STEVENS & ASSOCIATES LAWYERS

Summer 2021

# SAFETY IN THE WORKPLACE

## Safety in the Workplace – WHS Quarterly

**Our Summer 2021 edition includes:**

- Australian Government prosecuted and charged over quarantine failures; and
- Fair Work Commission Hands Down BHP Mandatory Vaccine Decision; and
- New Victorian and NSW WHS legislation.

## Australian Government Prosecuted and Charged Over Quarantine Failures

WorkSafe Victoria (**"WorkSafe"**) has charged the Victorian Department of Health with 58 breaches of the Occupational Health and Safety Act in relation to Victoria's initial hotel quarantine program. The charges are for a failure to provide a safe working environment without risks to health for its employees and for persons other than employees who were also exposed to these risks arising from conduct of its undertaking.

**The Facts**

Between March and July 2020, the Department of Health was responsible for the oversight and co-ordination of Operation Soteria, Victoria's first hotel quarantine program.

**The Investigation**

Worksafe's complex investigation took 15 months to complete and involved reviewing tens of thousands of documents and multiple witness interviews, whilst also taking into account material from last year's COVID-19 Hotel Quarantine Inquiry.

The inquiry's final report found that 21,821 returned travellers went through Victoria's hotel quarantine program ran from March to June 2020, with 236 or 1.1% of them testing positive for COVID-19 while in quarantine.

Expert evidence from the Inquiry found that, *"99% of Victoria's second wave of COVID-19 cases in the community came from transmission events related to returned travellers"* who were infected in these quarantine hotels, which directly led to "*high rates of local transmission… from these infected workers into the community".*

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**The Allegations**

WorkSafe alleges that the Department of Health breached WHS laws by failing to appoint people with infection prevention and control (**"IPC"**) expertise to be stationed at hotels it was utilising for the program.

It alleges the department failed to provide security guards with the requisite face-to-face IPC training by a person with expertise in IPC prior to them commencing work, and either failed, or initially failed, to provide written instruction for the use of PPE.

WorkSafe further alleges the Department failed to update written instructions relating to the wearing of masks at several of the hotels.

In all charges, WorkSafe alleges that Department of Health employees, Victorian Government Authorised Officers on secondment, or security guards were put at risk of serious illness or death through contracting COVID-19 from an infected returned traveller, other persons working in the hotels or from a contaminated surface.

**The Court Proceedings**

Worksafe's decision to prosecute has been made in accordance with WorkSafe's General Prosecution Guidelines, which require WorkSafe to consider whether there is sufficient evidence to support a reasonable prospect of conviction and whether bringing a prosecution is in the public interest. The maximum penalty for a body corporate for each of these charges is $1.64 million (9000 penalty units).

This matter will be heard in the Magistrates Court. Meanwhile, WorkSafe has a number of other continuing investigations relating to the control of COVID-19 risks across various workplaces.

**The Takeaway**

This prosecution of the Government body by Worksafe acts as a cautionary tale, demonstrating that employers can be held accountable for failing to provide and maintain a safe working environment for their employees, and also their customers. The best practice approach that we strongly advise clients to follow is to have a comprehensive work health and safety policy and procedure with respect to COVID-19, and to ensure everyone in your workplace implements and adheres to the same.

If you have any questions about your work health and safety obligations with respect to Covid-19 please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.

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## Fair Work Commission Hands Down BHP Mandatory Vaccine Decision

**Background**

A specially constituted five-member Full Bench of the Fair Work Commission (**Commission**) has determined that the mandatory vaccine policy at Mt Arthur coal mine (**Mine**) operated by BHP (**Company**) cannot be enforced. The case is the first of its kind in dealing with mandatory vaccine policies, and serves as an important test case with regards to the appropriate implementation of such policies.

The proceedings heard by the Commission were regarding a '*Site Access Requirement*' (**Policy**) at the Mine. This Policy prohibited access to the Site of the mine by people, including employees, who did not meet certain requirements, including having received at least one dose of an approved COVID-19 vaccine.

**Facts**

On 7 October 2021, Mt Arthur Coal Mine Pty Limited (**Mt Arthur** or **the Respondents**) released an announcement to the Mine's 724 employees of a requirement or direction that all workers at the Mine must be vaccinated against COVID-19 in accordance with the Policy. However, the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), together with Mr Matthew Howard (together, the **Applicants**), challenged the reasonableness and lawfulness of the direction on the basis that Mt Arthur failed to adequately fulfil its consultation obligations under work, health and safety legislation or under the Agreement.

**Legal Issue**

Accordingly, the Commission was tasked with settling the dispute in accordance with a dispute settlement procedure in the *Mt Arthur Coal Enterprise Agreement 2019* (**Agreement**) with respect to the Policy, namely, whether it constituted a lawful and reasonable direction.

**WHS Consultation Obligations**

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Under clause 30 of the Agreement, the obligation to consult is engaged if the employer has made a 'definite decision' to introduce a 'major change' to any aspect of the enterprise that is likely to 'have significant effects on employees.'

**Other relevant circumstances**

The Applicants submitted that the Policy was not directed at the circumstances of the mine and that the BHP Rationale did not have regard to all factors that Safe Work Australia identifies in its guidance on whether a requirement for workers to be vaccinated is 'reasonably practicable'. Further, they contended that there was nothing in the BHP Rationale to suggest that the Respondents had regard to the matters contained in s 19 of the *Work Health and Safety Act 2011* (Cth)or that they conducted the balancing exercise required by qualification of reasonable practicability under the Act.

**Decision**

Having regard to all circumstances, the Commission found that the direction supporting the Policy was ultimately unreasonable. Absent of a public health order and/or an express term in a contract, employment or industrial instrument, a direction must be reasonable. Whether the direction is *'reasonable'* is a question of fact having regard to *all* circumstances, which may include whether consultation obligations were adequately upheld by the Respondent, the nature of the Respondent's operations, among other considerations.

Significantly, while the outcome was against the Company, the Commission stressed that the Policy itself was not unlawful or unreasonable. Had the Policy been properly disseminated to employees during consultation, it would have been supported on work, health and safety grounds, contractual terms, and public health orders.

**Takeaway**

Responding to the decision, Ai Group chief executive Innes Willox said "the key message. . . is the importance of employers consulting with employees before implementing mandatory vaccination requirements for site access". We strongly recommend that employers consult their employees and/or representatives of employees before enacting any major changes that are likely to have an impact on their employees.

If you have any questions about employer obligations surrounding work health and safety considerations with respect to COVID-19 please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.

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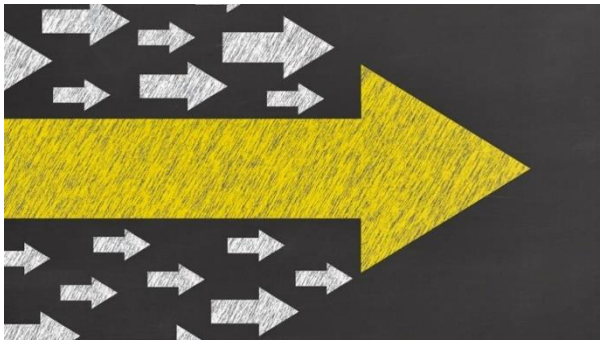

## New Victorian and NSW WHS Legislation

**Industrial manslaughter Bill introduced to NSW Lower House**

On 24 November 2021, NSW Opposition Bill seeking to create the offence of industrial manslaughter has passed the Legislative Council with amendments. The bill has now been introduced to the Lower House, where its passage will depend upon the support of crossbench and government MPs.

The *Work Health and Safety Amendment (Industrial Manslaughter) Bill* 2021 was introduced in May, with maximum penalties of 25 years' jail for senior officers and about $10 million for bodies corporate that negligently or recklessly engage in conduct that causes the death of a worker or another person at a workplace.

In notifying Parliament of his plans to introduce the Bill, then State Shadow Industrial Relations Minister Adam Searle highlighted the deterrent effect of such legislation, and said it appeared Queensland and Victoria's new industrial manslaughter laws had compelled businesses to raise their safety standards.

The amendments to Searle's Bill, agreed to in the Upper House last week, include a requirement for prosecutors to prove that an industrial manslaughter defendant engaged in reckless or negligent conduct "*without reasonable excuse*".

However, Government MPs are highly unlikely to support the Bill in the Legislative Assembly, given NSW voted against adding the offence of industrial manslaughter to the national model WHS Act, at a meeting of Australia's WHS ministers several months ago. Stevens and Associates will follow the progress of the Bill through parliament and provide for the updates on what this will mean for businesses.

**New Victorian WHS legislation**

Under the proposed legislation in Victoria, employers would be required to report safety "near misses" and incidents involving infectious diseases to a workplace safety regulator, Worksafe Victoria. The proposed Victorian laws

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also increase the benefits available to workers with silicosis and similar conditions.

Introduced to the State Parliament on 1 December 2021, the *Workplace Safety Legislation and Other Matters Amendment Bill* 2021 (**"the Bill"**) seeks to expand the range of incidents that WorkSafe Victoria must be notified to the regulator. The new list would cover near misses and infectious diseases and illnesses, as well as the risk of electric shocks, even where no injury or treatment is required.

The Bill, if passed, will also increase WorkSafe inspectors' powers to allow them to issue prohibition notices and give oral or written directions pertaining to non-immediate but serious health and safety risks, like exposure to silica dust.

Tragically, four workers have died from silica related illness and WorkSafe has accepted 59 claims for silica related diseases since the start of this year.

As stated by Minister for Workplace Safety Ingrid Stitt:

*"Silica-related illnesses have a debilitating impact on far too many workers in the stonemason industry. This strong action strengthens our support for workers affected by this terrible disease."*

*"We're strengthening our laws to better protect Victorians from the full range of risks that exist in the modern workplace and make sure employers are accountable for their workers' health and safety."*

**Takeaway**

Work health and safety laws are constantly evolving, and it is critical that companies ensure their compliance as it does.

If you have any questions about how the above work health and safety changes may impact your company or employment, please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.

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