NEWSLETTER - FEBRUARY 2022

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Note: The views of the contributors are not necessarily those of ALERA SA

Patron
Greg Stevens

PRESIDENT'S MESSAGE

Dear Members

Starting the year on a high
Our last function for 2021 was a great success with people being able to network, honour some local members and reflect on our 60th year. Patron, Greg Stevens hosted the annual Patron's Function on 30 November at the Police Club with a rolled up Christmas, Birthday and Awards agenda. A pleasant mix of formality and conviviality.

AleraSA had two nominees for national awards that were not able to be presented personally due to the virtual format of the 2021 National Conference.

Craig Stevens was the recipient of the SA award, not so much in recognition of his experience at the Police Association, Crown Law and in private practice but because of his steadfast service to the state and national bodies. Craig has always been ready and willing to do the heavy lifting and filling leadership positions. Craig is tireless in his work for the association and thoroughly deserves his gong.

The national body also bestowed Life Membership on Prof Keith Hancock AO for a lifetime of achievements. Later in this newsletter is a brief but impressive bio. Keith reflected on his career and the formation of the IR Society (as it was then known). Keith's presentation appears later too.

I trust everyone had a safe and pleasant break and is glad to have returned to the fray for 2022.

Glen Seidel, President – ALERA SA

Recent Activities

Seminar – 29 September 2021 - From Vaccine Passport To Work Permit? Mandatory Vaccinations in the Workplace

The Association hosted a seminar looking at what was then, very much, only the emerging possibility of wide-spread directions by employers to require their employees to be vaccinated to attend work. Our panel was chaired by Deputy President Anderson of the Fair Work Commission and consisted of Bernadette Mulholland from the South Australia Salaried Medical Officers Association, Kaye Smith from EMA Legal, Craig Stevens from Authentic Workplace Relations and Simon Bourne from Bourne Lawyers.

Bernadette Mulholland provided a unique insight into the issue from the point of view of her members, indicating that there was wide (but not universal) support for vaccine mandates amongst the membership. This was not just in order to protect themselves as employees in a workplace but because of their desire to ensure that the State's hospitals maintained the capacity – and the necessary ICU beds – to treat any and all of those who might come to need it. It was another of many rather sobering reminders of the extent to which our health care workers have kept the needs of others and their ability to be available to provide care when needed at the forefront of their minds throughout this pandemic.

Kaye Smith, who has gone on to write an excellent article featured later in this newsletter, gave a first-hand insight into how employers were approaching her for advice in dealing with this issue and what had been found to be effective in managing the introduction of vaccine-related policies in the workplace. Kaye indicated that she had found that discussion, education and meaningful consultation between employers and their employees was not only a very important part of the process (as the recent decision in *CMFMMEU v Mount Arthur Coal Pty Ltd* has confirmed) but one which is effective in minimising the resistance to any policies an employer is contemplating bringing in.

Craig Stevens spoke to the differences, or lack thereof, between public sector workplaces and the powers available to public sector employers compared to those operating in the private sector when it comes to vaccine 'mandates'. Craig posited that it is probably the nature of many public sector workplaces rather than any public/private sector distinction might mean the public sector is more likely to be able to mandate vaccinations for its workers. That was suggested to be because the public sector employs so many people in those areas which are considered to be particularly high risk, such as health, education, disability support and corrections.

Simon Bourne identified some themes which appeared to be carrying through from older cases looking at the introduction and enforcement of zero tolerance drug and alcohol policies and some of the very early decisions considering the mandatory vaccination policies brought in, at that stage, in the aged care sector. Simon noted the Commission's willingness to allow employers to enforce their policies, especially those brought in to minimise risks to health and safety at work - even where there may not have been any identifiable risk to safety created by the specific conduct of any given individual employee. He also noted the apparent reluctance of the Commission to consider making orders reinstating employees who were found to have been unfairly dismissed in circumstances where those employees had indicated or evidenced an unwillingness to comply with a policy which was being implemented by their former employer.

1 - Glen Seidel, President, presenting Craig Stevens with his National Award in recognition of his service to the Society

Patron's Function – 30 November 2021 – The Origins of the Industrial Relations Society [*]
Keith Hancock

The realities of industrial relations, stemming from the uneasy collaboration of capital and labour, have a history that is centuries old. They were discussed by writers such as Adam Smith and Karl Marx and had long been the subject of governmental invention. In the late 19th and early 20th centuries the workplace relations of employers and employees and the role of representative bodies — unions and employer associations — became the subject of systematic study, especially in the United States.

In Australia, however, there was very little of that. The pioneer, perhaps, was Orwell Foenander, a protégé of Douglas Copland. Working mainly in the 1930s and 1940s, Foenander wrote about a dozen books. Some of them are important, but they have the limitation of being written almost solely from the perspective of labour law. Foenander always stood in awe of the Arbitration Court judges. I had a few short conversations with him, mainly in the washroom of the toilet in the Melbourne University commerce building. There were several economists, including L F Giblin, H P Brown and Colin Clark, who wrote and spoke about the interaction of wages, working conditions and the economy. Kenneth Walker, a psychologist who had worked during the war in the Department of Labour and National Service and later became a professor at the University of Western Australia, was a respected contributor to discussion about the world of work. Joe Isaac, at Melbourne University in the 1950s, taught and wrote about labour economics and was more broadly versed in industrial relations. Joe had a good deal to do with my career.

[*] Script of a talk to the Patron's Function of AleraSA, 30 November 2021.

2 - Keith Hancock, Life Member

In 1955 I graduated at Melbourne with an honours degree in economics and history, and was employed by the University for 18 months as a tutor in economic history and public finance. During that period, I worked twice for the ACTU as an assistant to R M Eggleston QC in basic wage cases. My guess is that the ACTU recruited me for this work on the recommendation of Joe Isaac. In the second case, beginning about November 1956, I was joined by another assistant, R J Hawke. Bob was then a PhD student at the ANU in Canberra. The beginning of the case coincided with the Melbourne Olympics and there was no spare accommodation in Melbourne. So it was that Bob stayed with my parents and me in Hartwell. As I later recounted to Blanche D'alpuget, my mother remarked on what a nice, quiet boy Bob was.

Melbourne University was kind enough to award me a travelling scholarship. It was Joe Isaac who persuaded me to undertake a PhD in London and arranged for me to be supervised by Henry Phelps Brown, who was the first professor of labour economics at the London School of Economics. Henry had supervised Joe's PhD. He was a great supervisor and a great man. Among his many publications was an important book about the history of British industrial relations. I completed my PhD in 1959 and accepted the offer of a Lectureship in Economics at Adelaide University. My appointment was due, in part, to the University's need for a labour economist.

At some time in 1961, the head of the economics department, Peter Karmel, showed me a letter that he had received from Kingsley Laffer, who was a Senior Lecturer in Economics at Sydney University. In 1958, Kingsley had launched both the *Journal of Industrial Relations* and the Industrial Relations Society in New South Wales. The two were complementary, for Kingsley saw the Society as a source of subscribers for the journal. I do not know what led to Kingsley's interest in industrial relations. His letter to Peter Karmel asked whether Peter would take the lead in forming a Society in South Australia. I presume that he had written to like effect to people in other States in the hope of expanding the readership of his journal. Peter was not interested in doing the work himself, but asked whether I might take it on. He said that his good friend, John Portus, would probably work with me.

John had been appointed a Conciliation Commissioner in 1944. He eventually retired in 1978 and, I believe, is the longest-serving member of the federal industrial tribunal since its inception in 1904. We met and agreed to do our best to comply with Kingsley's request. Accordingly, we contacted various people and interest groups to get their support. We ran into an early hurdle, however, in the form of the Secretary of the Chamber of Manufactures, who warned his members against participating in what he saw as a socialist enterprise. John and I explained our predicament to Lindsay Bowes, Secretary of the Department of Labour. Lindsay readily agreed to help us get around the immediate problem and became an enthusiastic supporter of the Society. I would say that John, Lindsay and I had equal claims to be recognised as the founders. I much admired John and Lindsay and greatly regretted their passing.

Peter Hampton has admirably compiled the subsequent history of the Society and I will not replicate that. You can read on the web the names of the various office-bearers over the years 1962-70. John Portus was the first President and Lindsay Bowes the second. In the early years, I was secretary.

3 - Greg Stevens, Patron

The South Australian Society was the second, after New South Wales. By 1965, there were societies in New South Wales, South Australia, Victoria, Queensland and Western Australia. There were annual conventions of the New South Wales Society, usually held at Terrigal. These were well-attended by people from other States. At the 1965 convention, it was agreed to form a national body, the Industrial Relations Society of Australia, which took over from New South Wales the ownership of the journal. The inaugural President was J R Kerr. He was a QC and had represented the New South Wales government in one of the basic wage cases that I mentioned. Kerr was an active member of the New South Wales Society and a frequent contributor to the journal. Presidents typically served for one or two years. After Kerr, there were Norm Thom (President of the NSW TLC), George Polites, Lindsay Bowes, Keith Hancock, John Moore and then another South Australian, Harry Krantz. South Australian Presidents were then lacking until 1988, when Roy Hegarty was chosen. Bill Holdsworth became President in 1994 and Peter Hampton in 2012. Kaye Smith was National President in 2018 and 2019. The current President is Greg Bamber, an industrial relations academic at Monash University.

If this were not a convivial occasion, I would talk about the difficult and in some respects contentious question of what exactly is industrial relations. The conversion to 'Labour and Employment Relations', which I regret, has ducked that question. It still deserves an answer. But I will spare you that.

4 - Greg Stevens and Keith Hancock AO at the Patron's Function

Know Your Committee

Life Member - Emeritus Professor Keith Hancock AO

Professor Keith Hancock has made a significant contribution to the field of industrial relations and labour economics study and practice in a variety of capacities over many years. This is evident on a national and international basis where Keith has been recognised as an authority in various disciplines and fields including labour economics and wage fixation. Keith has also made a significant contribution to ALERA, in its former entity - the Industrial Relations Society of Australia - and to ALERA SA, which was recognised some years ago by way of life membership of that body.

Amongst Keith's many contributions and achievements relevant to his nomination, are:

- Qualifications include: BA (Melbourne), PhD (London), Hon DLitt (Flinders), Hon DCom (Melbourne), Honorary Fellow (London School of Economics).
- Following encouragement from Kingsley Laffer, was one of the moving forces for the establishment of an IR Society in South Australia and became the Inaugural Secretary of the IR Society of SA in 1961 - remaining on the committee in various capacities (including a term as President) until 1985.
- Former President of the Industrial Relations Society of Australia, part of the group that established this body, and a national committee member representing SA for many years.
- Senior Deputy President of the Commonwealth Conciliation and Arbitration Commission and later the Australian Industrial Relations Commission - appointed in 1987 and served until 1997.
- Vice Chancellor of Flinders University between 1980 and 1987 - amongst many other senior academic roles at Melbourne University, Adelaide University, Flinders University and London School of Economics.
- Made an Officer of the Order of Australia in 1987 for services to education.
- Chaired or sat on 3 major national enquiries conducted on behalf of various Commonwealth Governments; namely enquiries dealing with occupational superannuation, the monetary system and thirdly into industrial relations law and systems (commencing in 1973 and called the Hancock Committee/Report).
- Provided economic advice and support advocacy for the ACTU's case to the 1955, 1956 and 1957 basic wage case hearings.
- Author of many leading textbooks in economics, labour economics and wage fixation including "Wage Policy: Infancy and Adolescence", published by the University of Adelaide in 2013 and continues to research and publish articles and books to this day including more recently- "Work and Employment Relations, An Era of Change" and "Industrial Relations Reform: Looking to the Future" - Essays in honour of Joe Isaac AO.
- Fellow and former President of the Academy of the Social Sciences in Australia and former President of Economic Society of Australia (South Australian Branch).
- Founded the Flinders University (later the National) Institute of Labour Studies

Committee Member - Nicky Candy, Working Women's Centre

Nikki Candy is an Industrial Officer at the Working Women's Centre SA.

Nikki has a Bachelor of Laws and Legal Practice and a Bachelor of Arts from Flinders University. Nikki also studied abroad at the University of California, Santa Cruz where she studied Political Science and International Law.

Nikki has worked in the Industrial Relations arena for almost 15 years in a number of different positions and organisations. She has predominately worked representing disadvantaged workers and union members.

Nikki started her career in the Law Graduate Program at the Fair Work Commission in Melbourne where she worked for several years. She also worked in the Unfair Dismissal Team and was later promoted to an Associate to a Commissioner in Brisbane.

Upon moving back to Adelaide in 2012, Nikki became the Coordinator of the Young Workers Legal Service where she trained and mentored Law Student Volunteers to assist young people with wage theft claims, unfair dismissals and discrimination matters.

Before commencing at the Working Women's Centre, Nikki spent almost five years as an Industrial Officer and Advocate in the Construction and Maritime Divisions of the Construction, Forestry, Maritime, Mining and Energy Union.

Nikki is passionate about her role assisting vulnerable clients at the Working Women's Centre and particularly in representing workers in sexual harassment claims.

The Protective Power of Job Security

By Maddie Sarre et al, Working Women's Centre

Content Note: This report contains references to domestic and family violence, sexual harassment, assault and rape.

The findings in this report have demonstrated how insecure work makes it more difficult to resist, report and recover from gendered violence. The information compiled by the Working Women's Centre volunteers reveals and solidifies the link between financial instability and the persistence of harm against women both in the workplace and outside of it.

Gendered violence is violence that is connected to gender inequality. It is a dominance of power and control over certain individuals or groups of people connected to their gender. Gendered violence includes, but is not limited to, domestic, family and sexual violence, sexual harassment, sexual assault, and stalking. These forms of violence are ultimately utilized to intimidate, harass, control, belittle, harm, and/or coerce another person.

Examples of workplace gendered violence that clients of the Working Women's Centre encounter include but are not limited to sexist slurs and inappropriate joking or 'banter', inappropriate comments on their sex lives, persistent and unwanted sexual advances, and in extreme cases – sexual assault and rape.

Women are particularly subjected to gendered violence by men, as men are often in positions of power over women in society and the workplace. Over 1 in 3 Australian women have experienced violence perpetrated by a man since the age of 15. According to the Respect@Work Report (2020), 1 in 3 people in Australia have experienced sexual harassment at work in the last 5 years: 39% of women and 26% of men. It was also found that 79% of survey respondents stated that their harassers were male.

Additionally, the COVID-19 pandemic is connected to increases in domestic violence in Australia. A survey of 15,000 women in May 2020 found that two-thirds of those who had experienced violence during the first few months of the pandemic said the violence had either started or escalated during that time. South Australian domestic violence services noted a large spike in demand for emergency accommodation that coincided with the COVID-19 pandemic in 2020. Australia's domestic violence workforce have observed that COVID-19 has led to an "increase in control and coercion; increase in isolation; increase in financial abuse; and new ways and more severe emotional and psychological abuse."

Gendered violence is a cultural problem, but it also is driven by economic inequalities. **Insecure work**, also referred to as precarious work, refers to employment in which workers have few social and economic securities. Factors that may indicate the existence of an insecure job include uncertainty of wages, lack of permanency, lack of access to paid leave, irregular working hours, and lack of bargaining power. Generally, insecure work includes casual work, seasonal work, independent contracting work and rolling short-term contracts. Australia has high rates of insecure work: more than 1 in 5 Australian workers are employed casually. In the recent Australia Talks Survey, over a quarter of respondents were worried about losing their job in the next year.

In Australia, women are more likely to be employed insecurely than men. In August 2020, 23.8% of working women were employed casually compared to 20.5% of men. As of August 2021, 67.8% of part-time workers in Australia are women. This overrepresentation in insecure work makes women prone to financial instability over men with an additional impact on their ability to escape gendered violence should they experience it. Being employed precariously makes it more difficult to resist gendered violence, as resistance is likely to have greater repercussions.

It is well established that poverty, or economic dependence on men, which is often tied to insecure work, can stop a woman from leaving a violent relationship. Results from an online survey suggest that many women believe that taking time off work because of family and domestic violence would negatively impact their income. Insecure work can be used as a direct tool by employers to threaten workers. Through punitive rostering, employers or managers can exert control over workers in response to rejection or resistance to harassment. Women on temporary visas are particularly vulnerable, because the threat of losing your job if you resist sexual harassment is exacerbated for those who may also be threatened with losing their visa. In one Working Women's Centre SA sex slavery case, a worker was told that if they refused to provide sexual favors, their employer would not pay them for work already done.

Thus, the protective power of job security provides strengthened economic independence and the ability to escape violence. Secure employment also improves gender outcomes in the workplace by making workers feel safer to report incidences of gendered violence and increasing self-determination. Improving improve job security in our workplaces could involve: employers or organizational leaders making a commitment to improve job security for their employees; workers starting conversations in their workplace about gendered violence and what could be done to help prevent violence and building awareness of how insecure work is connected to gendered violence; and how there are structural factors which drive gender inequality and violence against women.

Employer's Perspectives – 'Mandatory' Vaccinations in the Workplace

By Kaye Smith, Partner, EMA Legal

The current pandemic raises a number of issues for employers, including how the shared obligation to minimize risks to work health and safety can be practically managed, whilst respecting choice and preserving workplace relationships. Employers are in a difficult position. Without clear leadership and legislative support for 'mandatory' vaccines (other than in specified industries or occupations), employers are left to balance competing interests, and manage the fall out.

It may be wrong to describe the current expectation as one of 'mandatory' vaccinations. There is a choice. Once employees exercise their choice to have or not have a vaccination, employers should in fairness, be free to manage that consequence including by dismissal. In practice, the overwhelming approach by employers has been in our experience, one of education and co-operation, and to bring together common interests through consultation. In many industries labour is already in short-supply. Employers need to run a business, and doing that successfully requires a balancing of the consumer interest, personal interest (no one actually *wants* to get COVID-19), employee interest, legal compliance and legal risk.

The first step toward assessing that risk must be to identify who is vaccinated, who intends to be vaccinated, who cannot on medical grounds be vaccinated and who is *choosing* not to be vaccinated. For those *choosing* to remain unvaccinated, the employer would seem to be on solid ground in likewise *choosing* to work with those who can be best protected from the virus as far as possible, and *choosing* to minimize the chance of legal liability if that person should contract virus. Before moving to any termination decision, it is important for employers to recognize the need to consult, even in short time frames, so as to understand and correct misinformation (if that is the cause of the hesitation) and explore alternatives if this is reasonable.

There are 'non-pharmaceutical' measures that can be adopted to minimize as far as practicable the risk to the non-vaccinated employee and others working with them. By no means exhaustive this might include:

- Approving leave without pay on agreed conditions (perhaps approving work for other employers in this time);
- Requirement to produce negative covid-19 test results on a frequent basis, particularly where rapid testing has become available;
- Requirement to wear masks, social distance, hand sanitise;

- Transfer to roles with less person-to-person 'forward facing' tasks;
- Work from home, reviewed periodically for efficiency and effectiveness, on a full or part time hours basis.

What are some of the other issues?

Employers who have successfully educated the majority of their workforce to reach safe levels of vaccination report evolving concerns from staff who are refusing or who are reluctant to work alongside other non-vaccinated people. That is a challenge that continues to play out. Employers are also grappling with the expectation from consumers that staff will be vaccinated, or will choose business who have a no-jab, no-entry policy. That also presents challenges. Consumers or visitors to business opposed to vaccination have their own perspective, and we have seen examples of unnecessary abuse and violence toward those business owners in Victoria that can never be condoned.

Concerns as to legal liability for employees contracting the virus are real. The recent decision of *Sara v G&S Sara Pty Ltd*[1] concerned an employee (the director of the Respondent and its related corporations) who travelled from Sydney to New York in July 2020 for work purposes. In late July he was diagnosed with COVID-19 and by late November he died from acute respiratory complications from the virus.

The virus was contracted in the course of employment - likely during the employee's travel to New York while passing through customs in San Francisco. This was based on:

- The onset of the employee's symptoms;
- The employee's reluctance to wear masks;
- The likely exposure to many people during the period of travel; and
- The medical evidence as to the likely incubation period.

The employee's widow was awarded a lump sum benefit of $834,200, in addition to weekly payments under the *Worker Compensation Act 1987* (NSW).

Put in this context, the decision of large employers such as SPC, Qantas, Virgin Australia, BHP and Telstra to introduce mandatory COVID-19 vaccinations is not surprising.

Case law is supportive generally speaking, of the lawfulness and reasonableness of an employer's direction to vaccinate. Context and circumstance is always critical but a number of serious challenges to the requirement, albeit in the context of underlying public health orders, have failed.

In *Maria Corazon Glover v Ozcare*[2], Commissioner Hunt found that a long-serving care assistant was not unfairly dismissed when her employer implemented a policy, in accordance with the Queensland government's Aged Care Direction, to have an influenza vaccine, which she refused. Hunt C determined that the employer's requirement was lawful and reasonable. The employer exercised a 'managerial prerogative' to safeguard clients and employees as far as reasonably practicable, and in circumstances where the employee was 'client-facing':

> [242] I do not accept that Ozcare's decision to introduce and enforce the Employee Immunisation Policy means that it has acted unlawfully. Ozcare has not physically required any employees, including Ms Glover to be vaccinated against their will. It has not held an employee down against their will and inflicted a vaccination upon them. Further, I do not consider its stated position requiring employees to be vaccinated or face termination is unlawful. I note it does not breach any ground of discrimination…

[1] [2021] NSWPIC 286.

[2] [2021] FWC 2989.

Finding that the direction was reasonable, Hunt C stated:

> [247] In considering the reasonableness of the introduction of the revised Employee Immunisation Policy, I have had significant regard to the vulnerability and age of the clients cared for by Ozcare and its employees in community care. Thousands of elderly clients, including more than 8,000 clients aged 75 or older ought to expect that the paid worker attending their home will take every precaution not to share influenza which alone could cause them to become extremely unwell or even die. Combined with the risk of potentially contracting coronavirus, it is, understandably, an alarming concern for the client and for their family (if they have family). In any inquiry into how an Ozcare client contracted influenza if largely isolated at home with few visitors, Ozcare would no doubt be required to answer questions, if put, as to whether the Ozcare worker was vaccinated against influenza. If answering to a client or a client's family that the Ozcare worker knowingly was unvaccinated and permitted to work, this could or might expose Ozcare to legal proceedings for relevant breaches of duty of care to its vulnerable patient.
>
> [248] I accept the evidence of Ozcare's witnesses that its community-care employees could potentially become super-spreaders of influenza, on account of them visiting many clients' homes per day, and there being no formal infection control in the clients' homes; far less than available in residential aged care. I have had particular regard to the evidence of Mr Foley at [163]. I accept Mr Foley's evidence that despite Ms Glover's assurances that she would religiously wear PPE, Ozcare has reasonably determined that in the event an employee contracted influenza, there is risk that it may be passed on to clients in their homes. The wearing of PPE alone, without vaccination is an insufficient safeguard.

In *Ms Bou-Jamie Barber v Goodstart Early Learning*[3], Deputy President Lake upheld the dismissal of a childcare worker who was unable to support her claims of having a 'sensitive immune system' and prior adverse reaction to a vaccination with any medical evidence. The employer had adopted a policy requiring employees to have influenza vaccinations, "unless they have a medical condition which makes it unsafe for them to do so."

In disagreeing with the employer that the employee's failure to get the vaccination rendered her unable to perform the inherent requirements of her role, the Deputy President commented that such a test should be considered a "higher bar than identifying a direction as reasonable and lawful." While the employer's argument in respect of the employee's failure to meet the inherent requirements of her position were not accepted, the Deputy President was satisfied that there was valid reason to terminate the employee's employment for her failure to comply with the lawful and reasonable direction to be vaccinated, commenting:

> [313] What is reasonable is a question of fact; it "does not involve an abstract of unconfined assessment as to the justice or merit of the decision." The direction must relate to the subject matter of the employment, which is informed by the "nature of the work the employee is engaged to do, the terms of the contract, and customary practices or the course of dealings between the parties."

The policy need only be reasonable, and it is immaterial that a "*better*" policy may exist.

The Deputy President determined that the direction was reasonable for reasons including the employer and employee's obligations under the *Work Health and Safety Act 2011* (Qld), the employer's operations in a highly regulated industry (childcare) where safety is of paramount importance, as well as the fact that to supplement a lack of vaccination, the employer would need to implement various other controls which would have either been impractical or ineffective.

[3] [2021] FWC 2156.

In the notable decision of *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd*[4], the majority of the Fair Work Commission's Full Bench (Vice President Hatcher, Deputy President Dean and Commissioner Riordan) upheld the dismissal of an aged care receptionist, who refused the comply with the NSW Government's second public health order requiring anyone entering an aged-care facility to have the influenza vaccination, unless they present a certificate in an approved form, certifying a medical contraindication to the vaccination against influenza. The reasons of the tribunal members highlight just how polarizing the question of vaccination is.

The employer dismissed the employee on the grounds that she could not perform the inherent requirements of her position. Despite the employee providing the employer with a letter of support from her General Practitioner stating that she suffered severe facial swelling and rash following an alleged 2016 vaccination, the majority of the Full Bench determined that a contraindication to the influenza vaccination must be something that qualifies, objectively speaking, as a medical contraindication to the vaccine. A skin condition was not found to constitute a medical contraindication.

In rejecting the application for appeal, the majority also observed that the employee's lack of willingness to have the COVID-19 vaccination per the Commonwealth Government requirement for all residential aged care workers to do so from 17 September 2021, supported the inference that the employee held a general anti-vaccination position, meaning her preferred remedy of reinstatement could not be granted. That observation was heavily criticized by Deputy President Dean in her dissenting decision. Dean DP made the point that this denied the receptionist the protections afforded by the *Fair Work Act 2009,* in part because of her anti-vaccination position. The Deputy President's decision concluded with the following robust remarks:

> [181] Blanket rules, such as mandating vaccinations for everyone across a whole profession or industry regardless of the actual risk, fail the tests of proportionality, necessity and reasonableness. It is more than the absolute minimum necessary to combat the crisis and cannot be justified on health grounds. It is a lazy and fundamentally flawed approach to risk management and should be soundly rejected by courts when challenged.
>
> [182] All Australians should vigorously oppose the introduction of a system of medical apartheid and segregation in Australia. It is an abhorrent concept and is morally and ethically wrong, and the anthesis of our democratic way of life and everything we value.
>
> [183] Australians should also vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID. Science is no longer science if it a person is not allowed to question it.
>
> [184] Finally, all Australians, including those who hold or are suspected of holding "anti-vaccination sentiments", are entitled to the protection of our laws, including the protections afforded by the Fair Work Act. In this regard, one can only hope that the Majority Decision is recognised as an anomaly and not followed by others.

The Deputy President's comments were recently heavily criticized by NSW Supreme Court Justice Beech-Jones in *Kassam v Hazzard; Henry v Hazzard*[5], with the Justice relevantly stating:

> [65] Given the very different jurisdictions being exercised by the Fair Work Commission and this Court, I would not ordinarily address the reasoning in their decisions (and I doubt they would address the reasoning in mine). However, as the Henry plaintiffs sought to rely on the reasoning it is necessary to record why that judgment is of no assistance.

[4] [2021] FWCFB 6015.

[5] [2021] NSWSC 1320

…
[68] Third, elsewhere in her reasons, the Deputy President considered it necessary to opine on matters affecting either the validity or the appropriateness of making the Aged Care Order under the PHA (at [147] to [173]). The function of determining its validity is for this Court to discharge and the function of determining whether it should have been made is for the political process. The Fair Work Commission has neither function.

[69] Fourth, the Deputy President's judgment concludes with a number of clarion calls imploring "all Australians" to do things such as "vigorously oppose the introduction of a system or medical apartheid and segregation" (at [182]) and "vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID" (at [183]). Political pamphlets have their place but I doubt that the Fair Work Commission is one of them. They are not authorities for legal propositions.

In this case, Justice Beech-Jones dismissed two challenges to the NSW State Government's use of Public Health Orders, mandating COVID-19 vaccinations for certain workers. The plaintiffs in this case claimed that they had made informed decisions to not be vaccinated and contended that the orders were invalid. The plaintiffs in the Kassam proceedings commenced claims against the Minister, the Chief Medical Officer and the State of NSW and the Commonwealth, while the plaintiffs in the Henry proceedings only commenced claims against the Minister.

The Kassam plaintiffs argued Order (No 2) was invalid because, the Minister did not undertake any real exercise of power in making the order, the Order was either outside of the power conferred by s 7 of the Public Health Act or represented an unreasonable exercise of the power, and it was unreasonable.

The Henry plaintiffs argued several Orders were invalid because of their effect on rights and freedoms, the Orders' purported extension beyond the scope of s 7(2) of the Public Health Act and that in making them, the Minister failed to have regard to various relevant considerations and to act reasonably.

In respect of the plaintiff's claims that the Orders curtailed their "rights and freedoms", Justice Beech Jones stated:

[9] 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. Hence, the principle of legality does not justify the reading down of s 7(2) of the PHA to preclude limitations on that freedom.

[10] Further, any consideration of the unreasonableness of an order made under s 7(2) is to be undertaken by reference to the objects of the PHA which are exclusively directed to public safety. Orders and directions under the PHA that interfere with freedom of movement but differentiate between individuals on arbitrary grounds unrelated to the relevant risk to public health, such as on the basis of race, gender or the mere holding of a political opinion, would be at severe risk of being held to be invalid as unreasonable (see Li at [70] per Hayne, Kiefel and Bell JJ). However, the differential treatment of people according to their vaccination status is not arbitrary. Instead, it applies a discrimen, namely vaccination status, that on the evidence and the approach taken by the Minister is very much consistent with the objects of the PHA. Accordingly, for this reason and the reasons set out below this aspect of both challenges fails.

In dismissing the challenges, Justice Beech-Jones noted that it is not the Court's function to determine how to respond to the pandemic, but to determine the legality of the orders, including consideration as

to whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences.

Justice Beech-Jones ultimately determined that the plaintiffs failed to demonstrate:

- that Order (2) was not a genuine exercise of power by the Minister;
- that the making of the Orders involved any failure to ask the right question or any failure to take into account relevant considerations;
- that the Minister took into account irrelevant considerations for an improper purpose when making the Orders;
- that the Orders were unreasonable;
- that the Orders were inconsistent with the relevant legislation.

While the decision of *Kuru v Cheltenham Manor Pty Ltd*[6] confirms that there are options other than mandatory vaccination open to employers to stop the spread of COVID-19 in the workplace (in this case by dividing the workplace into zones and prohibiting the intermingling of employees between zones without Personal Protective Equipment), many employers will argue that such measures fall short of what is 'reasonably practicable' to ensure risks are minimized for work health and safety purposes.

For now, in the absence of Government mandate, employers are left with no option but to carefully balance their own interests and that of their collective workforce with employees' rights to individual freedom, choice and employees' individual health concerns.

Consultation Obligations When Enforcing Vaccine Directions: *CFMMEU V Mount Arthur Coal Pty Ltd*

By Simon Bourne, Committee Member and Solicitor, Bourne Lawyers

Following the cases referred to by Kaye Smith in her article above, there has been a number of challenges to various policies (or 'mandates' if you wish) against not just private employers but various State governments, Health Ministers and Commissioners of Police. Until the case of *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mount Arthur Coal Pty Ltd T/A Mount Arthur Coal* [2021] FWCFB 6059, none of them had been successful, at least as far as I am aware.

In the decision in *CFMMEU v Mount Arthur Coal Pty Ltd*, the Full Bench of the Fair Work Commission decided that a site access direction issued by BHP (group of companies of which Mount Arthur Coal Pty Ltd is a member) which required employees to have had at least one dose of an approved COVID-19 vaccine by 10 November 2021 and to be fully vaccinated by 31 January 2022 in order to access the site and therefore attend for work was unreasonable.

Whilst on first blush the decision might be viewed as a significant win for those opposed to the introduction of directions which effectively force employees to be vaccinated or lose their job, the decision is much more appropriately viewed as a case of '*winning the battle, but not the war*'.

[6] [2021] FWC 949

As most of you will know, employees are obliged to follow directions issued by their employer as long as they are both '*lawful'* and *'reasonable*'.

The Full Bench found that the site access direction was, *prima facie,* lawful and the CFMMEU succeeded in its application only on the basis that the site access direction was '*unreasonable*' because BHP had failed to comply with the consultation requirements imposed under s 47 of the *Work Health and Safety Act 2011* (NSW) (a provision which is mirrored by s 47 of the *Work Health and Safety Act 2012* (SA)). Interestingly, the CFMMEU also relied upon a failure to consult in accordance with the relevant enterprise agreement. The consultation terms in the relevant enterprise agreement were in fairly common terms, and they only required consultation **after** a decision to make a major change had been made. The Full Bench was satisfied that BHP/Mt Arthur Coal had at least substantially complied with that obligation. Conversely, the Full Bench found that the *Work Health and Safety Act* requires that workers be given a reasonable opportunity to contribute to the decision-making process, that is, to be consulted **prior** to a decision being made. This is where BHP failed to comply with its obligations to consult.

The significance of the decision is in the recognition that the consultation obligations under work health and safety legislation are broader than those which typically apply as a result of a relevant Award or Enterprise Agreement. The *Work Health and Safety Acts* also apply to all employers and cover all employees, not just those covered by a relevant industrial instrument. This is potentially a source of significant further litigation in this area and one which might enable employees to 'have their voices heard' even if it doesn't change the ultimate outcome of any given policy being introduced. It is has the potential to apply equally to other health and safety related policies being introduced at a workplace.

The reason that the decision can be viewed as the CFMMEU winning the battle rather than the war is because the Full Bench then went on to make a number of comments suggesting, quite strongly, that the reason the direction was found to be unreasonable was limited to the lack of consultation only. Those further comments from the Full Bench include:-

1. That the ultimate decision as to whether to introduce something like a site access requirement is a decision for an employer, with consultation being no more than an important component of the decision-making process;
2. Consultation does not require those consulted to agree with the outcome or give them a power of veto;
3. That there were a range of factors which weighed in favour of a finding that the site access requirement was reasonable including that it was directed at ensuring the health and safety of employees, had a logical and understandable basis, was reasonably proportionate to the risk posed by COVID-19, and was developed having regard to the relevant workplace circumstances;
4. Given those considerations, had consultation been engaged in, it would have provided **a strong case** in favour of a conclusion that the direction was reasonable.

The Full Bench also expressed a view that vaccine directions did not constitute coercion in a legal sense, although it accepted that they were a form of economic and social pressure.

The case also left undecided the implications of an argument raised by the CFMMEU that the direction contravened provisions of the *Privacy Act 1988* (Cth) given it was unnecessary for the Full Bench to do so to dispose of the application.

Medical Exemptions to Compulsory Vaccination for COVID-19

By Ben Duggan, Partner, DW Fox Tucker Lawyers

Many South Australian employers have either introduced or are considering the introduction of a compulsory vaccination policy following for the re-opening of the State's borders.

A common term of such a policy is that an employee is unable to enter their employer's workplace unless they have been vaccinated (or "boosted") against COVID-19.

The Prime Minister, Scott Morrison, was asked by a Melbourne radio host in October if he supported such an approach. In response, the Prime Minister said that "businesses have the right to say who can come on their premises…And that doesn't fall foul of discrimination laws".

The ABC did a Fact Check on the Prime Minister's statement, concluding that it was "not the full story".[7] Experts referred to by the ABC in its post suggested that difficulties may arise in applying a compulsory vaccination policy to the following situations:

1. An employee unable to be vaccinated for medical reasons;
2. A minor who is not currently able to be vaccinated;
3. An employee who has not yet had fair access to vaccination.

We discuss the issue of medical exemptions under a compulsory vaccination policy below.

Government regulated medical exemption for vaccinations

Historically, the Federal Government has, through Services Australia,[8] implemented its vaccination policy, which has predominantly been directed towards vaccinations for children.

Services Australia has provided key guidance for regulated vaccinations and the process to be undertaken to obtain an accepted medical exemption from any requirement to obtain such vaccinations.[9] A medical exemption for a regulated vaccination may arise if an individual satisfies any of several grounds:

- had anaphylaxis after a previous dose of a vaccine;
- had anaphylaxis after a dose of any component of a vaccine;
- been significantly immunocompromised (applicable for live vaccines only); or
- have a natural immunity (applicable for hepatitis B, measles, mumps, rubella and chickenpox only).

Services Australia provides that a medical exemption may only be provided by the following types of health professionals:

- general practice registrars on an approved 3GA training placement;
- paediatricians;
- public health physicians;
- infectious disease physicians;

[7] ABC Fact Check posted 6 October 2021.

[8] Formerly the Federal Department of Human Services.

[9] The vaccination may be linked to payments from the Federal Government.

- clinical immunologists; and
- general practitioners who are vocationally registered, a fellow of the Royal Australian College of General Practitioners or a fellow of the Australian College of Rural and Remote Medicine.

Government regulated medical exemptions for vaccinations for COVID-19

Last year, the Federal Government commenced the implementation of its COVID-19 vaccine national rollout strategy.

An initial priority for the vaccine was provided to workers in several identified high risk and critical industries as follows:

- quarantine and border workers;
- frontline health workers;
- aged care and disability sector workers;
- defence, police, fire, and emergency workers; and
- meat processing workers.

The Federal Government and State Governments have also introduced regulations that require workers working within high-risk industries to undergo vaccination as a precondition of continuing to work in these industries.

Workers within these high-risk industries that are subject to vaccination requirements have been required to be vaccinated subject to certain medical exemptions otherwise known as contraindications.

In Victoria, for example, the State Government has over time expanded its vaccination requirements to workers in a number of industries which include:

- workers in residential aged care facilities;
- workers at construction sites;
- workers in healthcare settings;
- workers at school, childcare and early education services;
- retail workers (including workers at food and drink facilities; licensed premises); and
- professional Services workers.

The decision of the Victorian State Government to require construction workers to be vaccinated was met with considerable resistance culminating in violent protests in Melbourne.

The Victorian State Government has adopted the approach taken by

Services Australia towards medical exemptions in that it requires workers to provide evidence from a list of authorised medical practitioners:

- general practice registrars on an approved 3GA training placement;
- public health physicians;
- general physicians;
- infectious disease physicians;
- clinical immunologists;
- gynaecologist;
- obstetrician;
- GPs who are vocationally registered;
- GPs who are fellows of the Royal Australian College of General Practitioners; and
- GPs who are fellows of the Australian College of Rural and Remote Medicine.

A medical exemption is to be determined by reference to clinical guidance from the Australian Technical Advisory Group on Immunisation (ATAGI). They are an advisory group to the Federal Government and have published clinical guidance on COVID-19 vaccination in Australia.

Medical exemptions in the private sector in South Australia

In South Australia, the State Government has introduced COVID-19 vaccination requirements to a lesser degree than those introduced in Victoria.

Most private-sector workers are not in industries that have vaccination requirements.

South Australian employers are yet to introduce compulsory vaccination policies on the scale seen in other States, particularly in Victoria and New South Wales.

An upward trend in the introduction of compulsory vaccination policies is expected now the State has hit its vaccination target, and with the opening up of the State's border.

Employers that are yet to introduce a compulsory vaccination policy may consider the Services Australia approach - including towards medical exemptions - as a model for their policy.

The other factor is that vaccination is likely to become a requirement for workers to enter worksites with BHP's announcement of this requirement for its sites, including the mining site at Roxby Downs.

Workers will, subject to any applicable medical exemption, be required to comply with such a requirement to enter these vaccinated worksites.

The Fair Work Commission's approach towards medical exemptions to compulsory vaccination

In October, a full bench that consisted of 3 members[10] of the FWC dealt with an application brought by Ms Kimber against her employer, Sapphire Coast Community Aged Care, after she was dismissed for her failure to comply with its requirement that she be vaccinated against influenza.[11]

[10] Vice President Hatcher, Deputy President Dean and Commissioner Riordan.

[11] In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015 (27 September 2021).

Sapphire Coast Community Care introduced a compulsory vaccination policy following the announcement of a vaccination requirement for workers in Aged Care Facilities by the State Government.[12]

Ms Kimber's position was that she was medically exempt from the requirement to be vaccinated because she had suffered from severe facial swelling and a rash for ten months following an earlier vaccination. A key issue for the full bench of the FWC was whether the adverse reaction experienced by Ms Kimber was an accepted medical contraindication which, if established, would result in the dismissal being unfair. Ms Kimber supported her position through an Influenza Vaccine Medical Contraindication form completed by her GP in support of her position that she should not be required to comply with her employer's compulsory vaccination policy.

She argued that this form alone was sufficient by itself to make the vaccination requirement inapplicable to her such that she was entitled to an exemption from the requirement.

The decision of Deputy President Dean has received some publicity though her decision was a dissenting decision of the 3-member full bench of the FWC.

Vice President Hatcher and Commissioner Riordan's majority decision carefully considered the Influenza Vaccine Medical Contraindication form presented by Ms Kimber to her employer, holding that:

> "exemption from a vaccination requirement operates only where a medical practitioner certifies that the relevant person actually has what is, in objective terms, a medical contraindication to the vaccination. It plainly is not the case that the mere completion of the approved form on the basis of the identification of an alleged medical condition or episode that is not, in fact a medical contraindication is sufficient."

The majority preferred the evidence of Sapphire Coast Community Aged Care which had relied upon expert evidence from Professor Wakefield that Ms Kimber's described reaction to the earlier vaccination was most probably chronic dermatitis unrelated to the vaccine.

Vice President Hatcher and Commissioner Riordan also reached a conclusion that there are very few accepted contraindications to influenza vaccination and indicated that the major contraindications are:

- documented anaphylactic reactions to the vaccine or a component of the vaccine;
- a history of having Guillain-Barre syndrome within a six-week period of receiving the vaccine; or
- patients who are being treated with "check point inhibitors" as part of cancer therapy.

The majority in doing so referred to the *Australian Immunisation Handbook*, published by the Department of Health in their judgement commenting that it provides "*clinical guidelines for healthcare professionals and others about using vaccines safely and effectively*" based on "*the best scientific evidence available, from published and unpublished literature*".

Importantly, as the majority noted, the Handbook discusses what constitutes an "*adverse event following immunisation*" (**AEFI**) and provides that serious AEFI's are rare and it is even rarer that a vaccine causes an AEFI and that, in fact, in many cases AEFI's are simply coincidental.

To make its position abundantly clear, the majority also noted that the Handbook states that there is strong epidemiological evidence indicating that there is no causal association between vaccination and many diseases or conditions that have been suggested to relate to vaccines.

[12] *Public Health (COVID-19 Aged Care Facilities) Order 2020*.

In conclusion, the majority of the FWC found that Ms Kimber was not unfairly dismissed as the medical evidence did not provide sufficient support for an exemption to the compulsory vaccination requirement of her employer.

Comment

The Sapphire Coast Community Care decision was in the context of a medical exemption for a requirement to be vaccinated against influenza. However, the commentary and principles of the majority has application to workers seeking to be exempted from a requirement to be vaccinated against COVID-19.

In comments made since the Sapphire Coast Community Care decision, the President of the Royal Australian College of General Practitioners, Dr Karen Price, and others have made the point that it would be rare for a person to obtain a medical exemption for ***all*** COVID-19 vaccinations.[13]

In conclusion, though employers and others will need to consider the need for medical exemptions when implementing a compulsory vaccination policy, it appears that there may be limited scope for a worker to successfully apply for a medical exemption under such a policy.

Recent High Court Consideration Of The Employment Relationship

By Simon Bourne, Committee Member and Solicitor, Bourne Lawyers

Many of you will have no doubt heard of Mr Rossato, who was engaged on a casual basis by his employer WorkPac, and the lengthy legal proceedings which followed the termination of that employment relationship.

Mr Rossato signed a document entitled '*Casual or Maximum Term Employee Terms and Conditions of Employment – Employee Declaration*' at the commencement of his employment in December 2013 and was then engaged to perform work across six fixed-term contracts between July 2014 and April 2018, each of which were confirmed by way of a further '*Notice of Offer of Casual Employment*'.

Following on from an earlier decision with respect to a worker in similar circumstances in the matter of *WorkPac Pty Ltd v Skene*[14], Mr Rossato claimed untaken annual leave, public holidays, personal leave

[13] Dr Karen Price was quoted as having made such remarks in *The Australian*.

[14] (2018) 264 FCR 536

and compassionate leave following the termination of his employment and on the basis that he was, all circumstances properly considered, a permanent employee of WorkPac.

The matter worked its way through the Federal Court system, with the Full Court of the Federal Court ultimately declaring that Mr Rossato was not a casual employee for the purposes of the *Fair Work Act 2009* (Cth) nor the relevant Enterprise Agreement and was, therefore, entitled to the entitlements he claimed. WorkPac appealed that decision to the High Court of Australia.

The genesis of the dispute was, perhaps, in the fact that the *Fair Work Act 2009* (Cth) did not, at the relevant time, provide a definition of 'casual employment'. The High Court was critical of the Federal Court's earlier decision in Skene for its unorthodox legal analysis and the extent to which it was prepared to find an employment relationship which departed significantly from the express contractual terms agreed between the parties.

The High Court rejected the approach of the Full Federal Court, which embarked upon an assessment of the conduct of the parties and looked to all the surrounding circumstances to determine the true nature of the relationship, in a similar manner to the approach which is adopted by courts and tribunals when assessing whether a person is properly considered an employee or an independent contractor. The majority of the High Court found that the critical issue was to determine whether there was a 'firm advance commitment' of ongoing work and that the characterisation of the nature of the employment relationship should be determined by the terms of the contractual agreement struck between the parties at the commencement of employment. Significantly, the High Court considered the Full Court of the Federal Court had placed too much reliance on the roster system under which Mr Rossato worked (which was, on any view, regular and systematic) and found that 'in as much as the rosters imbued Mr Rossato's employment with the qualities of regularity and systematic organisation during the period of each assignment, those qualities have been demonstrated to be entirely compatible with the notion of 'casual employment' in the Act.'

As a result of the Full Court of the Federal Court's earlier decision in this matter a new section 15A was inserted into the *Fair Work Act 2009* (Cth) to define casual employment. The amending provision is consistent with what has now been said by the High Court, namely that the essential characteristic of casual employment is whether there is '*an offer of employment made by the employer … on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work*'.

The High Court's decision, coupled with what is now a statutory definition of a 'casual employee' should provide considerable guidance, even if not complete certainty, to employers and employees alike with respect to this issue.

There has been some suggestion that the High Court's adherence to the terms of the contract initially agreed between Mr Rossato and WorkPac is indicative of a potential change in attitude with respect to the contractual terms agreed between two parties when the issue is not that of casual or permanent employment but rather determining whether a person providing services to an enterprise is an employee or an independent contractor. Given that the High Court has recently heard the matters of *Jamsek v ZG Operations Pty Ltd* and *CFMNEU & Anor v Personnel Contracting Pty Ltd* on 31 August 2021 and 1 September 2021 respectively, both being matters considering the law with respect to the determination of an employment or independent contracting relationship with judgement reserved in each case, it is unlikely to be too long before the High Court provides us with some clarification of this area of the law as well.