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# Workplace View

Australia – September 2021

Australia continues to navigate its way through the COVID-19 pandemic, with different states and territories taking different approaches that may be impacting on your business. Businesses with employees in New South Wales, Victoria and the Australian Capital Territory continue to grapple with working from home arrangements due to staff being in lockdown and permit systems for authorised workers, while workers in other areas of Australia are largely continuing with business as usual.

One issue that employers from all over Australia (and the rest of the world) are currently tackling is the vaccination of workers. We are being asked questions about vaccination policies on an almost daily basis. Even if an employer has itself decided not to mandate COVID-19 vaccinations for its workforce, it may be being impacted by the vaccination policies of other employers (such as customers who have implemented a vaccination policy that also requires visitors to their workplace to be vaccinated). We set out in this issue of Workplace View the latest position in respect of the vaccination of workers in Australia.

Another issue that we have been assisting a number of our global clients with recently is long service leave, and whether the overseas service of an employee counts for the purposes of Australia's long service leave entitlement. We outline below a recent decision of the Victorian Court of Appeal that provides some guidance on this issue.

A number of other important compliance matters are also addressed in this edition of Workplace View. These include the requirement to provide employees with the Fair Work Information Statement and Casual Employment Information Statement, the casual conversion regime that comes into full effect on 27 September and reforms to superannuation that will introduce "stapled funds" from 1 November 2021.

Please make sure you save the date for our upcoming webinar on 9 December. We will be providing our review of 2021's most significant employment law issues and outlining a roadmap you can use to plan for the employment-related issues you are likely to face in 2022. Further details for the webinar are outlined below – we hope you can join us.

As always, we hope you find this edition of Workplace View an interesting read. If you require any assistance in relation to the topics addressed in this newsletter, or any other employment-related matters, please do not hesitate to contact us.

**Labour & Employment team in Australia**

## Vaccination of Workers in Australia

**Erin Kidd, Director**

The world over, employers are still grappling with challenges arising out of the COVID-19 pandemic. In recent months, one of the most significant considerations in Australia has been the vaccination of workers. Can employers require their employees in Australia to be vaccinated? What happens if the employees say no? Can employers collect vaccination data from their Australian employees? We answer these questions and more below.

### Are Vaccinations Mandatory in Australia?

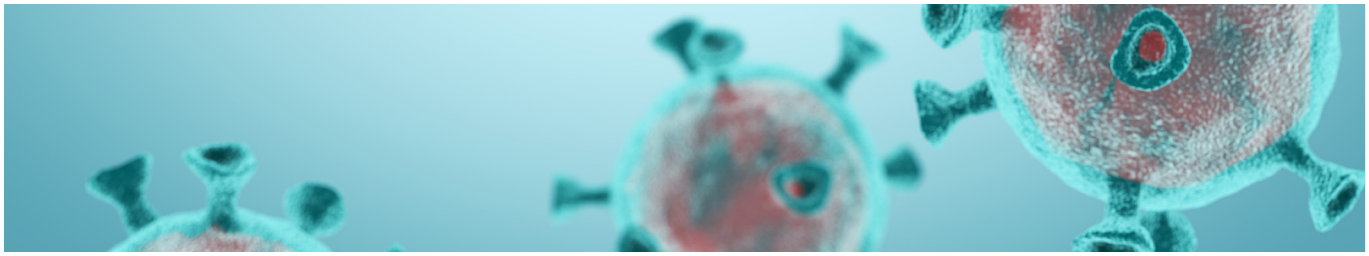
While the federal and state governments in Australia maintain the general position that COVID-19 vaccination is voluntary, mandatory vaccination has been implemented in a number of industries. For example, the federal government has mandated vaccination for residential aged care and quarantine workers, the Queensland government has mandated vaccinations for all health workers who work with diagnosed cases of COVID-19, and the New South Wales government has announced mandatory vaccines for health workers, aged care workers and school staff. COVID-19 vaccination is also required for construction workers, disability and early childhood care workers in certain locations in New South Wales where there are higher numbers of COVID-19 cases present.

### Can Private Enterprises Require Their Staff to Be Vaccinated for COVID-19?

If an employer operates in an industry where COVID-19 vaccination has not been mandated by government, it can only direct its employees to be vaccinated for COVID-19 if the direction is "lawful and reasonable". Whether a direction is lawful and reasonable is fact dependent and needs to be assessed on a case-by-case basis. Relevant considerations include the nature of the workplace, the extent of community transmission of COVID-19 in the location where the employee works, vaccine availability, the employee's circumstances and duties, and the employer's health and safety obligations to both keep the workplace safe and to eliminate or minimise (so far as "reasonably practicable") the risk of exposure to COVID-19.

To assist employers to undertake the case-by-case assessment, Australia's workplace watchdog, the Fair Work Ombudsman (FWO) has suggested that employers divide work into four broad tiers:

| Tiers | Type of Work | Is Mandatory Vaccination Reasonable? |
|---|---|---|
| 1 | Employees with duties to interact with people that have an increased risk of being infectious, such as hotel quarantine workers and border control. | **More likely to be reasonable**, given the increased risk of employees being infected with COVID-19, or giving COVID-19 to a person who is particularly vulnerable to the health impacts of COVID-19. |
| 2 | Employees required to have close contact with people who are vulnerable to the impact of COVID-19, including store workers who are providing essential goods and services. | |
| 3 | Interaction occurs, or is likely to occur, between employees and other people such as customers, other employees and the public within the normal course of employment. | Where no community transmission of COVID-19 has occurred for some time in the area where the employer is located, a direction to employees to be vaccinated is, in most cases, **less likely to be reasonable**. But where community transmission of COVID-19 is occurring in an area, and an employer is operating a workplace in that area that needs to remain open to provide essential goods and services, a direction to employees to receive a vaccination is **more likely to be reasonable**. |
| 4 | Employees have minimal face-to-face interactions as a normal part of their employment duties, such as those working from home. | **Unlikely to be reasonable**, given the limited risk of transmission of COVID-19. |




## What Do I Need to Consider Before Implementing a Vaccination Policy?

Before implementing a vaccination policy, an employer must consider whether it must consult with its staff under the terms of an applicable contract, industrial instrument (such as an award or enterprise agreement) or work health and safety laws. In many instances, we are seeing employers consult with their employees before seeking to mandate COVID-19 vaccinations, even when they are not obligated to do so. The reason for this is mainly to seek to procure employee engagement and prevent reluctance in respect of compliance should a policy be implemented.

## What if One of My Employees Refuses to or Cannot Be Vaccinated?

Performing a risk assessment will help determine whether particular working arrangements should be put in place for employees who cannot or will not be vaccinated. However, consideration must be given to the specific circumstances of the individual employee's duties, the nature of the workplace, and the reason the employee is not vaccinated. It is recommended that employers seek legal advice before excluding an employee from the workplace or taking disciplinary action (including dismissing an employee) on the basis that an employee is not vaccinated, as the action taken may give rise to a potential claim (as outlined below).

## Can I Encourage my Employees to Be Vaccinated for COVID-19?

Employers in Australia are strongly encouraged to support the vaccination rollout. As a result, many businesses who are unable to issue a lawful and reasonable direction requiring staff to be vaccinated have offered staff members certain incentives to aid the take-up of the vaccination. These incentives have mainly been extra leave or flexible working arrangements to assist with attending appointments to receive the vaccine.

Other incentives can be offered by employers to their employees subject to compliance with certain guidance issued by the Therapeutic Goods Administration (TGA), which is responsible for regulating the advertising of vaccines in Australia. The guidance provides that, among other things, the incentive or reward offered can only be offered to those who are fully vaccinated, may include cash or alcohol (although it cannot encourage excessive or rapid consumption of alcohol), and cannot include tobacco.

## Are There Any Risks in Imposing a Mandatory Vaccination Policy?

We consider an employer's primary risk of imposing a mandatory vaccination policy for its Australian workforce would be a claim of indirect discrimination, on the basis that an employee would argue they cannot comply with the requirement to be vaccinated due to a protected attribute, such as a disability or religious belief that prevents them from receiving a COVID-19 vaccine. An employer's defence to such a claim will require an assessment of the reasonableness of the direction, as well as factors like the existence of any relevant public health orders, work health and safety issues, the severity and distribution of COVID-19 in locations near the workplace, and whether there are any alternative methods that might reasonably achieve the employer's objectives without imposing the requirement.

Alternatively, an employee who is dismissed because they have not been vaccinated could seek to bring an unfair dismissal or general protections claim. To be successful in its defence of such a claim, the employer would need to show that, among other things, the mandatory vaccination requirement was a lawful and reasonable direction given by the employer to the employee and that the employee's failure to comply was a valid reason for their dismissal.

## What Are the Privacy Considerations When Collecting Employee Vaccination Status?

An employer can only require an employee to provide information about their vaccination status, which is "sensitive health information" under Australia's Privacy Act 1988 (Cth) (Privacy Act), in very limited circumstances. An employer must only collect vaccine status information if the employee consents to provide the information and the information is reasonably necessary for the employer's functions or activities. Employers should not be collecting information "just in case" or if it is possible to achieve their purpose without collecting this information. Information about an employee's vaccine status must be collected and stored in accordance with the requirements of the Privacy Act.

If you require advice about vaccinations in respect of your workforce, or assistance in respect of preparing a vaccination policy, please feel free to contact us.

## Does Overseas Service Count for the Purposes of Long Service Leave?

**Elisa Blakers, Associate**

Long service leave (LSL) is a leave entitlement unique to Australia and New Zealand. It originated in the colonial era as a way of providing public sector employees in some Australian jurisdictions with a "furlough" or leave of absence, which was long enough to allow them to travel by sea to visit "home" in the UK.

The entitlement is now ingrained in Australia, with both private and public sector employees entitled to a period of LSL once they have attained a specified period of continuous service (typically seven to 10 years) with their employer.

LSL can be a challenge to navigate for global employees. For example, when an employee transfers within a group of companies to Australia, does that employee's prior overseas service count for the purposes of a LSL entitlement? The answer to this question is often not an easily ascertainable one, with employers of workers in Australia required to navigate the complexities of state-based LSL and the common law.

A recent Victorian Court of Appeal decision has provided some guidance on the issue, finding that two employees initially engaged overseas who transferred to Victoria are not entitled to LSL under the Long Service Leave Act 2019 (Vic) (Victorian LSL Act). In the matter of *Infosys Technologies Limited v State of Victoria* [2021] VSCA 219, two employees who were initially hired in India before being "deputised" to Australia sought payment in lieu of LSL upon termination of their employment. At the time of their resignation, both employees each had more than seven years of service with Infosys (being sufficient service to attract a LSL entitlement under the Victorian LSL Act), and for each employee more than two years of this service was performed in Victoria.

The Victorian Court of Appeal determined that the reference to "seven years of continuous employment with one employer" in the Victorian LSL Act means continuous employment with one employer "in and of Victoria". Accordingly, given both of the employees' employment in India had no connection to Victoria, it did not form part of their continuous service. The employees did not, therefore, have sufficient service "in and of Victoria" to be entitled to a payment in lieu of LSL upon resignation.

The Court of Appeal noted that "in and of Victoria" can extend beyond circumstances where an employee's service with the employer is in Victoria. For example, service "in and of Victoria" may include not only employment performed inside Victoria, but also in obedience of a direction emanating from Victoria, including, for example, while an employee is on an international secondment.

This ruling will give some comfort to global employers with a mobile workforce based in Victoria. However, it is important to remember that LSL legislation is state and territory specific, and while this case may influence the position in other Australian states and territories, it was determined under the Victorian legislation. In circumstances where uncertainty arises as to whether an employee's overseas service counts for the purposes of LSL entitlements, we would recommend that you seek specific advice relevant to the state or territory in which you and/or the employee is based.

## Save the Date for Our Upcoming Webinar

Looking in the Rear-view Mirror at 2021 and Your Roadmap for 2022

**When:** Thursday 9 December 2021
**Time:** 11 a.m. AWST/1 p.m. AEST
**Where:** Online – dial-in details will be sent to you upon registration

Please mark your calendars to ensure you can attend our review of 2021's most significant employment law issues and gain information you can use to plan for the employment-related issues you are likely to face in 2022.

Registration will open soon – please keep an eye out for your invitation.

## Did You Know?

### Casual Changes – Are You Ready for 27 September 2021?

**Elisa Blakers, Associate**

Earlier this year, the federal government passed a number of changes to the casual employment regime. Although the amending law came into effect on 27 March 2021, some of the changes were subject to a six-month transition period, during which employers were required to take steps to prepare for the changes coming into full effect by 27 September 2021.

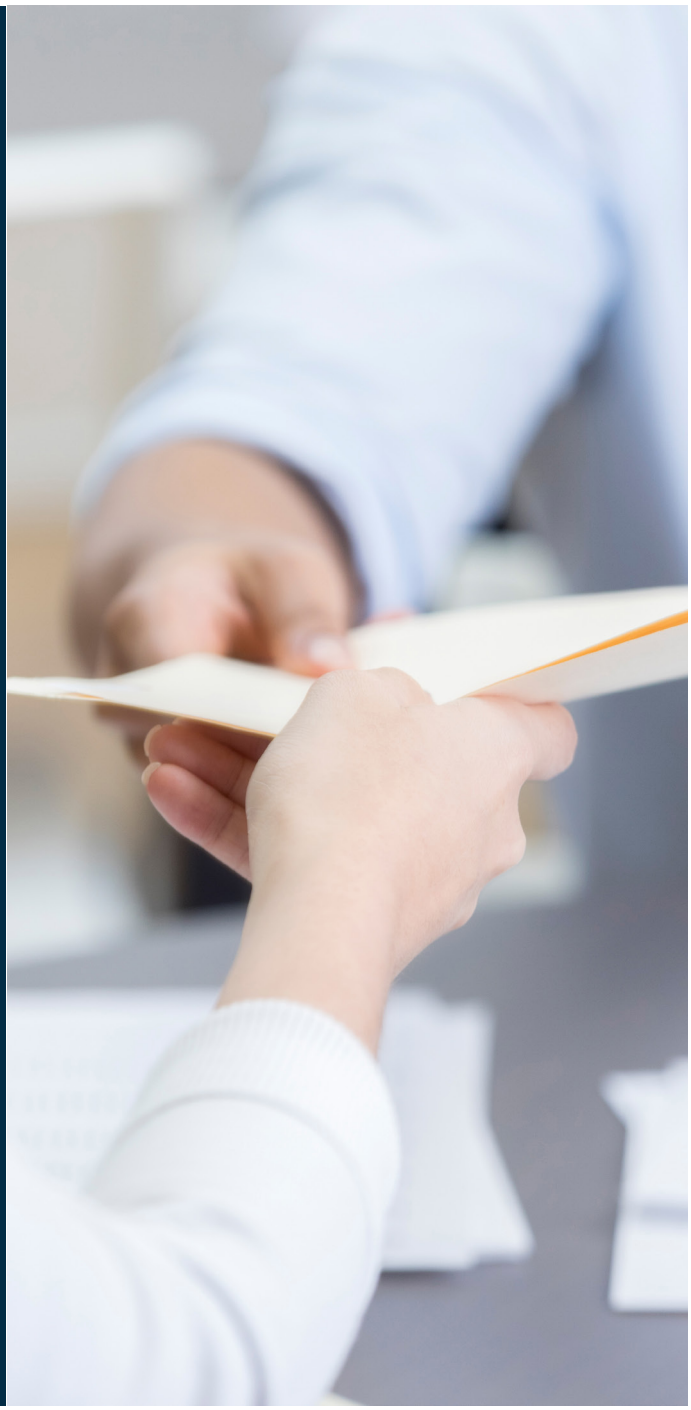
By 27 September 2021, any employer who employs casual employees (other than small business employers) must have done both of the following:

- Assessed all casual employees employed before 27 March 2021 as to whether they are eligible for casual conversion
- Provided written notification to all casual employees employed before 27 March 2021 of the outcome of this assessment, including if it is determined that the employee is ineligible for conversion

In addition, as soon reasonably practicable after 27 September 2021, employers (other than small business employers) must provide casual employees with a copy of the Casual Employment Information Statement (CEIS).

The changes impact on small business employers differently. Small business employers will not be subject to the positive casual conversion obligations, but will be required to respond to any request for conversion received from a casual employee. Further, small business employers were required to provide all casual employees with a copy of the CEIS as soon as practicable after 27 March 2021.

For more information about the casual changes and steps you must take prior to 27 September 2021, please see our recent article – "Casual Employment Changes in Australia: Preparing Your Organisation for 27 September 2021".



## Q&A

# The Fair Work Information Statement and Casual Employment Information Statement

**Erin Kidd, Director**

The National Employment Standards within the Fair Work Act 2009 (Cth) (FW Act) require an employer to give each employee the Fair Work Information Statement (FWIS) and to give each casual employee the Casual Employment Information Statement (CEIS). Find out more about these statements and an employer's obligation to provide them to employees in our Q&A below.

### What Is the FWIS and the CEIS?

The FWIS and CEIS are fact sheets that contain information about an employee's rights and entitlements.

The FWIS outlines information about the National Employment Standards, modern awards, agreement-making, the right to freedom of association, the role of the Fair Work Commission and Fair Work Ombudsman, termination of employment, individual flexibility arrangements and right of entry. The CEIS sets out information about the meaning of "casual employee" and the operation of the casual conversion provisions in the FW Act.

An employer must ensure it is providing employees with the most recent version of the FWIS and CEIS. An updated FWIS is published on or about 1 July each year. The first CEIS was published on 27 March 2021 and it was last updated on 9 August 2021.

### When Must the FWIS and CEIS Be Given?

Employers must give the FWIS to each employee before, or as soon as practicable after, the employee starts employment. In addition to the FWIS, employers must also give casual employees the CEIS before, or as soon as practicable after, the employee starts as a casual employee with the employer.

An employer is not required to give an employee the FWIS or CEIS more than once in any 12 months. This would apply in situations where an employer employs the employee more than once in a 12-month period (for example, where the employee is a casual).

Pursuant to the transitional period for the new casual employment regime (see the "Did you know?" section above), employers (other than small business employers) must provide existing casual employees with a copy of the CEIS as soon reasonably practicable after 27 September 2021. Small business employers were required to provide existing casual employees with a copy of the CEIS as soon as practicable after 27 March 2021.

### How Can the FWIS and CEIS Be Provided to Employees?

The FWIS and CEIS can be provided to an employee in hard copy or electronically, including by emailing the employee a link to the statements on the Fair Work Ombudsman's website or the employer's intranet.

We recommend that new employees receive a copy of the FWIS (and CEIS if relevant) with their employment contract or new starter pack.

### Are There Penalties for Not Providing the FWIS or CEIS?

As provision of the FWIS and CEIS are required by the National Employment Standards, a failure to provide these statements is a breach of the National Employment Standards. Such a breach can lead to hefty financial penalties for both the employer and any individuals involved in the breach.

### Where Can I find the FWIS and CEIS?

The FWIS and CEIS are both published by the Fair Work Ombudsman. The FWIS can be found here and the CEIS can be found here.

## Legislation Update

### Superannuation Reforms Introduce "Stapled Funds"

**Elisa Blakers, Associate**

Superannuation reforms aimed at reducing the number of super accounts an employee has (and, by extension, reducing duplication in fees associated with these super accounts) will soon come into effect.

From 1 November 2021, where a new employee does not nominate a super fund, employers will be required to make super contributions to an employee's existing "stapled fund". This means that, when an employee does not nominate a super fund, instead of directing super contributions to an employer's default super fund, employers will be required to make enquiries with the ATO as to whether the employee has an existing "stapled fund". A stapled super fund is an existing super account that is linked, or "stapled", to an individual employee so that it follows them as they change jobs.

Only in circumstances where an employee both:

- Has not nominated a fund
- Does not have an existing "stapled fund"

can the employer proceed to register the new employee with the employer's default superannuation fund.

These reforms will likely necessitate some changes to your on-boarding processes. We would also recommend that employers revisit their employment contract templates to ensure that the superannuation clauses are drafted in a way that recognises superannuation contributions will be made into the employee's "stapled fund" in circumstances where the employee does not nominate a preferred fund.

Please get in touch with us for more information about these changes or assistance with preparing for these changes.

## Case Law Update

### Employee's <10% Pay Cut Permitted by Enterprise Agreement and Regulations Still a Dismissal

*James v NSW Trains [2021] FWC 4733*

**Sharon Payn, Associate**

Can a pay cut of <10% be considered a "significant reduction" in an employee's remuneration under the Fair Work Act 2009 (Cth) (FW Act)? Can a demotion that is permitted by an employment contract, enterprise agreement, modern award or other legislation still constitute dismissal under the FW Act? On 3 August 2021, the Fair Work Commission (FWC) considered these questions and determined that the answer to both was "yes".

The case related to the employment of Mr James, who was employed by NSW Trains as a shift manager. Following an investigation into allegations of misconduct, NSW Trains took disciplinary action against Mr James by reducing his grade under the applicable enterprise agreement, resulting in his annual remuneration being reduced from AU$141,442 to AU$127,569 per annum. Mr James argued that the change to his grade amounted a demotion that involved a significant reduction in his remuneration or duties and he was, therefore, "dismissed" pursuant to section 386 of the FW Act. Mr James filed a claim for unfair dismissal in the FWC.

NSW Trains argued that Mr James was ineligible to bring his claim on the basis he was not "dismissed" because:

- Mr James was not demoted as there was no change to his position, duties or location of work. Mr James continued to be paid the applicable rate for a shift manager under the enterprise agreement. He remained in classification R6 despite being moved from a Level E to a Level A.
- Moving him to a different Level was permitted by the enterprise agreement and the Transport Administration (Staff) Regulation 2012 (NSW) (Regulations).

**Was Mr James Demoted?**

The FWC referred to the ordinary meaning of the word "demote" being "to reduce to a lower grade of class (opposed to promote)". Despite the fact that Mr James remained within the RC6 classification, the fact that he was moved from a Level E to a Level A within that classification satisfied the FWC that Mr James was moved to a lower grade, lower class or classification. It held, therefore, that Mr James had been demoted within the meaning of section 386(2) of the FWA.

**Was There a Significant Reduction in Remuneration?**

In order for a demotion to be considered a dismissal, section 386(2)(c)(i) of the FW Act requires the demotion to involve a significant reduction in the employee's remuneration or duties. Mr James' annual remuneration was reduced by 9.8%. Mr James explained the reduction in his remuneration would have an impact on his accrued annual leave and long service leave entitlements and superannuation benefits.

The reduction would also have an impact on any redundancy pay benefits that he might receive. Mr James submitted that AU$13,873 is a significant amount to him because he could use that money to pay his mortgage or school fees. The FWC was satisfied that Mr James' demotion involved a significant reduction in remuneration.

**Disciplinary Action Permitted by Enterprise Agreement and the Regulations**

The enterprise agreement and the Regulations expressly permitted NSW Trains to reduce an employee's position, rank or grade after an investigation concludes in a finding of fault. However, the FWC stated that this is irrelevant for the purpose of determining whether a demoted employee who remains employed has been dismissed within the meaning of section 386 of the FW Act.

**No Termination of Employment**

In addition, the FWC stated section 386(2)(c) of the FW Act implies that a demotion that involves a significant reduction in the employee's remuneration is a dismissal even if the employee remains employed by the employer and there has been no termination of the employment relationship.

**Outcome**

The FWC held that Mr James was demoted, his demotion involved a significant reduction in remuneration and he was dismissed within the meaning of section 386 of the FW Act. Mr James was, therefore, entitled to bring an unfair dismissal claim. The FWC is yet to deal with the merits of Mr James' unfair dismissal claim or the relief he seeks.

**What Does This Case Mean for Employers?**

Employers need to be mindful that a reduction in pay can constitute a "dismissal" under the FW Act. While the reduction needs to be "significant", there is no "magic number" or percentage that determines whether an employee's pay cut is a significant reduction in their remuneration under the FW Act. What constitutes a significant reduction will depend on the facts of the particular case.

Further, a demotion that is permitted by the employment contract, enterprise agreement, award or other legislation does not override section 386 of the FW Act. Despite the demotion being permitted under contract, instrument or other statute, the employee may still bring an unfair dismissal claim (if they satisfy the eligibility criteria). The existence of a contractual or other statutory right to demote an employee (and the fairness in which it is exercised) becomes relevant and is only one factor the FWC will consider when determining whether the employee's dismissal was harsh, unjust or unreasonable.

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