

# Australia's Fair Work Commission Confirms That a Mandatory Vaccination Policy Can Be Lawful and Reasonable in the Absence of Government Vaccination Mandates

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The Fair Work Commission's recent decision in *AMWU and AWU v ASC Pty Ltd t/a Australian Submarine Corporation [2022] FWC 1198* has confirmed that an employer can introduce a mandatory vaccination policy, even in the absence of a public health order requiring mandatory vaccination in respect of the employer's industry or the location in which the employer operates. However, in order for the policy to be lawful and reasonable, there are still some thresholds that need to be met.

## What Was the Case About?

In December last year, the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) and the Australian Workers' Union (AWU) applied to the Fair Work Commission (FWC) to deal with a dispute under the ASC Enterprise Agreement 2021 (Agreement). The AMWU and AWU (Unions) are two of the three employee organisations covered by the Agreement.

The respondent to the dispute was ASC Pty Ltd trading as Australian Submarine Corporation (ASC), which had introduced a requirement that employees and contractors be double-vaccinated against COVID-19 before entering the worksite.

To confine the dispute, ASC and the Unions agreed that the central issue concerned two questions:

1. Had ASC met the consultation requirements prescribed by the Agreement in respect of its vaccination policy?
2. Would an instruction from ASC that employees covered by the Agreement comply with the vaccination policy be a lawful and reasonable direction?

### Question 1:

#### **Had ASC Met the Consultation Requirements Prescribed by the Agreement in Respect of Its Vaccination Policy?**

In respect of the first question, the FWC found in favour of ASC in answering the question "yes".

The Unions submitted that ASC failed to meet its consultation obligations under both the Agreement and the Workplace Health and Safety Act 2012 (SA). They submitted that the decision to introduce the vaccination mandate was a definitive decision made without consultation and, in any event, any consultation occurred only on matters of the implementation of the mandate and not the mandate itself. This failure to consult, submitted the Unions, rendered the vaccination mandate unlawful and therefore unreasonable.

ASC submitted that it had conducted a process of consultation on both the policy and its planned implementation. ASC also submitted, amongst other things, that the industrial and legislative consultation obligations do not extend to an obligation to agree with positions put forward, and that it acted lawfully in maintaining its view, after consultation, that it was appropriate to implement the mandatory vaccination policy.

Noting that ASC had a predisposed view to the appropriateness of its decision to introduce the vaccination mandate, the FWC nevertheless held that the consultation process still had the capacity to inform and impact ASC's view to the appropriateness of the decision. This was evidenced by:

- Changes made to the policy first proposed, including that ASC would no longer retain vaccination certificates or medical exemptions, and there would be a "show cause" process for non-compliant employees.
- ASC facilitating an opportunity for health and safety representatives and others involved in the consultation process to review ASC's risk assessment and develop one of their own.

### Question 2:

#### **Would an Instruction From ASC That Employees Covered by the Agreement Comply With the Vaccination Policy Be a Lawful and Reasonable Direction?**

In respect of the second question, the FWC also found in the affirmative and therefore in favour of ASC.

The policy was held to be lawful on the basis that ASC materially complied with its consultation obligations under both the Agreement and WHS legislation, and that the policy and any outcome for breaching it was not unlawful under the Privacy Act 1988 (Cth).

The FWC also found that the mandatory vaccination policy was reasonable, despite the Unions having argued that it was unnecessary because other control methods (such as mask wearing, social distancing and rapid antigen testing) were sufficient to manage the health and safety risks presented by COVID-19. Given the work on the submarines includes work in confined spaces where social distancing is not always possible, that non-compliance with mask wearing occurs from time to time and rapid antigen testing would occur only weekly, the FWC found that other control methods, whilst important, were not adequate to mitigate ASC's assessment of risk.

The Unions had also argued that the vaccination mandate was unreasonable on the basis that it was disproportionate to the current risks presented by COVID-19, particularly given matters such as the increased vaccination rates of the general population, the Omicron variant being a less severe variant of COVID-19 and the general easing of public health restrictions by government. ASC, on the other hand, submitted that the opening of borders and increased risk of transmissibility of Omicron strengthened, not diminished, the reasonableness of its mandatory vaccination policy.

In assessing the reasonableness of the policy in this regard, the FWC noted it should not substitute its view for management decisions except where they are unlawful, unreasonable or otherwise require third-party intervention. The FWC said that whilst the existence of a government vaccination mandate to enter a high-risk setting may support the reasonableness of a complementary policy mandate in that setting, the converse is not true. Rather, the reasonableness of an employer's policy proposing a vaccination mandate is to be objectively considered on its merits, and should not be burdened by a presumption of unreasonableness simply because government authorities have not declared that worksite to be a high-risk setting.

## The Outcome

The FWC determined that the mandatory vaccination policy has a logical and understandable basis, in that it deals with the management of a real and present risk to health and safety. The implementation of the mandatory vaccination requirement was not considered to be disproportionate as a workplace health and safety response to the risks presented by COVID-19.

Although the mandatory vaccination policy was permitted to remain, the FWC did make three recommendations regarding the policy. These were:

1. To extend the period for employees to be vaccinated in accordance with the policy by a further 14 days, such that any unvaccinated employees could make further decisions on compliance with the policy before disciplinary action was taken.
2. The policy should be reviewed within 12 months, given the relatively rapid changing face of the pandemic and its impact on workplaces.
3. ASC should consult on any mandatory requirement for a third (or booster) dose of the vaccine before such a dose becomes required by way of the policy.

## What Does This Decision Mean for Employers?

In light of this decision, employers should take comfort from the fact that vaccination policies made outside the bounds of a vaccination mandate issued by government will be considered lawful and reasonable, as long as the following steps and conditions are followed:

1. A consultation process has occurred as required under the terms of any industrial instrument and/or work health and safety laws.
2. The policy is reasonable, having regard to the risks identified in a health and safety risk assessment.

Those employers who have not engaged in consultation, or undertaken a risk assessment, should look to do so as a matter of priority to ensure that their policy, and any disciplinary action taken in respect of employees who do not comply with its terms, cannot be successfully challenged.

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