Summary of Decision

3 December 2021

CFMMEU & Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal
C2021/7023

[2021] FWCFB 6059

Overview

[1] This decision determines a dispute at the Mt Arthur open cut coal mine (the **Mine**) in the Hunter Valley in New South Wales. Mt Arthur Coal Pty Ltd (**Respondent** or **Mt Arthur**) employs the employees who work at the Mine. Mt Arthur is a wholly owned subsidiary of Hunter Valley Energy Coal Pty Ltd, which operates the Mine. Mt Arthur and Hunter Valley Energy Coal Pty Ltd are members of the BHP group of companies.

[2] The *Mount Arthur Coal Enterprise Agreement 2019* (the **Agreement**) covers about 724 production and engineering employees who work at the Mine. Mt Arthur employs other employees at the Mine who are not covered by the Agreement and there are about 1000 other workers at the Mine who are employed by other entities. The dispute only concerns the 724 employees who work at the Mine, are employed by Mt Arthur and who are covered by the Agreement (the **Employees**).

[3] Mt Arthur manages the Mine and controls who is permitted to enter, and the conditions on which they do so.

[4] The dispute concerns an announcement by Mt Arthur on 7 October 2021, of a requirement or direction that all workers at the Mine must be vaccinated against COVID-19 as a condition of site entry (**Site Access Requirement**). The Site Access Requirement requires the Employees to:

a) have at least a single dose of an approved COVID-19 vaccine by 10 November 2021, and
b) be fully vaccinated by 31 January 2022.

[5] The Employees were informed that if they attend the Mine after midnight on 9 November 2021 they will not be permitted access to the Mine unless they have provided Mt Arthur with evidence that they have had at least a single dose of an approved COVID-19 vaccine.

[6] The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), which represents about 700 of the Employees, and the Secretary of the local CFMMEU lodge (the

Applicants) made an application under s.739 of the FW Act seeking that the Commission deal with the dispute under the dispute resolution procedure in the Agreement (the **Application**).

[7] The Applicants and Mt Arthur agreed that the following question be arbitrated by the Commission:

> 'Whether the direction as set out in attachments 1 and 2 to the application filed by the CFMMEU in proceedings C2021/7023 is a lawful and reasonable direction in respect to employees at the Mt Arthur mine who are covered by the Mt Arthur Coal Enterprise Agreement 2019.' [1]

[8] On 2 November 2021, the Applicants applied to the Commission for interim relief which, although not expressly stated, sought to permit unvaccinated Employees to work at the Mine without satisfying the Site Access Requirement, until the Full Bench delivered its decision. This application was heard by Deputy President Saunders on 9 November 2021 and the Deputy President issued a decision dismissing the application for interim relief on the same day.[2]

[9] In the Decision the Full Bench emphasised these particular features of the matter before it:

1. The Employees and the Respondent are covered by an enterprise agreement approved by the Commission (the Agreement).

2. The Application is made under s.739 of the FW Act seeking that the Commission deal with a dispute under the dispute resolution procedure in the Agreement.

3. The dispute resolution procedure in the Agreement is not limited to disputes about matters arising under the Agreement and extends to 'any dispute […] arising in the course of employment'.

4. The decision to implement the Site Access Requirement was made in a dynamic environment which has evolved even since the hearing of this matter with the World Health Organisation designating variant B.1.1.529 (the Omicron variant of COVID-19) as a variant of concern.

[10] As to the last point the Full Bench acknowledged that employers face a difficult task in managing the risks for their workers in such a dynamic environment.

[11] The Full Bench concluded that the answer to the question posed by the parties was 'no', and in doing so the Full Bench said (at [252] – [253]):

> 'We note that there are a range of considerations which otherwise weighed in favour of a finding that the Site Access Requirement was reasonable, including that:

1. It is directed at ensuring the health and safety of workers of the Mine.
2. It has a logical and understandable basis.

---

[1] [2021] FWCFB 6059 at [11].

[2] [2021] FWC 6309

3. It is a reasonably proportionate response to the risk created by COVID-19.
4. It was developed having regard to the circumstances at the Mine, including the fact that Mine workers cannot work from home and come into contact with other workers whilst at work.
5. The timing for its commencement was determined by reference to circumstances pertaining to NSW and the local area at the relevant time.
6. It was only implemented after Mt Arthur spent a considerable amount of time encouraging vaccination and setting up a vaccination hub for workers at the Mine.

Had the Respondent consulted the Employees in accordance with its consultation obligations − such that we could have been satisfied that the decision to introduce the Site Access Requirement was the outcome of a meaningful consultation process – the above considerations would have provided a strong case in favour of a conclusion that the Site Access Requirement was a reasonable direction.'

The Facts

[12] The following general factual propositions were uncontentious and were established on the evidence before the Full Bench:

1. COVID-19 involves a high burden of disease, greater than influenza.

2. Any infected person is at risk of developing serious illness from the virus, which may lead to death.

3. The risks posed by COVID-19 have changed with the rapid rise of the Delta variant which is more infectious and has more severe health effects than previous variants.

4. All COVID-19 vaccines currently available in Australia are effective at preventing symptomatic infection, including from the Delta variant.

5. All COVID-19 vaccines currently available in Australia substantially reduce the risk of serious illness or death, including from the Delta variant.

6. All COVID-19 vaccines currently available in Australia are safe and any adverse effects are usually mild. There is a much higher risk of developing serious complications and dying from acquiring COVID-19.

7. An unvaccinated person is more likely to acquire COVID-19 from another unvaccinated person, rather than a vaccinated person.

8. While other measures, such as mask wearing, and social distancing, are demonstrated to reduce the transmission of COVID-19, the effectiveness of these measures depends on people applying them consistently or correctly. They do not provide a substitute for the constant protection offered by vaccines, nor do they reduce the risk of developing serious illness once somebody acquires an infection.

9. Vaccination is the most effective and efficient control available to combat the risks posed by COVID-19.

10. Even with high vaccine rates in the community, COVID-19 will remain a significant hazard in any workplace in which there is a possibility that people will interact or

use the same common spaces (even at separate times). The Mine is clearly such a workplace.

[13] Further, the Full Bench found that it followed from proposition 7 above, as a matter of logic, that:

> 'higher rates of vaccination decrease the chance that an unvaccinated person will acquire COVID-19 because an unvaccinated person is less likely to acquire COVID-19 from a vaccinated person than an unvaccinated person. In this sense, higher rates of vaccination do decrease the risks to an unvaccinated person. However, [as the expert evidence made clear], higher rates of vaccination do not remove the risk of COVID-19 infection for unvaccinated workers. That is because unvaccinated workers are at risk of catching COVID-19 from other unvaccinated workers and fully vaccinated workers, who can acquire COVID-19 and efficiently transmit the disease to others. Indeed, unvaccinated people are more likely to acquire COVID-19 compared with vaccinated people. Further, unvaccinated workers on a work site increase the risk of spreading COVID-19 to vaccinated workers and other unvaccinated workers. In turn, those persons are at risk of spreading COVID-19 outside the workplace to their families and friends[3].'

[14] The Full Bench was also satisfied, on the basis of the expert evidence, that the rates of infection of COVID-19, in the Hunter Region and throughout Australia, are likely to increase over time as movement restrictions ease, with the result 'that it is inevitable that everyone who works on the Mine will come into contact with someone – probably many people – who are infected with COVID-19' and that 'when COVID-19 does so spread, those who remain unvaccinated are at greatest risk of acquiring COVID-19, becoming seriously ill or dying from acquiring COVID-19, and infecting other people with whom they come into contact.'

A Lawful and Reasonable Direction – General Observations

[15] None of the Parties contended that there was anything in public health orders, the Agreement or the express terms in the Employees' contracts that would provide the legal basis for the Site Access Requirement. It followed that the basis for the Site Access Requirement must derive from the term implied into all contracts of employment to the effect that employees must follow the lawful and reasonable directions of their employer.

[16] The Full Bench observed that it was uncontentious that:

1. A lawful direction is one which falls within the scope of the employee's employment. There is no obligation to obey a direction which goes beyond the nature of the work the employee has contracted to perform, though an employee is expected to obey instructions which are incidental to that work.

2. Employer directions which endanger the employee's life or health, or which the employee reasonably believes endanger his or her life or health, are not lawful orders; unless the nature of the work itself is inherently dangerous, in which case the employee has contracted to undertake the risk.

[3] Ibid at [61].

3. The order or direction must also be 'lawful' in the sense that an employee cannot be instructed to do something that would be unlawful; such as a direction to drive an unregistered and unroadworthy vehicle.

[17] The Full Bench noted that employees are only obliged to comply with employer directions which are lawful *and* reasonable and that:

> 'Reasonableness is 'a question of fact having regard to all the circumstances' and that which is reasonable in any given circumstance may depend on, among other things, the nature of the particular employment. The approach to the task of assessing the reasonableness of a direction to an employee was identified by Dixon J in *Darling*, as follows:
>
> > 'But what is reasonable is not to be determined so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award governing the relationship, supply considerations by which the determination of what is reasonable must be controlled. When an employee objects that an order, if fulfilled, would expose him to risk, he must establish a case of substantial danger outside the contemplation of the contract of service.''[4]

[18] In considering the operation of 'reasonableness' the Full Bench concluded that aspects of a previous Full Bench decision (*Woolworths Ltd (t/as Safeway) v Brown* (*Woolworths*)) was plainly wrong. The relevant passage from *Woolworths* is as follows:

> 'What is reasonable will depend upon all the circumstances including the nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument governing the relationship. A policy will be reasonable if a reasonable employer, in the position of actual employer and acting reasonably, could have adopted the policy. That is, a policy will only be unreasonable if no reasonable employer could have adopted it. A policy will not be unreasonable merely because a member of the Commission considers that a better or different policy may have been more appropriate. As the Full Bench observed in the XPT case, albeit in a somewhat different context, its not the role of the Commission "to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable.' (Emphasis added)[5]

[19] The Full Bench noted that the posited test of reasonableness in this passage - 'if a reasonable employer, in the position of actual employer and acting reasonably, could have [made the direction]' - raised more questions than it answered:

> 'How does one discern what a 'reasonable employer' 'acting reasonably' could do? The posited test does not shed any light on the issue to be determined and… 'places a gloss on the question of reasonableness without helping to answer the question...
>
> No authority is cited in support of the formulation adopted by the Full Bench; it travels well beyond the observations of Dixon J in *Darling*; and it does not sit conformably with a similarly expressed test in the administrative law context.' [6]

---

[4] Ibid at [72] (footnotes omitted).

[5] Ibid at [73] (footnotes omitted).

[6] Ibid at [75]-[76] (footnotes omitted)

[20] The Full Bench rejected the Respondent's primary contention that 'a direction will always be reasonable when, as in this case, the object and purpose of the direction is compliance with the employer's statutory and common law duties'. In rejecting that proposition the Full Bench said:

> 'We do not accept the submission put by the Respondent. It proceeds as a false legal premise and seeks to give determinative weight to the asserted purpose and object of a direction to the exclusion of any other consideration, including the impact of the direction on the rights and interests of the Employees.
>
> We agree with ACCI that a range of factors will bear on whether a direction is reasonable. As we have mentioned, the reasonableness of a direction is a question of fact having regard to *all* the circumstances, which may include whether or not the employer has complied with any relevant consultation obligations.
>
> Whether a particular direction is reasonable is not to be determined in a vacuum, it requires consideration of all the circumstances, including the nature of the particular employment, the established usages affecting the employment, the common practices that exist and the general provisions of any instrument governing the relationship. In NSW, this would include consideration of obligations in the WHS Act, which governs employment relationships in that jurisdiction. The assessment of reasonableness and proportionality is essentially one of fact and balance and needs to be assessed on a case-by-case basis. The assessment will include, but not be determined by, whether there is a logical and understandable basis for the direction.[7]'

[21] In relation to reasonableness generally the Full Bench concluded that it was uncontroversial that:

1. In order to establish that a direction is reasonable, it is *not* necessary to show that the direction in contention is the preferable or most appropriate course of action or in accordance with 'best practice' or in the best interest of the parties.

2. In any particular context, there may be a range of options open to an employer within the bounds of reasonableness.

3. A direction lacking an evident or intelligible justification is not a reasonable direction an employee is obliged to obey, but that is not the only basis upon which unreasonableness can be established.

[22] The Full Bench also noted that 'reasonableness is a question of fact…it is an objective assessment of the reasonableness of the direction, having regard to all of the circumstances.'[8]

Mt Arthur's Consultation Obligation

[23] The Full Bench recognised that that the content of any specific requirement to consult is determined by the context, including:

---

[7] Ibid at [94]-[96] (footnotes omitted)

[8] Ibid at [263].

- the precise terms in which such a requirement is expressed in the applicable industrial instrument, contract or legislation, including the circumstances in which the obligation is enlivened,

- the factual context in which the requirement arises, including the size and nature of the business and the nature of the change which is the subject of the consultation and the impact of that change on the persons who are required to be consulted, and

- whether the factual circumstances dictate a quick response.

[24] In this case it was uncontentious that the introduction of the Site Access Requirement and its implementation enlivened the consultation obligations in the *Work Health and Safety Act 2011* (WHS Act) at ss 47 to 49. The WHS Act is based on the work health and safety model laws, which have been enacted in all jurisdictions except Victoria and Western Australia.

[25] The Full Bench concluded that the Respondent was required to comply with s.47(1) of the WHS Act, which requires it to consult, so far as reasonably practicable 'with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety' and said:

> 'Consultation is treated by the WHS Act as a matter of substance which is to occur prior to implementation. Section 48(2) requires that the consultation involve a HSR, who in the context relevant here is a 'mine safety and health representative.''[9]

[26] Section 275 of the WHS Act provides that codes of practice approved under s.274 are admissible in proceedings for an offence against the WHS Act. The Full Bench also considered the *NSW Government Code of Practice Work Health and Safety Consultation, Cooperation and Coordination* (the Code), which is based on a national model code of practice developed by Safe Work Australia) was approved in August 2019 under s.274 of the WHS Act. As to the application of the Code to the dispute, the Full Bench said:

> 'We consider that the Code does not create separate consultation obligations and a PCBU could comply with its WHS consultation obligations without following the Code. Section 275(4) plainly recognises that a PCBU could comply with the WHS Act in a way that is different to the standard required in the Code. Noting, however, that codes of practice are intended to provide practical guidance to assist duty holders to meet the requirements of the WHS Act, we consider that the Code is relevant to our consideration of whether the Respondent met its consultation obligations under the WHS Act.'[10]

[27] In section 5.2.3 of the Decision the Full Bench considered whether Mt Arthur complied with its consultation obligations under the WHS Act. After examining what took place before and after the announced introduction of the Site Access Requirement on 7 October 2021, the Full Bench concluded:

> 'The process undertaken by the Respondent and BHP in relation to the decision to implement of the Site Access Requirement has been set out above. In our view, the Employees were not given a genuine opportunity to express their views and to raise work health or safety issues, or to contribute to the decision-making process relating to the decision to introduce the Site Access

[9] Ibid at [103] (footnotes omitted)

[10] Ibid at [124]

> Requirement. They were not provided with information relating to the reasons, rationale and data supporting the proposal, nor were they given a copy of the risk assessment or informed of the analysis that informed that assessment. In effect the Employees were only asked to comment on the ultimate question: should the Site Access Requirement be imposed? The contrast in the consultation or engagement with Employees in the implementation phase compared to the assessment phase is stark and suggests that during the assessment phase the Respondent was not consulting *as far as is reasonably practicable* as required by s.47 of the WHS Act. There was no real explanation provided by the Respondent as to why there was a markedly lower level of engagement during the assessment phase.
>
> We do not consider that HSRs were involved in any consultation in any meaningful way as required by s.48(2) and we note that established mechanisms such as health and safety committee meetings were not used for this purpose. We agree with the Applicants that the language used in the 31 August 2021 communication demonstrates that the Employees would not be consulted in a meaningful way prior to a decision being made by BHP about the Site Access Requirement. Accordingly, we are not satisfied that there was consultation in accordance with ss.47 and 48 of the WHS Act. In reaching this conclusion, we have taken the guidance provided by the Code into account.'[11]

Was the Site Access Requirement a lawful and reasonable direction?

[28] The Full Bench said that the Site Access Requirement was *prima facie* a lawful direction because:

- it falls within the scope of the employment, and
- there is nothing 'illegal' or unlawful about becoming vaccinated.

[29] During the proceeding the ACTU contended that the lawfulness of an employer's direction 'is not exhausted by considering whether the subject matter of the direction falls within the scope or subject matter of the employment, but extends further to a consideration of the employment (and other) laws that bear upon that subject.' The Full Bench did not need to express a concluded view on this point.

[30] The Full Bench determined that, in all the circumstances and on balance, the Site Access Requirement was not a reasonable direction. The determinative consideration was that the Full Bench was not satisfied that the Respondent had consulted the Employees as required by ss.47 and 48 of the WHS Act.

Other Matters

[31] The Full Bench dealt with the Respondent's compliance with consultation obligations in the Agreement in section 5.2.2 and concluded (at [136]):

> 'We note that the issue of compliance with clause 30 of the Agreement and the effect of any alleged non-compliance was not advanced by the Applicants or the Union Interveners.[12] In the circumstances and in view of the finding made below about the Respondent's compliance with

[11] Ibid at [174]-[175]

[12] In Ai Group's Reply Submission, 16 November 2021 at [95]-[106], Ai Group submits that clause 30 of the Agreement does not apply to the direction to vaccinate and any failure to comply with the clause does not remove an employer's capacity to issue a lawful and reasonable direction.

the duty to consult in the WHS Act, it is not necessary to express a concluded view on this point. We would observe, however, that based on the analysis in Chapter 5.2.3 below it appears to us that Mt Arthur substantially met its obligation under the Agreement in that it consulted the Employees *after* it had made a definite decision to introduce the Site Access Requirement.'

[32] The Full Bench also considered the Respondent's obligation under the Privacy Act (at [202] – [214]) and concluded that:

> 'On the limited information before us, we are unable to reach a concluded view about whether the Respondent has breached its privacy obligations, including whether an APP3.4 exception to the requirement for consent to the collection of sensitive information applies. In any event, it is unnecessary for us to do so given the conclusion we reach in relation to the reasonableness of the direction.'[13]

[33] The issue of bodily integrity is dealt with in section 5.4 of the Decision. The Union Interveners contended that the Site Access Requirement 'at least impacts upon the choice of an individual to undergo a medical procedure' and hence engages the common law right to personal and bodily autonomy and integrity.

[34] The Full Bench said that existence of such a right was uncontroversial but that the right was not violated by the terms of the Site Access Requirement because the Site Access Requirement does not purport to confer authority on anyone to perform a medical procedure on anyone else.

[35] The Full Bench accepted that the Site Access Requirement was 'a form of economic and social pressure'[14] and that:

> 'The practical effect of the Site Access Requirement is to apply pressure to employees to surrender their bodily integrity (by undergoing medical treatment) in circumstances where they would prefer not to do so. In our view, this is plainly a relevant matter in assessing the reasonableness of the direction. However, we also accept that this factor is not determinative of the question of reasonableness; it is a consideration to be weighed in the balance with the other relevant considerations…
>
> The practical effect of the Site Access Requirement also underscores the significance of the failure to meaningfully consult with the Employees prior to the decision to introduce the Requirement. It is common knowledge that some citizens feel very strongly about their bodily integrity and do not wish to be vaccinated. A minority of the Employees appear to hold such views. It is particularly important that these employees be heard; that they be consulted and their views be taken into account.'

Mt Arthur: The Way Forward

[36] The Decision concludes by addressing the next steps for Mt Arthur:

> 'Mt Arthur's failure to comply with its consultation obligations under the WHS Act is the major consideration which led us to conclude that the Site Access Requirement was not a lawful and reasonable direction. The consultation deficiencies we have identified can be addressed by Mt Arthur consulting the Employees in relation to the question of whether or not the Site Access

---

[13] [2021] FWCFB 6059 at [214]

[14] Ibid at [222]

> Requirement should be imposed at the Mine. Any subsequent dispute will need to be determined having regard to the particular circumstances at the time.
>
> The current New South Wales roadmap proposes the relaxation of various COVID-19 related restrictions on the earlier of 15 December 2021 or when New South Wales reaches 95% double vaccination. Provided Mt Arthur commences its consultation with the Employees [about whether or not the Site Access Requirement should be imposed at the Mine] in a timely fashion, we expect that Mt Arthur would be in a position to make a decision about whether to impose the Site Access Requirement at the Mine prior to 15 December 2021. The consultation with the Employees is directed at whether a site access requirement should be adopted and if so the terms of such a requirement. That is particularly so in circumstances where Mt Arthur has already engaged in extensive consultation with the Employees in relation to the implementation of the Site Access Requirement.'[15]

[37] The Full Bench concluded by noting that it is available to facilitate any discussion between the Applicants and Mt Arthur regarding the consultation process to be undertaken.

---

[15] Ibid at [265]-[266].