

## Article Information

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# Fair Work Commission Considers COVID-19 Vaccination Policy Implemented During Omicron

***A recent decision<sup>[1]</sup> relating to a dispute under an Enterprise Agreement shows that COVID-19 vaccination policies in the absence and easing of government directions can be reasonable and lawful, even with high community and workplace vaccination rates. In this case, the Fair Work Commission disagreed with submissions from union representatives that insufficient consultation occurred, the policy was unreasonable because lesser control measures could be used, or that vaccine requirements were disproportionate to the risk, particularly in light of Omicron, and upheld the policy as lawful and reasonable.***

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The Australian Manufacturing Workers' Union (**AMWU**) and the Australian Workers' Union (**AWU**) (collectively, 'the Unions') applied to the Commission under the *Fair Work Act 2009* to deal with a dispute about a COVID-19 vaccination policy (**Policy**). The Australian Submarine Corporation's (**ASC**) Policy required that employees and contractors be vaccinated against COVID-19 before entering the worksite at Osborne, South Australia. The dispute came before the Commission under the dispute settlement procedure of the *ASC Enterprise Agreement 2021 (the Agreement)*. The applicant Unions are two of the three employee organisations covered by the Agreement.

### Formulation of the Policy

On or around 10 November 2021, ASC via its Executive Management group (**Executive**), formed the view that the situation regarding COVID-19 had changed. This was based on an announcement by the South Australian Government of the state borders opening on 23 November 2021, and an announcement by the Navy of a requirement that persons onboard its vessels be double vaccinated. The ASC proposed changes to their COVID-19 Policy, which included immediate control measures (phase 1) and a mandatory double vaccination requirement (phase 2).

The Policy outlined that failure to comply could result in disciplinary action, including the potential for termination of an employee's employment on the grounds of not being able to meet the inherent requirements of the role if the employee did not have an approved exemption, such as on medical grounds.

### Consultation

Between 10 and 23 November 2021, ASC executives informed relevant arms of management of the decision to implement a vaccination policy. ASC communicated this decision to its employees and their representatives on 23 November 2021, the same day that South Australia opened its interstate borders.

The People & Culture (P&C) Manager met with the ASC Joint Consultative Committee (JCC) and Health and Safety Representatives (HSRs) the day after the announcement. That same day he contacted and wrote to officials of the AMWU and AWU about the proposed changes.

On 25 November the P&C Executive Manager met with AMWU leaders about the proposed changes in advance of the AMWU holding a workplace meeting of members.

A proposed Policy was circulated by ASC to union representatives on 3 December 2021.

ASC approved paid and unpaid meetings so that unions covered by the Agreement could discuss the Policy with their

members. The third union covered by the Agreement advised ASC that they “[do] not share the concerns raised by other trade groups at Osborne or their representatives.”

Consultation initially focussed primarily on phase 1, which operated from 6 December 2021 (with some changes such as delayed commencement date until evidence of community transmission and mask wearing being required by all persons including those vaccinated). Commencement had originally been proposed for 1 December 2021.

On 8 and 10 December the Unions notified an industrial dispute concerning the announcement. They alleged a lack of consultation, particularly with phase 2. The Commission convened conferences of the parties on 15 and 20 December 2021.

Consultation on phase 2 was extended by ASC from 15 to 21 December 2021.

ASC communicated its decision to proceed with phase 2, with some modifications, to JCC members and to HSRs on 22 December 2021. Modifications included no longer retaining vaccination certificates or medical exemptions, and including a show-cause process for non-compliant employees. ASC also provided an overview to employees of the consultation process and of changes made to the Policy following its consideration of initial feedback.

As phase 2 remained a disputed matter, consultation resumed at the workplace level between 20 December 2021 and 17 March 2022.

HSRs met on 6 January 2022 to discuss control measures that had been implemented.

The Policy was published on 17 January 2022, applying to “all employees, contractors and visitors.” ASC met with JCC members and union representatives about the Policy on 17 and 18 January 2022.

### **HSRs’ risk assessment**

An employee representative requested a revision of ASC’s risk assessment. On or around 25 January 2022, ASC agreed that HSRs could submit a risk assessment of their own.

On 7 and 15 February 2022, ASC met with JCC representatives and HSRs to discuss feedback on ASC’s risk assessment and to put in place arrangements for the HSRs to conduct and submit a risk assessment of their own.

On 17 February 2022 the HSRs submitted their risk assessment. The HSRs’ risk assessment supported phase 1 control measures but not the phase 2 vaccination obligation.

### **Decision to proceed with vaccination requirements**

Over the weekend of 5 and 6 March 2022, a subset of the Executive met and reviewed whether it would proceed with implementing the Policy. On 7 March 2022, the Executive decided to proceed with the vaccination requirements, with some modifications, and enforcement beginning from 28 March 2022. ASC informed HSRs immediately, and the broader workforce of the decision the following day.

On 9 March 2022, ASC provided HSRs written confirmation of its decision and a copy of ASC’s updated risk assessment following the Executive meetings on 5, 6 and 7 March 2022. On 11 March 2022 the Unions sought a relisting of the dispute notification.

ASC liaised with employees who had indicated that they were concerned about being, or unwilling to be, vaccinated. In the period between 24 January 2022 and 28 March 2022 that number of employees progressively declined.

### **Submissions**

The Unions submitted that ASC failed to meet its consultation requirements under the Agreement and the *Workplace Health and Safety Act 2012* (SA) (**WHS Act**). Therefore, they contended that the Policy was unlawful and unreasonable. The Unions said that the risks posed by COVID-19 at the time were disproportionate to a vaccination requirement. There were also claims that collection and retention of information contravened the *Privacy Act 1988* (Cth).

ASC submitted that they had followed the consultative process required by law, by communicating with employees through the JCC, HSRs and the Unions, and altering the Policy in accordance with the views expressed. Consultation directed specifically at whether the phase 2 mandate should proceed occurred in February and March 2022 through the JCC and the Unions, evidenced by, for example, ASC considering a revised risk assessment by the HSRs. ASC further submitted that their decision to not retain any data meant that the Policy was not in breach of the *Privacy Act*. Finally, ASC proposed that the Policy was not unreasonable as it provided grounds for medical exemption, was an active measure to manage health and safety risks, and it was a proportionate response following the opening of borders and consequent increased

transmission. Of COVID-19 in the South Australian community.

### **Did ASC meet the consultation requirements prescribed by the Agreement in respect of its COVID-19 Vaccination Policy?**

#### Did ASC meet its consultation obligations?

The Commission acknowledged that consultation should be meaningful and engaged in before an irreversible decision has been made. The obligation will only be met where a party has a real opportunity to influence the decision maker.

On an overall consideration of the evidence, the Commission **did not** agree with the Union's position that the decision to adopt a vaccination policy was irrevocable, and concluded that ASC **did** meet its consultation obligations under the Agreement. The consultation had the capacity to inform and impact the employer's view on the appropriateness of its decision and whether to proceed with that decision.

The Commission concluded that consultation was underway before the dispute notifications were lodged, and was not forced on ASC by third parties.

The Commission found that ASC did not delay informing the Unions of its changed position as to vaccination on 23 November 2021.

### **Would an instruction from ASC that employees covered by the Agreement comply with the COVID-19 Vaccination Policy be a reasonable and lawful instruction?**

#### Lawfulness

The Commission found that ASC had materially complied with its consultation obligations under the Agreement and the WHS Act, so a direction to comply would be lawful.

Further, it found that the variation of the Policy to not require the *retention* of vaccination certificates, indicated no breach of the *Privacy Act*.

The Commission was also satisfied that the information required by ASC (showing proof of vaccination or medical exemption) was "*reasonably necessary for one or more of the entity's functions or activities*", being the implementation of workplace policies in active compliance with its health and safety obligations under the Agreement and the WHS Act, and was accordingly lawful.

#### Reasonableness

First, the Unions contended that the vaccination mandate was unnecessary because phase 1 control measures like mask wearing, social distancing, and rapid antigen testing on site, would sufficiently manage health and safety risks presented by COVID-19.

The Commission noted that just because one measure or a combination of measures in mitigation of risk may have meaningful effect does not mean that different or more stringent measures are unreasonable.

It found that work on submarines includes work in confined spaces where social distancing cannot always be observed. Moreover, mask wearing is only as effective as the level of compliance. Finally, rapid antigen testing on site entry occurs only weekly, meaning that the virus can still be transmitted unknowingly. Therefore, the Commission found it was reasonable to conclude that phase 1 controls were not adequate alone to mitigate risk.

Secondly, the Unions contended that the Policy was disproportionate to the risk presented by COVID-19. They claimed that ASCs case for requiring vaccination had weakened, due to:

- high vaccination rates in Australia and South Australia generally;
- high vaccination rates amongst the ASC workforce;
- Omicron variant being less severe;
- opening of interstate and international borders; and
- general easing of public health restrictions including revocation of the *Emergency Management*

Further, the Unions submitted that the Policy apply pressure to some employees "*to surrender their bodily integrity in circumstances where they would prefer not to do so.*"

Conversely, ASC submitted that the case for implementing the Policy had strengthened, having regard to:

- increased risk of transmission and incidence of COVID-19 consequent of opening borders and easing restrictions;
- increased risk of transmission and incidence of COVID-19 in ASC worksites in South Australia;
- increased transmissibility of the Omicron variant and the risk that future variants could pose a greater risk to health and safety;
- scientific and medical evidence continuing to support vaccination as the most effective risk mitigation measure;
- vaccines being readily available to employees;
- business continuity risks, considering the requirement by ASC's client (the Navy) that crew and persons on vessels taken from an Australian port into open water must be double vaccinated, and employees travelling on short notice to its Western Australian operations or internationally required double vaccination under government directions;
- the unique and confined working environment in and around submarine manufacture and maintenance; and
- it would be unfair to those employees who were reluctant to be vaccinated, but who had done so, to then allow a small group remaining unvaccinated to not comply with the Policy on account of high vaccination rates achieved by others.

The Commission gave little weight to the fact that ASC worksites were not and have not been the subject of government directions concerning vaccination, and that the declaration of a major emergency for South Australia was revoked. The fact that a large percentage of ASC's workforce was now vaccinated (and thus at less risk of serious adverse health consequences or death from COVID-19) was not a persuasive argument against the reasonableness of the phase 2 mandate.

Some weight was placed by the Commission on the fact that a vaccination requirement intrudes on bodily integrity, and that the effect of such a Policy places pressure on an employee to give up this fundamental right, particularly when dismissal is a potential consequence of non-compliance. However, the Policy provided for medical exemption and in that sense it was not an unqualified vaccination policy.

The Policy was found to have a logical and understandable basis in that it dealt with the management of a real and present risk to health and safety. The Commission stated that persons employed under the Agreement interact with each other, other employees/contractors and with the broader community, such that *'the risk of transmission is real, not abstract or peripheral.'* Although the Omicron variant of COVID-19 was found to be less severe in impacts, the Commission stated that it is highly transmissible, evident following the opening of borders and easing of restrictions.

Moreover, the Commission concluded that controls introduced in phase 1, whilst useful, inadequately mitigated risk. Vaccination was found to be the most effective way to minimise risk. Some of the work required of ASC employees meant that they work in confined spaces where social distancing cannot practically be observed. The Commission placed some, but only little, on the business continuity risks raised by ASC.

It was concluded that the ASC Policy was not unlawful or unreasonable, and a direction to employees to comply **would** therefore be lawful and reasonable.

**Importantly, the Commission made three recommendations:**

- That an extension of time to respond to the show cause letters for a further seven days from the publication of the decision be given, and that a further seven days from that be provided before ASC, after considering the responses received, take disciplinary action against those persons in receipt of show cause letters.
- That ASC review the Policy within 12 months.
- The Commission made no decision regarding mandating the requirement of a booster dose. The Commission stated that consultation on that matter should occur.

Every workplace is different, but this decision provides employers with some clarity as to what is required to best ensure vaccination policies can be found to be lawful and reasonable in this phase of the pandemic.

[1] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; and Australian Workers' Union v ASC Pty Ltd T/A Australian Submarine Corporation* [2022] FWC 1198