

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for
the In-House Legal Community

Session 1 - The end game: transitioning your organisation to a steady state in a COVID-19 world

Presented by Bede Gahan, Partner

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Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Agenda

- Where are we now?
- What are the essentials for the workplace?
 - Work health and safety obligations
 - Privacy considerations
 - Work from home arrangements
 - Costs associated with COVID-19 matters

Where are we now?

Public health orders / directions

- Vary from state to state
- Similarities:
 - High risk industries / occupations
 - Prohibition on attending the workplace if not vaccinated
 - Exemptions for those with medical contraindication
 - Collection of information regarding vaccination status

Where are we now?

Public health orders / directions (cont)

- *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818
 - Employees with medical contraindications must comply with the requirements for proving a medical contraindication
 - Generally speaking, an employee must accept a medical contraindication supported by the evidence in the appropriate form
 - In certain circumstances, the medical certificate can be challenged

Where are we now?

Public health orders / directions (cont)

- The termination of employment will, in principle, be fair if:
 - An employee is not vaccinated in accordance with a public health order
 - Is unable to be redeployed
- That is, the termination will be fair because:
 - There is a valid reason for the dismissal
 - The employee has been treated fairly

Where are we now?

Public health orders / directions (cont)

- Relevant cases:
 - *Valid reason:*
 - *Tew v The Bethanie Group Inc. T/A Bethanie Aged Care* [2022] FWC 96
 - *Edwards v Regal Cream Products Pty Ltd* [2022] FWC 257
 - *Fairness:*
 - *Tew v The Bethanie Group Inc. T/A Bethanie Aged Care*
 - *Andrea Fried v Travel Management Services Pty Ltd* [2022] FWC 261
 - *Fitzpatrick v Chubb Fire and Security Pty Ltd* [2022] FWC 121

Where are we now?

Other considerations

- There is / what is the ongoing risk?
- Vaccination is unlikely to be mandated
- COVID-19 control measures are established and accepted:
 - Education
 - Exclusion
 - Cleaning / hygiene
 - Social distancing(?)
 - Personal protective equipment(?)

What are the essentials for the workplace?

Work health and safety

- What is the status of your risk assessment?
- What control measures will you put in place?
- Are you appropriately consulting by:
 - Providing relevant information to workers
 - Properly identifying issues to consult on

What are the essentials for the workplace?

Work health and safety

- *CFMEU v Mr Arthur Coal Pty Ltd* [2021] FWCFB 6059
 - Lawfulness and reasonableness of direction to be vaccinated turned on WHS consultation
 - What control measures require consultation (at this point in time)?
 - Pre-existing measures?
 - Movements in / out of the office?
 - Compliance with public health requirements / recommendations

What are the essentials for the workplace?

Work health and safety (cont)

- Are you, as an officer, exercising due diligence:
 - Knowledge
 - Understanding
 - Resources and processes
 - Monitoring
 - Legal compliance
 - Verifying

What are the essentials for the workplace?

Privacy

- Collection, use and disclosure processes:
 - Who collects / approves the collection of information?
 - Has an employee consented to the collection?
 - Is the collection reasonably necessary?
 - How long is the information retained?
 - Where is the information stored?
 - Who is the information holder / custodian?
 - How will the information be used or disclosed?
 - Do your collection notices facilitate or prohibit use or disclosure?

What are the essentials for the workplace?

Privacy (cont)

- CFMMEU v BHP Coal Pty Ltd T/A BHP Billiton Mitsubishi Alliance / BMA & Ors [2022] FWC 81
 - Privacy complaints about collection of information
 - Continues the trend of employer measures being held to be lawful and reasonable
 - Again underlines the need for a proper consultation process

What are the essentials for the workplace?

Work from home

- What do you use work from home for?
 - Flexibility?
 - COVID-19 control measure?
- If flexibility:
 - How does this impact work processes?
 - Do you need to change the way you work / work processes?
 - How do you measure / manage performance?

What are the essentials for the workplace?

Costs

- “Costs follow the event”
- Many costs have been temporarily borne by employees
- What are the ongoing costs to employees / the employer?
- How are those costs allocated?
 - As a default, by the employer?
 - Enterprise bargaining?
 - Through the setting of expectations with employees (eg costs of working from home)

Team Contact



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