



G|24 Market Update

6 December, 2021

BHP Mt Arthur vaccination mandate ruled not lawful

CFMMEU & Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal

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The Fair Work Commission (FWC) has handed down its decision to determine a dispute between Employees of Mt Arthur Coal Pty Ltd (a subsidiary of Hunter Valley Energy Coal Pty Ltd and, ultimately, member of the BHP Group of companies) and Mt Arthur Coal (Mt Arthur). The dispute relates to a direction by Mt Arthur that all Employees must be vaccinated against COVID-19 as a condition of accessing worksites. The direction issued by Mt Arthur was announced on 7 October 2021, requiring all employees to:

- have at least a single dose of an approved COVID-19 vaccine by 10 November 2021; and
- be fully vaccinated by 31 January 2022.

Ultimately, the Full Bench of the FWC were not satisfied that the direction given by Mt Arthur was a reasonable direction by an employer that must be followed by employees in connection with the terms of their employment contracts. **However**, the determinative variable of the FWC decision was whether Mt Arthur had provided for an adequate period of consultation with effected employees in accordance with their consultation obligations under the *Work Health and Safety Act 2011* before making the direction, rather than whether the direction itself was lawful and reasonable.

Usefully, the FWC noted that the following considerations, that, if accompanied with a 'meaningful consultation process' would support a finding that the direction was reasonable in the circumstances:

- it was directed at ensuring the health and safety of workers;
- it was made on a logical and understandable basis;



- it was a reasonably proportionate response to the risk created by COVID-19;
- it was developed with regard to the specific circumstances of the workplace to which it related (including the fact that alternative arrangements, including remote work, were not available);
- the timing for implementation was set with regard to the broader circumstances of the local area (i.e. the emerging developments in relation to the spread of COVID-19 in NSW and the local area); and
- it was implemented after the employer allocated considerable time and resources to encourage vaccination (including setting up a vaccination hub for employees to enable access to vaccination).

Ultimately, the FWC's finding that the direction given by Mt Arthur was not a lawful and reasonable direction turned on specific deficiencies in Mt Arthur's consultation processes in relation to its vaccination policy. Consequently, while the decision does not have immediate impacts on the equivalent policies of other employers, the factors explored by the full bench provide useful guidance (including those summarised above) in relation to the fundamental considerations that should be evident in the formulation of such policies.

G|24's experience is that the high velocity, varied and unpredictable nature of the COVID-19 pandemic in Australia and the region raises specific risks and challenges to 'BAU' approaches to policy development and implementation. The FWC's decision highlights the need for employers to ensure that the risk of deficiencies or compromises in the implementation of COVID-19 policies and response protocols are properly understood and mitigated and that all specific legal and regulatory obligations that are incorporated into policy implementation programmes.