

# VACCINE MANDATES AND THE IMPORTANCE OF CONSULTATION

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## Australia Labour, Employment and Workplace Safety Alert

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A Full Bench of the Fair Work Commission (FWC) in *CFMMEU & Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 has found that BHP's COVID-19 policy mandating vaccination, while likely lawful, was not a reasonable direction because BHP did not adequately consult with employees before implementing the mandate.

While the majority of factors were in favour of BHP's introduction of the mandate, the FWC found that affected employees should have been provided with a reasonable opportunity to persuade BHP in relation to the decision to implement the vaccine mandate. The FWC found that while the current COVID-19 vaccine mandate is not a reasonable direction, this issue can be addressed with proper consultation, which would render the mandate both lawful and reasonable.

The decision will have limited impact in jurisdictions where public health orders mandate vaccination.

This decision has significant implications for employers who have introduced, or are proposing to introduce COVID-19 vaccine mandates. The decision highlights the need for employers to properly consult with employees before introducing a COVID-19 vaccine mandate, and provides guidance as to what may constitute sufficient consultation.

Employers who already have a COVID-19 vaccine mandate in place should consider, with this decision in mind, whether they met their minimum consultation obligations pursuant to applicable Work Health and Safety (WHS) legislation and any relevant industrial instrument.

## SUMMARY OF THE FACTS

Mt Arthur Coal Pty Ltd (Mt Arthur) is a member of the BHP Group, and operates a coal mine in New South Wales (NSW) (the Mine). The dispute concerned 724 employees who work at the Mine and are covered by the *Mount Arthur Coal Enterprise Agreement 2019* (the Agreement).

On 7 October 2021, Mt Arthur announced that all workers at the Mine were required to be vaccinated against COVID-19 as a condition of site entry. The announcement provided that workers 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 (the Site Access Requirement)

The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) notified a dispute under s739 of the *Fair Work Act 2009* (Cth) (FW Act), claiming the Site Access Requirement did not constitute a lawful and reasonable direction.

## THE FAIR WORK COMMISSION DECISION

The FWC held that the Site Access Requirement was lawful but was not reasonable. This was primarily because Mt Arthur did not sufficiently comply with its obligations to consult employees about the direction.

### Was the Site Access Requirement Lawful?

Although not expressing a concluded view, the FWC found the direction was *prima facie* lawful because it fell within the scope of the employment, and there is nothing illegal or unlawful about becoming vaccinated.

The FWC also observed that generally where the purpose of a direction is to protect the health and safety at work of employees and other persons frequenting the premises, then the direction is likely to be lawful.

### Was the Site Access Requirement Reasonable?

The FWC confirmed that reasonableness is a question of fact having regard to all the circumstances, and that what is reasonable in any given circumstance may depend on, among other things, the nature of the particular employment.

The FWC went on to state that in order to establish that a direction is reasonable, it is not necessary to show that the direction is the preferable or most appropriate course of action, or in accordance with best practice or in the best interests of the parties.

The following factors were considered "reasonable" aspects of the Site Access Requirement:

- It was directed at ensuring the health and safety of workers of the Mine;
- It had a logical and understandable basis;
- It was a reasonable and proportionate response to the risk created by COVID-19;
- It was developed having regard to the circumstances at the Mine, including the fact that Mine workers cannot work from home and necessarily come into contact with other workers whilst at work;
- The timing for its commencement was determined by reference to circumstances pertaining to New South Wales and the local area at the relevant time; and
- It was implemented only after Mt Arthur spent a considerable amount of time encouraging vaccination and setting up a vaccination hub for workers at the Mine.

However, notwithstanding these factors, the FWC found the Site Access Requirement ultimately was not reasonable because Mt Arthur had not complied with its obligation to consult properly with its employees prior to implementation.

### The Obligation to Consult

The *Work Health and Safety Act 2011* (NSW) (the WHS Act) obliges persons conducting a business to consult with workers, insofar as is reasonably practicable, and sets out some criteria to meet that requirement.

The WHS Act is based on model laws that have been enacted in all jurisdictions except Victoria and Western Australia, though those States also have similar consultation obligations.

In finding that it was uncontentious that the introduction of the Site Access Requirement enlivened the consultation obligations in the WHS Act, the FWC made some general observations on what constitutes consultation:

- The consultation required will depend on the terms in which the requirement is expressed, and the nature of the issues subject to the requirement;
- Those consulted must be given an opportunity to be heard;
- The consultation must be real, it must not be a mere formality;
- The party to be consulted must be given notice;
- A right to be consulted is not a right of veto;
- The consultation process must occur before the decision is made; and
- The consultation must provide a genuine opportunity for the affected party to attempt to persuade the decision-maker to adopt a different course of action.

Mt Arthur argued it had consulted employees through a series of phases where it:

- Promoted COVID-19 vaccinations to all employees and provided an education program;
- Asked for feedback through setting up a central mailbox which invited questions and set up a COVID-19 Vaccination Working Group to assess and collate questions and comments; and
- Engaged with employees focusing on how the direction should be introduced and addressed the circumstances of employees who could not be vaccinated.

The FWC found that despite these actions Mt Arthur had not done enough to consult because:

- The employees were not asked to contribute any ideas or suggestions in relation to the decision-making process or the risk assessment that underpinned the decision;
- Little to no information was provided to employees about the risk assessment;
- While Mt Arthur was not obliged to provide the Risk Assessment document to employees, it was required to provide information explaining how matters had been weighed up and taken into account; and
- The employees were not given a reasonable opportunity to express their views, raise work health or safety issues, or contribute to the decision-making process before the decision was made.

## **WHAT NEXT FOR MT ARTHUR AND BHP?**

The FWC noted that Mt Arthur can address its consultation deficiencies by properly consulting with employees in relation to the question of whether or not the Site Access Requirement should be imposed at the Mine.

Provided that Mt Arthur commences its consultation process in a timely fashion (noting that the NSW roadmap proposed the relaxation of various COVID-19 restrictions on the earlier of 15 December 2021, or at 95 percent double vaccination rate), Mt Arthur should be in a position to make a decision about whether to impose the Site Access Requirement prior to 15 December 2021.

## WHAT DOES THIS MEAN FOR VACCINE MANDATES?

This decision does not mean that an employer mandate to be vaccinated is not a lawful and reasonable direction – in many ways the decision bolsters employers' ability to introduce such mandates, within reason and with appropriate consultation prior to making such a decision.

Employers seeking to implement COVID-19 vaccine mandates should ensure that they properly consult with employees, and afford employees a reasonable opportunity to persuade the employer as to whether to introduce the mandate, and if so, how. If an employer is concerned that it may not have met the required consultation standard, it should seek advice about its own particular circumstances.

Further, this decision took place in a context where there was nothing in the public health orders that provided a legal basis for the Site Access Requirement, from which it followed that the basis for the mandate was a lawful and reasonable direction.

The Fair Work Commission's judgment can be accessed [here](#).

## KEY CONTACTS



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