judge observed at PJ [284] in relation to the body of material which the Kassam Parties sought to rely on:

"all this [sic] of this material takes the matter nowhere for two reasons. First, there is nothing in any of the materials relied on, including the material concerning aged care workers, to support the contention that NSW was required under some agreement to mandate vaccines to anyone (cf Spencer at [210]). Second, even if they were, there is nothing in Order (No 2) or the [Public Health Act] to suggest that any aspect of their operation or validity is dependent on the existence of any agreement with the Commonwealth to require them to mandate vaccines which on the authority of Magennis might render them inoperative."

(at 141): *"There is nothing in the Kassam Applicants' submission that s 51(xxiiiA) directly subtracts from State legislative power. A qualification to a new head of legislative power granted to the Commonwealth following a referendum cannot result in a diminution of State legislative power. The Kassam Applicants' alternative submission, based upon joint action by the Commonwealth*

and the States, fails at the threshold because it was not shown that there was is any legal or practical compulsion on any medical or dental practitioner to perform any medical or dental service. The primary judge explained this, by reference to binding authority, at [267]-[274]."

https://freemandelusion.com/wp-content/uploads/2022/03/Kassam-v-Hazzard-Henry-v-Hazzard-2021-NSWSC-1320.pdf

https://freemandelusion.com/wp-content/uploads/2022/01/Kassam-v-Hazzard-Henry-v-Hazzard-2021-NSWCA-299.pdf

In ***Tilley v State of Queensland (Queensland Health) [2022] QIRC 002***, (at 35) Hartigan IC agreed with Beech-Jones CJ in *Kassam v Hazzard [2021] NSWSC 1320* (from 261) regarding the correct interpretation of section 51(xxiiiA) of the Constitution:

"In relation to Mr Tilley's contention with respect to s 51(xxiiiA) of the Commonwealth of Australia Constitution Act, regard must be had to the terms of that provision. Relevantly, s 51(xxiiiA) of the Constitution states:

Legislative powers of the Parliament: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— (xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:

*This provision of the Constitution appears to relate to the Commonwealth's power to make laws regarding the provision of, inter alia, medical services. The civil conscription limitation appears to relate to those who provide the, inter alia, medical services. In **Wong v Commonwealth of Australia and Anor, Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309 [2009] HCA 3** the High Court, in considering s 51 (xxiiiA) of the Constitution, relevantly held (at 60):*

The legislative history and the genesis of s 51(xxiiiA) supports a construction of the phrase "(but not so as to authorize any form of civil conscription)" which treats "civil conscription" as involving some form of compulsion or coercion, in a legal or practical sense, to carry out work or provide services; the work or services may be for the Commonwealth itself or a statutory body which is created by the Parliament for purposes of the Commonwealth; it also may be for the benefit of third parties, if at the direction of the Commonwealth. [footnotes omitted].

Accordingly, I do not consider that s 51(xxiiiA) of the Constitution is relevant to the circumstances of this matter as it relates to the provision of, inter alia, medical services, rather than the receipt of such services by an individual. Further, I do not consider that s 51(xxiiiA) of the Constitution is relevant to this matter as it relates to the Commonwealth's power to make such laws and does not cover the responsibilities of the State."

https://freemandelusion.com/wp-content/uploads/2022/03/Tilley-v-State-of-Queensland-Queensland-Health-2022-QIRC-002.pdf

Luke Beck, an associate professor of constitutional law at Monash University, told ***AAP FactCheck*** that this section was added to the constitution in 1946 to *"allow the Commonwealth to fund various social services schemes"* such as Medicare, the pharmaceutical benefits scheme and payments available through Centrelink. Dr Beck called this claim "*pseudo-legal nonsense"*, saying the civil conscription limitation only prevents the federal government from forcing people to do work as doctors and dentists – it did not grant people individual rights. The High Court dealt with the clause in 2009, when it ruled that requiring doctors to comply with professional standards in order to receive Medicare payments did not amount to civil conscription, he pointed out. *"There's nothing in the constitution that would prevent a law making COVID vaccination mandatory. We have had mandatory vaccination rules for some professions for a long time in respect of other vaccines,"* Dr Beck added.

Amelia Simpson, an associate professor at the Australian National University (ANU) who specialises in discrimination and equality principles in constitutional law, said the claim was *"far-fetched"* and *"highly unlikely to be accepted by any court".* She said the prohibition on civil conscription was included to prevent the "forced enlistment of medical personnel to work for the government". *"It was a response to the fears of the medical profession in Australia at the time (70 years ago) that their profession may be nationalised and their ability to work in private practice restricted,"* Dr Simpson said. *"It has got nothing to do with coercive immunisation of citizens, then or now."*

Scientia professor George Williams, the deputy vice-chancellor and former dean of law at UNSW, said the clause could be used to prevent the Commonwealth – although not the states – from compelling doctors to take part in mass immunisation programs. *"On the other hand, it would not prevent the Commonwealth from requiring citizens to be vaccinated,"* he said in an email.

The Legal experts also noted that the section of the constitution only relates to the Commonwealth's power and does not cover responsibilities of the states. Ron Levy, an associate professor with expertise in constitutional law at the ANU College of Law, said that even if a person somehow convinced a court to re-read the section to bar mandatory vaccination, that decision would not apply to any laws of the states. Under the constitution, the Commonwealth is responsible for national health policies such as Medicare, whereas the states look after public hospitals and deliver preventative services such as immunisation programs.

https://freemandelusion.com/wp-content/uploads/2022/04/Does-a-constitutional-clause-ban-vaccine-mandates-in-Australia_-Australian-Associated-Press.pdf

Nothing to do with Centrelink benefits

Halliday v The Commonwealth of Australia [2000] FCA 950; 45 ATR 458:

> *"The only restriction on the Commonwealth's power to make laws imposing civil conscription is found in s 51(xxiiiA) of the Constitution. The power to legislate to provide medical and dental services is limited by the phrase "but not so as to authorize any form of civil conscription". This prohibition applies only to the provision of medical and dental services, and not to the other benefits etc mentioned in par (xxiiiA)."*

***British Medical Association v The Commonwealth* (1949) HCA 44**; at 286-287:

"This condition cannot by reason of its place in par. (xxiiiA.) apply to a law providing "benefits to students" and "family allowances". Its place in the paragraph raises the question whether it applies only to the provision of medical and dental services and nothing else or to the provision of any matter in the paragraph which precedes the condition. They are maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services. It would seem odd to say that there is power to make a law with respect to the provision of maternity allowances "but not so as to authorize any form of civil conscription." And if the condition applies to that subject matter it would appear to be odd that it is not made to apply to "family allowances." Clearly it does not apply to that subject matter. If the construction that the condition applies only to the provision of medical and dental services is not adopted, the only alternative construction is that it applies to every subject matter beginning with maternity allowances down to medical services. This alternative construction would bring the idea of conscription into association with matters with which it is not naturally or logically connected. I think that the key to the interpretation of the paragraph is that the idea of conscription cannot naturally be associated with the provision of anything in the paragraph except the services which are mentioned; they are medical and dental services. The condition immediately follows the words "medical and dental services." In my opinion it should not be annexed to anything before the word "medical." There is no comma between dental services and the first of the brackets enclosing the condition: there is a comma at the end of the second bracket. The words "medical and dental services (but not so as to authorize any form of civil conscription)" are a separate branch of the legislative power conferred by the paragraph. No other branch of the power is qualified by the condition."

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***Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) HCA 6** at 12:

"Secondly, the prohibition contained in the words "but not so as to authorize any form of civil conscription" in s.51(xxiiiA) applies only to the reference in the paragraph to the provision of "medical and dental services". The words of that prohibition, however, are not irrelevant to the scope of the other matters described in the paragraph at least to the extent that whenever medical or dental services are provided pursuant to a law with respect to the provision of some other benefit, for example, sickness or hospital benefits, "the law must not authorize any form of civil conscription of such services": the B.M.A. Case per Williams J. at pp.286-287; see also..."

https://freemandelusion.com/wp-content/uploads/2020/11/alexandra-private-geriatric-hospital-pty-ltd-v-the-commonwealth.pdf

General Practitioners Society v. The Commonwealth (1980) HCA 30, per Gibbs J. at p 549:

"It was held by the majority of the Court in British Medical Association v. The Commonwealth that the bracketed words in par. (xxiiiA) qualify only "medical and dental services", and that the other heads of power in the paragraph are not subject to those words: see per Rich J., per Dixon J., per McTiernan J., and per Williams J. ; contra, per Latham C.J."

https://freemandelusion.com/wp-content/uploads/2020/11/general-practitioners-society-in-australia-v-the-commonwealth.pdf

Therefore, the *"the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits"* part are not matters which fall within the matters to which *"but not so as to authorize any form of civil conscription"* applies. It applies only to the *"medical and dental services"* part of the subsection. Family Tax Benefit and Childcare Subsidy are not payments for medical and dental services anyway (even if they are linked to having a medical procedure) nor are services provided by conscripted health workers.

The mother in a Family Court dispute regarding orders that the child be vaccinated, filed an application in the High Court seeking an order removing an appeal against the orders made to the High Court, asserting that there was a question involving section 51(xxiiiA) of the Constitution. It was contended that:

> *"...the Family Law Court only has the power to make a binding order upon the mutual consent of the parties. If there is no mutual consent by the parties any order made by the Family Law Court has no legal effect because it would contravene the prohibition on civil conscription provided in s 51(xxiiiA) which is binding on all the Courts and Judges".*

The High Court application was dismissed by Steward J, finding it lacked merit and was misconceived:

> *"The constitutional point would appear to rely upon the carve out for "civil conscription" in section 51(xxiiiA) of the Constitution, which is in the following terms: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:"*
>
> *The mother alleges that this paragraph confers a constitutional freedom of some kind from compulsory vaccination. Her application for removal, which characterises the freedom as a constitutional "right", is very difficult to follow and is, with great respect, assertive in nature. Her contention is not supported by any authority and would appear to have very slim prospects of success.*
>
> *In **General Practitioners Society v The Commonwealth (1980) 145 CLR 532**, Gibbs J (as his Honour then was) observed that the phrase "civil conscription" applied to medical and dental services and "refers to any sort of compulsion to engage in practice as a doctor or a dentist or to perform particular medical or dental services" (at 557). Earlier in his Honour's reasons, Gibbs J explained the term "civil conscription" in the following way: "The word 'conscription', in the sense that seems to be most apposite for present purposes, means the compulsory enlistment of men (or women) for military (including naval or air force) service. The expression 'civil conscription' appears to mean the calling up of persons for compulsory service other than military service."*
>
> *As it is directed at preventing the conscription of a doctor or dentist to perform compulsory medical or dental services, the carve out for civil conscription in para (xxiiiA) would appear to have nothing at all to do with the power of the Family Court to make orders by consent for the*

vaccination of the daughter. Further, it is not suggested in any way that the doctor who might perform that vaccination will do so compulsorily pursuant to some Act of Parliament."

In ***Covington & Covington [2021] FamCAFC 52***, Strickland, Ryan & Aldridge JJ dismissed an Appeal application and gave reasons for judgment, adding:

> *"Furthermore, the mother would appear to recognise in her affidavit relied upon that what section 51(xxiiiA) prohibits, is legislation that authorises any form of civil conscription. However, here there is an order that the child be vaccinated; and therefore the only legislation that could be in play is the **Family Law Act 1975** (Cth). Thus, the mother would have to persuade the High Court of Australia that that Act, and presumably section 65, and maybe section 67ZC, is the relevant legislation that is caught by the prohibition in section 51(xxiiiA). However, nowhere does the mother make that submission, and indeed, in our view, it is a submission that could not be made.*
>
> *What the mother does do in her affidavit is suggest that the relevant legislation which is caught by section 51(xxiiiA) here is the Victorian Public Health (No Jab, No Play) Act 2008, and as a result that Act is invalid. However, the first point to make is that that is a Victorian Act, and not Commonwealth legislation, when only the latter would be caught by section 51(xxiiiA). Secondly, and obviously, the order was not made under the Victorian Act; it was made under the Family Law Act 1975 (Cth), and thirdly, the vaccinations once given, will be given pursuant to the orders made by his Honour.*
>
> *The mother suggested in oral submissions that this Court had more material before it than was before Steward J. We assume that that is referring to the reliance before this Court on the High Court decision of **Wong v The Commonwealth (2009) 236 CLR 573**. However, that decision can give no comfort to the mother. It does not provide a basis for the application of s 51(xxiiiA) to the proceedings here. In summary then, we are not persuaded that there is any merit in the constitutional issue relied on to have the appeal removed to the High Court of Australia. Thus, we dismissed the Application in an Appeal filed on 13 April 2021."*

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