

BNSW Membership guidance regarding the role of vaccinations in keeping business running safely

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Content

Introduction	2
Today's state of play	2
Safety considerations applicable to all businesses	3
The role of vaccinations in keeping business safe	4
Can I require customers to be vaccinated to enter my business?	5
Can I require new employees to be vaccinated to work in my business?	6
Can I require current employees to be vaccinated to work in my business, if their contract does not provide that they must be vaccinated?	7
Consultation with workers is critical	8
So what should employers do if wanting to introduce vaccination requirements for existing employees?	9
The application of anti-discrimination laws	10
Can some customers or employees refuse vaccination?	10
Health or Medical exemptions	11
Further advice	13



Introduction

Today's state of play

On 15 December 2021, supported by organisations such as BNSW, the NSW Government decisively removed a number of COVID-19 related public health restrictions that had been imposed on businesses and consumers for a large part of 2021.

These changes included, amongst others, the removal of density limits in a lot of businesses as well as the removal of requirements for persons to be vaccinated to enter most NSW workplaces.

The changes help NSW get back to business.

However, with the threat posed by the virus SARS-CoV-2 and its latest variant (Omicron) still very much a real one, the focus now shifts on businesses to ensure that they do what they can to keep their workplaces safe.

This is important to protect employees and customers alike and to ensure business continuity as we learn to 'live with COVID-19'.

Safety considerations applicable to all businesses

All NSW businesses have obligations under the *Work Health and Safety Act 2011 (WHS Act)* to ensure, so far as is reasonably practicable, the health and safety of workers engaged by the business as well as others who come into contact with the business.

This duty extends to all 'officers' of the business (that is, directors, secretaries and persons who make decisions that can substantially affect the business), who must exercise 'due diligence' to ensure risks to health and safety are eliminated or otherwise minimised as much as reasonably practicable.

These duties are non-delegable. That is, they cannot be delegated to others. The business (and its officers) must satisfy the obligations imposed on them by the WHS Act.

Having regard to these obligations, businesses should be conducting risk assessments to identify how they can best manage the risks of persons contracting the COVID-19 illness from interactions with their business.

These risk assessments will naturally need to consider the types of controls available to minimise the spread of SARS-CoV-2, including:

- social distancing
- use of masks
- regular sanitisation
- regular COVID-19 testing
- employer implemented contact tracing
- vaccination

There is no single suite of measures that will work for every business, which is why BNSW urges all businesses to assess the level of threat posed by SARS-CoV-2 to their employees and customers and to then implement controls that are proportionate to manage this risk.

The role of vaccinations in keeping business safe

It is now without doubt that the greatest protection against SARS-CoV-2 and the illness it causes (COVID-19) is vaccination.

Publicly available data from Government health bodies¹ identifies that vaccines are effective at materially reducing the prospects of persons developing COVID-19 from the delta variant of SARS-CoV-2 and materially reducing the prospect of serious illness or death. The same is expected in relation to the Omicron variant, although data is still emerging in relation to this latest virus strain.

On 3 December 2021, a 5-member Full Bench of the Fair Work Commission handed down its decision in what has become a ‘test case’ on vaccination in workplaces. In the decision, *CFMMEU & Anor v Mt Arthur Coal Pty Ltd* [2021] FWCFB 6059 (**Mt Arthur Case**), the Full Bench identified the following matters as being uncontroversial (at [29]):

1. An unvaccinated person is more likely to acquire the COVID-19 related virus from another unvaccinated person, rather than a vaccinated person.
2. While other measures, such as mask wearing, and social distancing, are demonstrated to reduce the transmission of the COVID-19 related virus, they do not provide a substitute for the constant protection offered by vaccines, nor do they reduce the risk of developing serious illness (from the COVID-19 disease) once somebody acquires an infection.
3. Vaccination is the most effective and efficient control available to combat the risks posed by COVID-19.

It is clear that vaccination is *the tool* that is going to be most effective at combatting the risk of serious illness arising from persons who come into contact with NSW businesses (although other controls should also be utilised where practicable).

This gives rise to the important question — can businesses require vaccination as a condition of entry for both customers and staff?

Can I require customers to be vaccinated to enter my business?

Yes.

Business owners ordinarily have possession or control over the premises in which they operate. Assuming that to be the case, they have the right to determine the persons that enter or that may be turned away.

There may be some very limited instances where customers can bring claims against businesses for refusing to serve them pursuant to anti-discrimination laws (this is primarily related to persons who cannot become vaccinated because of a legitimate illness and is discussed further below), however, this is not likely to apply in the majority of cases.



¹ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html>; <https://www.gov.uk/government/news/vaccines-highly-effective-against-hospitalisation-from-delta-variant>

Can I require new employees to be vaccinated to work in my business?

Yes.

The starting point for answering this question is to assess an employee's contract of employment.

For new employees or new contracts, employers can require vaccination as a pre-condition of employment, thereby mandating vaccination.

This will then serve to lawfully compel vaccination in order for employees to work.

Again, there may be some limited instances where employees can legitimately refuse to be vaccinated pursuant to anti-discrimination laws (associated with persons who cannot become vaccinated due to illness — discussed further below), however, broadly speaking, once the obligation to become vaccinated is expressly recorded in a contract, this obliges the employee to become vaccinated.

Can I require current employees to be vaccinated to work in my business, if their contract does not provide that they must be vaccinated?

Absent a public health order or express contractual right obliging employees to become vaccinated, vaccination can be made a pre-condition of working where the requirement to be vaccinated against COVID-19 amounts to a "*lawful and reasonable direction*".

Employers have the right to issue "*lawful and reasonable*" directions to their employees, and employees are under an obligation to comply with such directions.

What is considered lawful and reasonable will typically require an examination of the relevant factual circumstances. What may be considered a lawful and reasonable direction in one case may not necessarily be considered a lawful and reasonable direction in another set of circumstances.

However, because of the findings about vaccination outlined by the Fair Work Commission in the *Mt Arthur Case* and because of the ongoing spread of SARS-CoV-2 in NSW, it is likely that vaccination will be viewed as a reasonable requirement to impose in many or most cases, provided that employers have properly conducted risk assessments, tailored their vaccination requirements to their business and consulted before introducing vaccine requirements.

In the *Mt Arthur Case*, the FWC ultimately held that, had BHP properly consulted with its employees affected by a vaccination requirement to enter all sites (including the Mt Arthur Mine), there would have been a "**strong case**" for introducing the requirement to be vaccinated to enter the mine.

The FWC held that a number of factors gave rise to the strong case in favour of the vaccination requirement imposed by BHP, including that, the requirement:

- was directed at ensuring the health and safety of workers of the site
- had a logical and understandable basis
- was a reasonably proportionate response to the risk created by COVID-19
- was developed having regard to the circumstances at the site, including the fact that workers cannot work from home and come into contact with other workers whilst at work
- was timed by reference to circumstances pertaining to NSW and the local area at the relevant time
- was only implemented after Mt Arthur spent a considerable amount of time encouraging vaccination

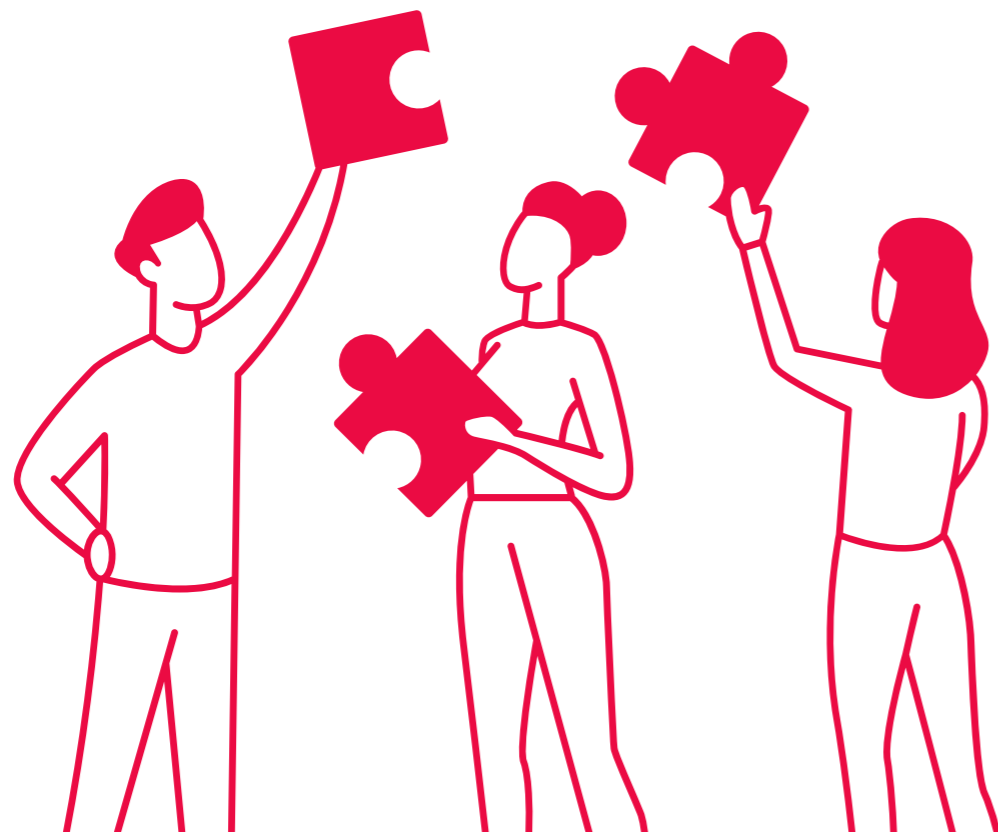
Consultation with workers is critical

The model WHS laws in each State contain prescriptive obligations to consult when assessing risks to health and safety and when making decisions about how to minimise those risks.

In the *Mt Arthur Case*, the FWC unsurprisingly found that these WHS obligations mean that employers must consult **before** making a decision to introduce vaccination requirements, not once the decision has been made.

The FWC found that BHP had engaged in 'scant consultation' in its risk assessment phase regarding whether to introduce its vaccination site requirements, even though there was extensive consultation during the implementation phase.

The failure to adequately consult meant that BHP's requirement to be vaccinated on site was not a lawful and reasonable direction that BHP could implement for existing employees.



So what should employers do if wanting to introduce vaccination requirements for existing employees?

Whilst in many cases vaccination requirements will be lawful and reasonable to impose, they should only be introduced:

1. after conducting a risk assessment tailored to each category of worker to determine whether vaccination is a necessary and proportionate control to protect the health and safety of employees; and
2. after meaningfully consulting with the workforce on both the risk assessments conducted and vaccination requirement proposals.

Businesses should be careful to not simply mandate mandatory vaccinations as a policy at a 'Head Office' level and then seek to consult with employees generally on the implementation of such a policy.

The basis must be a proper risk assessment relevant to the risk profile of the categories of employees in the workplace and meaningful consultation on the risk assessments at that level as well as any ultimate implementation of risk controls.

However, where a business ultimately identifies that the only control that is properly going to substantively minimise the risk of employees suffering severe COVID-19 illness is vaccination, then vaccination requirements should generally be valid and defensible.

The application of anti-discrimination laws

Can some customers or employees refuse vaccination?

Under Australia's anti-discrimination laws, it is unlawful to treat a person less favourably on the basis of protected attributes, including gender, race, disability or age.

Mandating vaccinations will not result in 'direct discrimination' as a customer or employee's decision to refuse vaccination is not an attribute protected by any Australian discrimination laws.

However, 'indirect discrimination' is also prohibited by discrimination laws.

This is where there is a rule or policy that is the same for everyone but has an unfair effect on a group of people who share a particular protected attribute.

Whether indirect discrimination will be unlawful in the context of mandatory vaccinations will depend on:

- Whether groups of people with an employee or customers' particular attribute are in fact **less able to comply with the requirement** imposed by the business than the broader population. For instance, persons with some disabilities or of particular ages may simply be unable to obtain vaccination safely.
- Whether the requirement imposed is **reasonable** in the circumstances.

Whether a court considers it 'reasonable' for an employer to mandate COVID-19 vaccinations is likely to be highly fact dependent, considering the workplace and the employee/customer individual circumstances as discussed above.

One way to ensure that a mandatory vaccine policy does not indirectly and unlawfully discriminate against any employees or customers is to develop a policy that has appropriate exceptions in respect of at least:

- persons for whom the vaccine has not been approved for use (this minimises age discrimination issues); and
- those with medical or other contraindications (that is, persons whose medical conditions mean that vaccination may be harmful for them)

Health or Medical exemptions

Where an employee or customer seeks to refuse to be vaccinated on medical grounds, the employee or customer should provide appropriate medical evidence for this.

Where a person establishes that they have a medical exemption, businesses should consider whether:

- having an unvaccinated worker or customer can be accommodated, given that the majority of employees will be vaccinated
- other measures can be adopted in conjunction with the person being unvaccinated (for instance, a periodic testing regime)
- it is possible to seek alternative duties or modified safer working arrangements for any employee.





Further advice

The above information is not legal advice specific to any businesses' individual circumstances.

Furthermore, when collecting information regarding whether a person is vaccinated, businesses may also need to comply with *Privacy Act 1988* requirements.

Accordingly, businesses seeking to implement vaccination requirements should ultimately obtain legal advice specific to their own circumstances. BNSW's law firm, Australian Business Lawyers & Advisors is at the forefront of advising on and acting in vaccination matters and is able to help NSW businesses with these matters.



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