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**MANDATORY
COVID-19
VACCINATION IN
QUEENSLAND'S
COMMUNITY LEGAL
CENTRES AND NOT-
FOR-PROFITS**

29 November 2021

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PRESENTATION OVERVIEW

Mandatory COVID-19 vaccination issues

1. Incoming restrictions
2. Employer directions
3. Unfair dismissal
4. Other vaccination-related decisions
5. Discrimination & bullying
6. Privacy concerns
7. Questions





1. INCOMING RESTRICTIONS

INCOMING RESTRICTIONS

From 17 December 2021, unvaccinated people will be unable to:

- visit vulnerable settings, including hospitals, residential aged care, disability accommodation services, and prisons. This does not apply to residents and patients of these facilities, and there will be some exceptions for medical treatment, end-of-life visits, childbirth and emergency situations
- attend hospitality venues such as hotels, pubs, clubs, taverns, bars, restaurants or cafes
- attend indoor entertainment venues such as nightclubs, live music venues, karaoke bars, concerts, theatres or cinemas
- attend outdoor entertainment activities such as sporting stadiums, theme parks or tourism experience like reef excursions
- attend festivals – either indoor or outdoor – such as musical festivals, folk festivals or arts festivals
- attend Queensland Government owned galleries, museums or libraries.

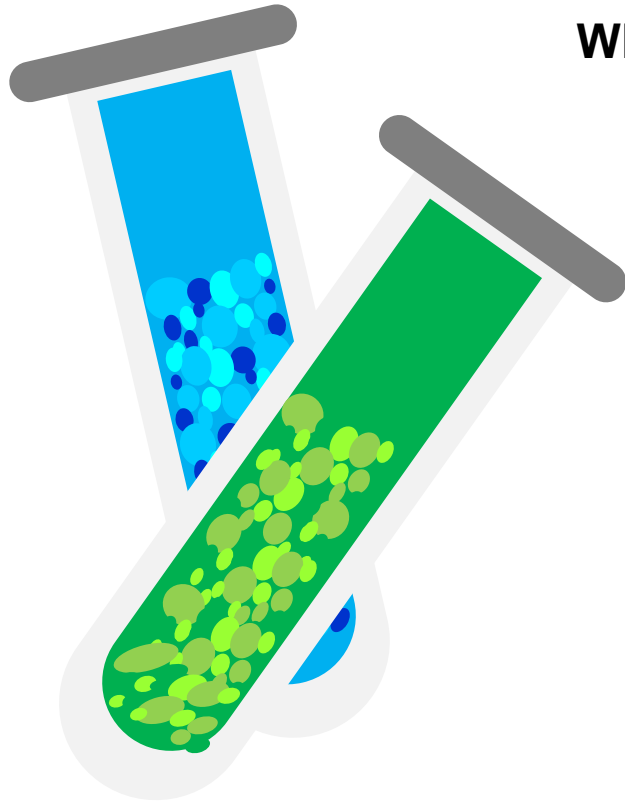
Both vaccinated and unvaccinated people will be able to access essential services and activities.





2. EMPLOYER DIRECTIONS

LAWFUL AND REASONABLE DIRECTION



Whether the direction is lawful

- Are there any Public Health Directions that relate to the direction?
- Example: aged care workers are now required by the Federal Government to be vaccinated against COVID-19
- Example: State government mask mandates
- Does an employee's Enterprise Agreement or Modern Award consider the issue?
- Does an employee's individual employment contract consider the issue?

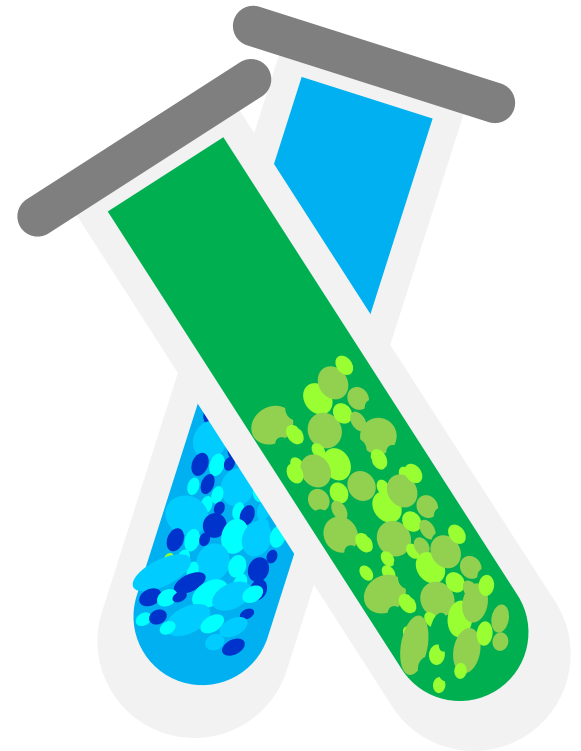
Note: a common clause in an employment contract is that the employee will abide by reasonable directions



LAWFUL AND REASONABLE DIRECTION

Whether the direction is reasonable

- Employer obligations under statute, including model Workplace Health and Safety laws;
- The inherent requirements of the role and the nature of employer's business (face to face, working in close proximity);
- The efficacy of the direction – does it mitigate risks?;
- Medical conditions/allergies to the vaccine;
- Time off work to get vaccinated;
- Access to the vaccine;
- Other control measures to prevent transmission – e.g. masks and handwashing.
- Consultation.



FEATURES OF A REASONABLE DIRECTION

A direction regarded as reasonable will likely balance the health interests of the workforce and individual employees with the rights of employees to refuse the direction on a legitimate basis. A reasonable direction might:

1. Identify and expressly state the risk to be mitigated within the specific workplace;
2. Identify the source of right or entitlement to issue the direction (i.e. contract or employment, policies, industrial instrument or legislation);
3. Confirm that an employee will be provided an opportunity to respond to the changes;
4. Confirm that responses provided by an employee will be considered;
5. Confirm that employees will receive paid time off work to receive the vaccine, and if necessary recover from it; and
6. Confirm that employers will cover the costs associated with receiving the vaccine.



NEED FOR CONSULTATION

Obligations under the Enterprise Agreement


Does the change constitute a major workplace change that is likely to have a significant effect on the employees?

Obligations under *Work Health and Safety Act 2011 (Qld)*

Section 47 – Duty to consult workers

Section 48 – Nature of consultation

Section 49 – When consultation is required

- when making decisions about ways to eliminate or minimise risks;
 - when making decisions about the adequacy of facilities for the welfare of workers;
 - when proposing changes that may affect the health or safety of workers.
- 

NEED FOR CONSULTATION

Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors [2021] QIRC 356

- An appeal against the Commissioner of Police's directions that mandated that all staff (unless exempted) must receive their first dose of a COVID-19 vaccine by **4 October 2021**.
- The applicants sought to overturn the directions on the following ground (among others):
 - The Commissioner failed to consult with employees before making the direction, in breach of the Work Health & Safety Act 2011.
- Ultimately, the Commission accepted that there was an obligation to consult under WHS laws, but that the obligation wasn't breached.



3. UNFAIR DISMISSAL

UNFAIR DISMISSAL

- Dismissal for failure to comply direction may be challenged in the Fair Commission, or the Queensland Industrial Relations Commission (for state employees), as an unfair dismissal, if the employee is eligible to access that jurisdiction
- The statutory test is a discretionary test of whether the dismissal is “*harsh unjust or unreasonable*” including regard to whether:
 - there is a valid reason for the dismissal
 - procedural fairness
 - broader harshness considerations



UNFAIR DISMISSAL DECISIONS

Glover v Ozcare


- Employee was a community-based care worker
- Employer considered that the employee's refusal to get the flu shot created a "significant risk" to their clients, and refused to roster her on for work

Jurisdictional decision:

"In my view, each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector."

Merit decision:

"Ms Glover's role was not that of a widget maker in a widget factory where her status as an unvaccinated employee might not matter. In that scenario, it might be lawful for a widget factory employer to mandate influenza vaccinations for widget makers where no such government directive had been made; however, it might not be or is not likely to be reasonable in all of the circumstances."



UNFAIR DISMISSAL DECISIONS

Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156

(Application for unfair dismissal remedy)


Facts:

- Employee was an early childhood educator at a child care centre
- In April 2020, the Employer introduced a policy which mandated the flu shot, unless the employee has a medical condition which makes it unsafe
- Employee had a sensitive immune system, including coeliac, and had an allergic reaction to the flu shot 11 years ago
- Employer terminated her employment in August 2020 due to failure to be vaccinated to meet inherent requirements of the role

Deputy President Lake at [435] to [436]]:

“This is a case where the Employer made a logical and legal analysis of the risks and hazards in the workplace, developed a response and implemented a policy to target that risk.

The policy was a reasonable one and the Applicant chose not to comply. No medical exemption was substantiated and accordingly, the Applicant’s employment came to an end. I am not satisfied that is unfair.”



UNFAIR DISMISSAL DECISIONS

Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWC 1818

- Receptionist at high-care aged care facility refused the flu shot on medical grounds
- In 2016, the employee received the flu vaccination and experienced, on her evidence, a “*major and debilitating skin inflammation*” which “*covered the top part of my body, my face and neck with internal organs also affected*” and “*which persisted for many months*”.
 - No explanation of how long after the flu shot this occurred, or the meaning of ‘internal organs’;
 - No evidence that she sought medical treatment for the condition;
 - No evidence that she took time off work for it, or told anyone at management about it
- Employee declined to have the flu shot in 2017, 2018 and 2019, and then 2020
- Employer terminated her employment on basis that flu shot constituted ‘inherent requirement of her role’
- Held: valid capacity-related reason for the dismissal



UNFAIR DISMISSAL DECISIONS

Kimber v Sapphire Coast Community Aged Care Ltd [2021] FWCFC 6015

Appeal to the Full Bench of the Fair Work Commission

Grounds of appeal:

1. Commission's finding that the employer had 'acted in an objective and reasonable way' was not advanced by the employer
2. No proper basis for conclusion that vaccination was an inherent requirement of employment
3. The applicant's medical certification that she was exempt from the vaccination requirement was sufficient
4. The Commission failed to address the employee's submissions as to why the expert immunology evidence should not have been relied on
5. Commission did not accord sufficient weight to their findings that the employer had made misleading or untruthful statements



UNFAIR DISMISSAL DECISIONS

***Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFC 6015**

Appeal to the Full Bench of the Fair Work Commission

Majority decision: leave to appeal denied

- Employee's medical practitioner had not identified a medical contraindication to the vaccine
- The Commission was entitled to accept the expert immunologist's evidence, and did not need to put that to the (unqualified) employee
- The Full Bench had concerns as to the 'credibility' of the employee's claim that she did not have the flu shot because of her reaction, and rather, suspected she was generally 'anti-vax'

Dissenting decision: Deputy President Dean

- The employee did have a valid medical exemption, so she could enter her place of work, and there was no valid reason for her dismissal
- Also, mandatory vaccinations generally cannot be justified





4. OTHER COVID-RELATED DECISIONS

COVID-19 RELATED DECISIONS

***Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors* [2021] QIRC 356**

- QPS Commissioner directed QPS staff to be vaccinated with one of three approved vaccines against COVID-19.
- Dispute notifications filed with QIRC by police officers and QPS staff
- Challenges to direction:
 1. Directions were inconsistent with the *Police Administration Act 1990* (Qld), and were an attempt to unilaterally vary the terms and conditions of employment, and therefore, had no effect
 2. Employer had failed to consult under the applicable State awards
 3. Employer had failed to consult under the WHS Act



COVID-19 RELATED DECISIONS

Brasell-Dellow & Ors v State of Queensland, (Queensland Police Service) & Ors [2021] QIRC 356

Held: applications dismissed

- Directions are consistent with the QPS and the PS Act
 - With some restrictions, the Commissioner can give lawful directions
 - the Commissioner's direction was given in her capacity as the effective 'employer'
 - The employee must comply unless there is a 'reasonable excuse'
- No failure to consult
 - No consultation required under the awards
 - Anyway, there was appropriate and adequate consultation
 - Employer undertook 'direct engagement and consultation' with all employees and also consulted all five employee unions



COVID-19 RELATED DECISIONS

Kassam v Hazzard [2021] NSWSC 1320

- Plaintiffs had chosen to refuse to be vaccinated
- Plaintiffs included construction workers, health care workers, aged care workers, a teacher, a cleaner, and a mechanic
- Challenge to orders made under NSW *Public Health Act* restricting movement of people who have not received COVID-19 vaccine
- Argued:
 - a) PHOs violated a person's right to bodily integrity
 - b) PHOs which require a person to prove their vaccination status violates their privilege against self-incrimination
 - c) PHOs differentiated between people who are vaccinated and unvaccinated, constituting discrimination on basis of disability
 - d) PHOs were rendered invalid by s. 51(xxiiiA) of the Constitution
- Held: proceedings dismissed



COVID-19 RELATED DECISIONS

Kassam v Hazzard [2021] NSWSC 1320

Per Beech-Jones CJ at [9] on the bodily integrity arguments:

“Although it was contended that the impugned orders interfere with a person’s right to bodily integrity and a host of other freedoms, when all is said and done the proper analysis is that the impugned orders curtail freedom of movement which in turn affects a person’s ability to work (and socialise).

So far as the right to bodily integrity is concerned, it is not violated as the impugned orders do not authorise the involuntary vaccination of anyone.

So far as the impairment of freedom of movement is concerned, the degree of impairment differs depending on whether a person is vaccinated or unvaccinated. Curtailing the free movement of persons including their movement to and at work are the very type of restrictions that the PHA clearly authorises.”



COVID-19 RELATED DECISIONS

Kassam v Hazzard [2021] NSWSC 1320

Per Beech-Jones CJ at [63] on consent to a medical procedure:

“People may choose to be vaccinated or undertake some other form of medical procedure in response to various forms of societal pressure including a law or a rule, an employment condition or to avoid familial or social resentment, even scorn.

However, if they do so, that does not mean their consent is vitiated or make the doctor who performed the vaccination liable for assault. So far as this case is concerned, a consent to a vaccination is not vitiated and a person’s right to bodily integrity is not violated just because a person agrees to be vaccinated to avoid a general prohibition on movement or to obtain entry onto a construction site.

[The public health orders] do not violate any person’s right to bodily integrity any more than a provision requiring a person undergo a medical examination before commencing employment does.”



COVID-19 RELATED DECISIONS

Kassam v Hazzard [2021] NSWSC 1320

Per Beech-Jones CJ at on discrimination at [204]:

“Second, even if being unvaccinated satisfies the definition of disability, then the differential treatment of people who are not vaccinated may not amount to direct discrimination because it appears that such people are not being treated less favourable “in circumstances that are not materially different” to the vaccinated (s 5(1) and 5(2)).

There is a material difference between being a person who is vaccinated and a person who is unvaccinated, namely, the degree of transmission threat they represent to others.

Similarly, the definition of indirect discrimination is qualified by a provision that stipulates that any requirement or condition imposed on an aggrieved person that “is reasonable, having regard to the circumstances of the case” is not discrimination”



COVID-19 RELATED DECISIONS


Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320

Per Beech-Jones CJ on the Constitution at [266]:

“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]).

And at [273]:

“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.”



COVID-19 RELATED DECISIONS

Johnston & Ors v Commissioner of Police & Anor; Witthahn & Ors v Chief Executive of Hospital and Health Services and Director General of Queensland Health & Ors [2021] QSC 275

- Joinder of two applications:
 - Application by seven police officers for statutory orders of review, pursuant to the *Judicial Review Act 1991* (Qld), of the Police Commissioner's Direction requiring all officers and some staff to be vaccinated
 - Application by one nurse, and twelve ambulance officers, against the Chief Executive of the HHS, and the Commissioner of QAS, about their vaccination directions
- Grounds for relief included that Directions exceeded their respective enactment's powers, breached rules of natural justice, or were improper exercise of power
- Issue: whether applications arose out of 'industrial matters' which properly fell within QIRC's exclusive jurisdiction
- Held: directions are industrial matters, but by virtue of 'supervisory jurisdiction', Qld Supreme Court has jurisdiction to entertain the applications – final hearing 20-22 December 2021




COVID-19 RELATED DECISIONS

CFMMEU, AMWU and anor v Mt Arthur Coal Mine

Facts:

- BHP Group introduced the requirement that their employees at the Mt Arthur Coal Mine (NSW), must have at least a single dose of an approved COVID-19 vaccine by:
 - **10 November 2021**; and
 - be fully vaccinated by **31 January 2022**;
 - This direction is referred to as the '**Site Access Requirement**'.
- There have been no state government Public Health Orders mandating COVID-19 vaccination across the mining sector in NSW.

Issues raised:

- Were workers properly consulted about the Site Access Requirement?
 - Was the Site Access Requirement formulated with regard to the particular circumstances of the Mine and Employees?
 - Is the Site Access Requirement a reasonable and lawful direction?
- 

COVID-19 RELATED DECISIONS

CFMMEU, AMWU and Anor v Mt Arthur Coal Mine

- CFMMEU made application under s 739 Fair Work Act, seeking the Commission deal with a dispute arising under a dispute resolution procedure in the *Mt Arthur Coal Enterprise Agreement 2019*.
- The Respondent is BHP Group.
- The matter did not resolve at Conciliation.
- The Full Bench then invited peak union and employer bodies, and the Minister to intervene, due to the significance of the matter:
 - AMWU, CEPU, ACTU, Ai Group & ACCI, were all granted leave to intervene.
- CFMMEU sought interim relief to prevent workers from dismissal, discipline or any prejudice to their employment, should they fail to present evidence of vaccination status by **10 November 2021**.
- Interim relief was dismissed by the Commission.



COVID-19 RELATED DECISIONS

CFMMEU, AMWU and Anor v Mt Arthur Coal Mine

- Rejection of interim relief was determined on the basis that there was:
 - no suggestion on the evidence that the Site Access Requirement would lead to a stoppage of work; and
 - inconvenience for affected workers did not outweigh the risk of serious illness or death posed to other employees at the site.
- Though, Deputy President Saunders agreed that there were serious questions as to whether BHP had complied with its consultation requirement under s.47 *WHS Act 2011* (NSW).
- On this basis, there is a case as to whether the Site Access Requirement was a 'reasonable direction'.



COVID-19 RELATED DECISIONS

CFMMEU, AMWU and Anor v Mt Arthur Coal Mine

- Leading contract law barrister, Ian Neil SC, appeared for BHP.
- He has advanced the proposition that a vaccination direction that is lawful (eg. within the scope of the contract), will always be reasonable.
- This proposition is currently being tested by a five-member Full Bench of the Fair Work Commission, presided over by President Ross.
- This will be the first decision of a tribunal or court considering whether a COVID-19 vaccination mandate is reasonable in the absence of a public health direction.
- The decision is expected to be handed down today by the Full Bench.



5. DISCRIMINATION & BULLYING

INDIRECT DISCRIMINATION

Disability Discrimination Act 1992 (Cth)

Section 6 - Indirect disability discrimination:

- a) the discriminator requires compliance with a requirement or condition;
 - b) because of the disability, the aggrieved person cannot comply with that requirement or condition; and,
 - c) the requirement or condition does or is likely to disadvantage persons with the disability.
-
- It will not be discrimination if the offending requirement is reasonable, having regard to the circumstances of the case.
 - The Federal legislation requires reasonable adjustments to be made to accommodate the disability
 - It will not be discrimination if the person, because of the disability, cannot perform the inherent requirements of the role



BULLYING

A worker who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission (or Queensland Industrial Relations Commission) for an order to stop the bullying

When is a worker bullied at work?

A worker is bullied at work if:

- a) while they are at work,
- b) an individual or group of individuals,
- c) repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and,
- d) that behaviour creates a risk to health and safety, and
- e) that behaviour is not reasonable management action carried out in a reasonable way



6. PRIVACY CONCERNS

EMPLOYEE INFORMATION

An employer can collect health information if:

1. The individual consents to the collection (expressly or impliedly); AND,
2. The information is ‘reasonably necessary’, or directly related to, one or more of its functions / activities (e.g. preventing COVID-19 in the workplace).

Note: individual consent is not required where the collection is mandated by law

Office of the Australian Information Commissioner:

“Only the minimum amount of personal information reasonably necessary to maintain a safe workplace should be collected, used or disclosed”



PERMITTED GENERAL SITUATION

Permitted general situation – Privacy Act 1988 (Cth) s. 16A

A permitted general situation exists in relation to the collection, use or disclosure of personal information about an individual if...

the employer reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health and safety



EMPLOYEE INFORMATION

Lee v Superior Wood Pty Ltd [2019] FWCFB 2946

On whether there was a 'valid reason' for the employee's dismissal:

- Where the employee had not consented to the collection of his fingerprint, the direction that he use a fingerprint scanner was not lawful;
- Where he had been threatened with disciplinary action should he not permit to it being collected, any consent he gave was not genuine; and,
- Where he did not have a right to refuse the collection of his fingerprints, the direction was not reasonable.

Held: an employee cannot be directed to consent to the collection of their personal information.




RECENT DECISIONS

***Knight v One Key Resources*[2020] FWC 3324**

- Employee refused to fill out survey of locations he'd visited, was terminated
- Employee filed UFD, argued that direction to complete the survey was not lawful or reasonable as it was in breach of the Australian Privacy Principles
- Employer argued it was necessary to fulfil its WHS obligations
- Held:
 - the information was not 'sensitive information', and;
 - otherwise, a general permitted situation existed; so,
 - employee had failed to follow a lawful and reasonable direction

***Fesshatsyen v Mambourin Enterprises Ltd* [2021] FWC 1244**

- Disability support worker failed to report a high temperature reading, in breach of employer's policy, and was terminated
 - Held: direction to comply with a temperature check procedure, and self-report high readings, was reasonable and lawful
- 



QUESTIONS



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