



# YEAR IN REVIEW 2021

Employment, Safety  
& People



Maddocks



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# Introduction

We are delighted to present you with our sixth edition of our *Year in Review*, highlighting the issues we have all been addressing this year in employment, safety, industrial relations and discrimination; notable cases; and some implications we are considering for 2022 and beyond.

Most of us would have thought 2021 would be less challenging than 2020. However, as we have all experienced, it was a difficult year which has tested the resilience of our leaders and our people.

Again we have witnessed, and been proud to support you, our clients in People & Culture and Health & Safety teams navigate a plethora of changes and challenges.

You have had to rapidly respond to superannuation changes, obligations to casual workers, sexual harassment legislation and, of course, mandatory vaccination directions, to name a few. While we anticipate COVID-19 will continue to be a challenge into 2022, we expect employers will be well equipped to handle a flexible workforce and to resume a somewhat normal way of working.

We are all well aware of the challenges of the COVID-19 pandemic and how it continues to change the dynamic between employers, employees and the workplace. This is being seen in the form of mandatory vaccine mandates and now the possibility of the Great Resignation, as employees feel safe enough to begin looking for external opportunities and begin to question what it is they seek in a job, or even a career – or simply take time off after an inordinately stressful two years.

We expect 2022 will be another busy year for employers as international travel begins to open up, COVID-19 outbreaks are managed, grants from the pandemic are wound back, supply chains re-established and the federal election ramps up. However, we believe the past 18 months or so has taught employers to be flexible, allowing them to meet these challenges with a new level of preparedness and resilience. We remain optimistic about the capacity of employers to evolve and adapt to a world of work that is changing at a turbocharged pace.

This publication provides an overview of some of these issues, and we will continue to support you, our clients, with regular webinars, seminars and updates over the next year.

We value working with you and we look forward to supporting you and working together again throughout 2022 and beyond.

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# 2021 by the numbers

## General employment law

**13,201**

unfair dismissal  
applications were made to  
the Fair Work Commission

**10,522**

conciliations conducted

**21 days**

average time from  
lodgement to conciliation

**19.5%**

decrease in applications in  
the last 12 months

**45%**

proportion of all  
applications lodged

## General protections

**4,102**

applications lodged

**3,959**

disputes conducted at  
conciliation

**15%**

decrease in claims over the  
last 12 months

**14%**

proportion of all claims  
lodged

## Industrial relations

**4,479**

agreements lodged with  
the Fair Work Commission

**3,753**

agreements approved by  
the Fair Work Commission

**13%**

proportion of all  
applications lodged

## Anti-bullying

**782**

applications lodged with the Fair Work Commission

**4.5%**

increase in claims over the last 12 months

## Hearings & conferences

**12,287**

number of hearings and conferences held by Commission Members around Australia

**3,959**

number of general protections involving dismissal held by experienced staff

**69%**

were held by telephone or videoconference

## Job Keeper applications

**291**

total applications

**68**

wage condition or minimum payment guarantees

**70**

JobKeeper enabling stand downs

**59**

location, days and times of work

**41**

taking paid annual leave

**16**

duties of work

**130**

matters appearing to be outside Part 6-4C

**6**

secondary employment, training for professional development

## Work health & safety

**194**

workplace fatalities

**\$13,500**

median workers compensation for serious injury

**159**

prosecutions and enforceable undertakings (ACT – 5, VIC – 89, NSW, 65)

## General protections — other

**1,156**

applications lodged

**10%**

increase in claims over the last 12 months

### References

Fair Work Commission, [Annual Report](#)

Australian Human Rights Commission

Safe Work Australia, [Annual Report](#)



# Business as usual

## The casual landscape

### The Government's IR Reform Act – and what you need to know about changes to casual employment

Back in March 2021, a watered-down Industrial Relations (IR) Reform Bill made its way onto the Commonwealth statute book. It was well-publicised that negotiations with the crossbench resulted in the Federal Government dropping most of its ambitious reform agenda.

As originally put before Parliament, the IR Bill sought to introduce sweeping reforms to five areas of industrial relations, including:

- casual employees
- modern awards
- enterprise agreements
- greenfield agreements
- wage theft.

In the face of substantial opposition, four of the five areas were culled. The only reforms that did pass were those concerning casual employees. These mainly attempted to remedy the uncertainty brought about by the Full Court of the Federal Court's decision in *WorkPac v Rossato* [2020] FCAFC 84 (a decision which was later overturned by the High Court in *Workpac v Rossato* [2021] HCA 23). In the Full Court of the Federal Court, the Court found that because Mr Rossato's work was '*regular, certain, continuing, constant and predictable*', he was not a '*true*' casual and should have been classified as a permanent employee. What's more, Mr Rossato was entitled to retain all casual loading payments in addition to compensation for all leave entitlements that he did not receive.

The changes introduced by the IR Bill include the following:

- Casual employment has been defined as a person who receives and accepts an offer of employment on the basis that the employer makes 'no firm advance commitment' to continuing and indefinite work according to an agreed pattern of work. Whether an employer makes 'no firm advance commitment' under this definition is a tricky question and depends on a number of factors. Importantly though, 'subsequent conduct' is excluded from the relevant considerations.
- If a Court finds that an employee has been misclassified as a casual employee and paid a casual loading when the employee was in fact permanent, the Court must reduce the amount payable for their unpaid entitlements by the amount of loading paid.

- There is a new 'National Employment Standard' requiring employers (that are not small businesses) to offer some casual employees conversion to permanent employment after 12 months of employment. Transitional provisions required steps to be taken on 27 September 2021 for many employers and their existing casual employees. There is also a residual right for some casual employees to request conversion to permanent employment, if they have the requisite service and have worked a regular pattern of hours which they could continue to work as a permanent employee.
- Employers have to give every new casual employee a Casual Employment Information Statement (CEIS) before, or as soon as possible after, they start their new job.

IR reform is always a political hot-potato. Given the next Australian federal election has to be held on or before 21 May 2022 and with the nature of the changes earlier this year, we expect that more is to come after the election. Watch this space!

#### Key points

- A casual employee is one whose employment offer makes 'no firm advance commitment' of continuing and indefinite work.
- The Court will reduce any unpaid entitlements by the amount of casual loading paid to employees misclassified as casuals.
- Employers need to be aware of their obligation to offer some casual employees conversion to permanent employment.



## Super began to incrementally increase to 12% from 1 July 2021

In 2021, the Federal Government amended the *Superannuation Guarantee (Administration) Act 1992*. Employers are now obligated to 'staple' existing funds to new employees to reduce the amount of lost superannuation and, importantly, decrease account fees.

### What the Act changes

From 1 July 2021 to 1 July 2025, the Superannuation Guarantee will increase employer contributions from 9.5% to 12% in 0.5% increments each year. This is the first time the Superannuation Guarantee has been increased since 2014.

Employer superannuation contributions will incrementally increase as follows:

Period	Superannuation Guarantee
1 July 2021 – 30 June 2022	10%
1 July 2022 – 30 June 2023	10.5%
1 July 2023 – 30 June 2024	11%
1 July 2024 – 30 June 2025	11.5%
1 July 2025 – 30 June 2026 and onwards	12%

### Choice of fund rules

The reforms also introduced several other changes to superannuation, including amendments to the choice of fund rules in the legislation known as 'stapling'.

From 1 November 2021, where an employee commences employment but has not nominated a superannuation fund, the employer is required to make contributions to the employee's existing superannuation fund (in circumstances where they have one). Employers will be able to check with the ATO to see if the employee has an existing super account.

The purpose of this change is to prevent employees from having multiple super funds as account fees can significantly erode the amount of superannuation over a period of time. By figuratively 'stapling' the employee's super fund to them, their account follows them from each job and overrides the employer's nominated default fund.

### Enterprise agreement terms

If an enterprise agreement applies to the employee and it includes terms specifying that contributions will be made to the employer's default fund in the absence of

the employee nominating an alternative fund of their choice, then:

- if the enterprise agreement was made before 1 January 2021, the employer can continue applying this term until the next time the enterprise agreement is negotiated; but
- if the enterprise agreement was made after 1 January 2021, then effective from 1 November 2021, the stapling rules will override the offending provision in an enterprise agreement and the employer must make contributions to the employee's existing superannuation fund (in circumstances where they have one).

### What should employers do?

Employers should review employment contracts and update all payroll settings and systems to ensure the Superannuation Guarantee rate is increased appropriately each financial year. Employment contracts should also be reviewed to ensure they either reflect a 'total employment cost' model (where any super increases will be absorbed and the overall package won't increase) or a 'salary plus super' model where the employer effectively funds any additional cost to an employee's package due to the super increases.

From 1 November 2021, employers should ensure that they 'staple' existing funds to new employees by obtaining information about their existing superannuation funds where the new employee does not nominate a super fund (provided the new employee is not covered by an enterprise agreement which was made before 1 January 2021). Employers who are currently negotiating enterprise agreements should prepare clauses which amend their superannuation obligations to reflect the new stapling requirements.

### Key points

- Review employment contracts and update payroll settings and systems to ensure the Superannuation Guarantee rate is increased appropriately each financial year.
- Review processes to ensure existing superannuation funds are 'stapled' to employees.

# High Court decides that a casual is a casual

## *Workpac v Rossato & Ors* [2021] HCA 23

In a highly anticipated decision, the High Court of Australia upheld WorkPac's appeal on the classification of casual employees.

Coupled with the amendments to the *Fair Work Act 2009 (Cth)* (FW Act), the decision provides certainty and confidence for employers who employ casual employees under Australian law. The decision may also foreshadow a potential change in approach for determining the nature of other working relationships.

### Full Federal Court decision

In May 2020, the Full Federal Court handed down its decision in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, which controversially held that Mr Rossato was a permanent employee despite his contracts stating he was a casual. The Full Court found Mr Rossato's employment, when viewed as a whole, did not reflect casual employment, which is exemplified by irregular, uncertain and unpredictable employment.

As a result, Mr Rossato was entitled to payment for annual leave, personal/carer's leave, compassionate leave and public holidays.

Further, WorkPac was not allowed to set off the 25% casual loading it had paid to Mr Rossato throughout his employment against the permanent employee entitlements the Full Court decided were due to Mr Rossato. In effect, Mr Rossato was allowed to 'double dip' on his entitlements.

### High Court decision

On 4 August 2021, the High Court in *Workpac v Rossato & Ors* [2021] HCA 23 unanimously overturned the Full Federal Court's decision and held that Mr Rossato was a casual employee.

The High Court found Mr Rossato's employment was on an 'assignment-by-assignment basis', and Workpac and Mr Rossato had not agreed the employment would be on an ongoing basis. Mr Rossato's contract expressly provided that his employment was on an 'assignment-by-assignment basis', where he could accept or reject an offer of an assignment and WorkPac was under no obligation to offer further assignments to him.

Importantly, the High Court concluded that where the parties had recorded the terms of their relationship in a comprehensive written contract, the character of the relationship between the parties should be determined by reference to that contract unless the contract is a sham.

### What are the impacts?

Whilst the new definition of 'casual employee' in s 15A of the FW Act limits the practical impact of the decision of the High Court, it still provides employers with some guidance on how the new statutory definition will be applied.

One takeaway for employers is that, when assessing whether an employee is a casual, the focus should be on what is agreed with the employee at the time the employment contract is made, and not the way in which the employment unfolds afterwards by way of unenforceable expectations or understandings or the manner in which the parties perform the agreement.

A second take away is that the decision of the High Court may signal a change in approach for handling employment more generally regarding the determination of the character of working relationships. In late August and early September the High Court heard two appeals which relate to the determination of whether a worker was an employee (or not). The decisions in these cases are likely to provide guidance on whether the approach in *Workpac v Rossato & Ors* will be applied more broadly in determining questions of employment status.

### Key points

- The contract of employment entered into between the employer and employee should be very clear about the type of employment offered.
- Casual employment contracts must align with the new definition of 'casual employee' in s 15A of the Fair Work Act.
- Watch this space for potentially broader changes to how employers determine the nature of their working relationships.





## When outsourcing a problem creates a bigger one: the Qantas decision

The pandemic has seen employers faced with unprecedented levels of uncertainty and cost pressures. Two decisions this year involving Qantas (*Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873; and *Transport Workers' Union of Australia v Qantas Airways Limited (No 2)* [2021] FCA 1012) serve as a reminder of what risks may lay ahead if an employer decides to rationalise its activities and reduce costs (such as by outsourcing).

The Transport Workers' Union successfully argued that Qantas engaged in adverse action for prohibited reasons when it decided to outsource its ground handling operations at a number of airports last year.

### What was the issue in this case?

The issue was whether Qantas decided to outsource the jobs of the relevant employees in 2020 because in 2021 they would have the ability to engage in protected industrial action and bargaining. By then, the relevant enterprise agreements would have reached their nominal expiry date. The union alleged Qantas decided to get in first and outsource the jobs where protected action was likely to be taken by the affected employees. Industrial action would have obvious cost implications for a cash-strapped Qantas.

The ability to participate in a protected action ballot and protected industrial action, as well as in enterprise bargaining more generally, are 'workplace rights' for the purposes of the general protections provisions of the *Fair Work Act 2009*.

Accordingly and critically, once adverse action is established (which the outsourcing of the jobs would be) the onus of proof shifted to Qantas to establish that whatever reasons it did have, they did not include prohibited reasons, such as the fact that the workers were entitled to the benefit of their rights to bargain and engage in protected industrial action.

## What did the Court decide?

Qantas was unable to discharge the reverse onus that the decision was not made for reasons that included a prohibited reason when the evidence of the critical witnesses was viewed in light of all of the other evidence before the Court.

The trial judge found in favour of the Transport Workers' Union; that is, Qantas' decision to outsource its ground handling operations constituted unlawful 'adverse action'.

His Honour found himself '*comfortably satisfied*' that part of what distinctly mattered to Mr Jones, Chief Operating Officer, was the prospect of Qantas having to deal in 2021 with the '*actual exercise by the union and employees covered by the enterprise agreements of the workplace rights identified*'. He said part of Mr Jones' reasoning in endorsing outsourcing in November last year was to '*prevent an anticipated event, being the exercise of these rights (not just the consequence of them)*'.

As has been well established by the High Court, if a Court believes the decision maker's evidence as to what were the actuating reasons they had in mind, and these were not unlawful, then the onus of proof will be discharged. As is often the case, the ultimate decision maker makes their decision on the basis of reports and recommendations prepared by others. In this case, Mr Jones recommended to the ultimate decision maker, Mr David, that the outsourcing process should commence. The Court determined there was no material difference between the reasons behind Mr Jones' recommendation and Mr David's decision. The reasons of the person making the recommendation could effectively be imputed to the final decision maker.

## What are the lessons to be learnt?

Firstly, timing does matter. If a decision is made to outsource just before those whose jobs were to be outsourced would have the ability to exercise their workplace rights (in this case, to bargain), then the burden of proving there is no 'smell' about the decision will, in a practical sense, be that much greater. It is not impossible for an employer to discharge the onus of proof in such circumstances; but the cogency of the evidence required to do so will be greater. Therefore, it is important to ask, is there a convincing body of evidence to prove that the same decision would have been made even if the claimed attribute (such as the employee's exercise of a workplace right) didn't exist?

Secondly, beware of 'killer' documents such as email trails. For example, in this case the Court had before it the Chief Operating Officer's notes he had prepared for a Board meeting, comparing the likely approaches of different Unions which could be involved in the bargaining process. Employers should always assume non-privileged notes, documents and emails will be discoverable in litigation.

Thirdly, what is the evidence of the ultimate decision maker and what would it be based upon? If there has been reporting and recommendations made 'up the line', will the ultimate decision maker be in a position to give evidence of what their reasons were, to the exclusion of all others, or will they be 'tainted' by what was in the mind of those below?

As always, the question for any employer to ask themselves when undertaking any actions which could fall within the broad scope of what constitutes 'adverse action' under the Fair Work Act is, "*Why did we do what we did, and can we prove it?*"

### Key points

- Think about the timing of the outsourcing decision; the ability to participate in a protected action ballot and protected industrial action, as well as in enterprise bargaining more generally, are workplace rights.
- Consider the motives behind outsourcing decisions and be aware of the evidence informing the decision makers choices in these circumstances.



## Lockout of workers gets backed by FWC full bench

*Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd [2021] FWC 4808*

In a rare decision looking at 'employer response action', a Fair Work Commission (FWC) full bench ruled that workers at a Tasmanian potato processing plant were unlawfully locked out of the workplace in July this year. The ruling clarifies when an employer can lockout workers in response to employee industrial action. The FWC held that a lockout of workers taken in response to employee industrial action which has been organised, but not yet engaged in, will not be protected industrial action and will be unlawful.

McCain Foods and the Australian Manufacturing Workers' Union (AMWU) had been bargaining for a new enterprise agreement with AMWU seeking 4% annual pay rise over three years. In response, McCain had offered 3.5% backdated to the expiry of the enterprise agreement in February 2021, with 3% pay rises in each of the next two years. Negotiations had reached an impasse.

On 16 July 2021, the AMWU notified McCain that it intended to engage in 'employee claim action' from 7:00am on 22 July 2021, consisting of stoppages of work by AMWU members. In response, McCain swiftly implemented a lockout of AMWU members from 7:00am on 22 July 2021 to 7:00pm on 23 July 2021. The

lockout occurred before AMWU members actually undertook industrial action.

On 29 July 2021, the AMWU provided McCain with a notice that it intended to take 'employee response action' commencing that same day, consisting of:

- one-hour stoppages regarding work involving fryers
- one-hour stoppages of work involving forklifts
- meal breaks taken at the same time rather than staggered
- indefinite refusal to answer two-way radios or telephones
- indefinite refusal to perform paperwork or computer work in any areas on site.

Despite this notice, AMWU members did not take any industrial action on 29 July 2021. At 5:17pm that day, McCain notified employees that it intended to lockout AMWU members from 7:00pm stating that the threatened industrial action constituted an unacceptable risk to safety, including increasing the risk of a fryer fire, and the plant would be closed until there was a resolution to the issue. The lockout was implemented at 7:00pm that night.

The AMWU applied for an order in the FWC the following day for the lockout to be stopped as it was not protected employer response action. The FWC ruled on 31 July 2021 that the lockout was protected employer response action because it was taken in response to employee industrial action which had been 'organised' and this was sufficient. It was not necessary that the employee industrial action had not yet proceeded. The application was dismissed.

The AMWU appealed this ruling to the full bench on 2 August 2021 and sought an expedited hearing on the basis the lockout was continuing. On 3 August 2021 McCain advised employees that it was ending the lockout and normal work resumed on 4 August 2021.

Even though the lockout had ended, the full bench considered the matter as it raised an important question regarding when an employer could take protected employer response action which would likely arise in the future. A majority of the full bench found the decision at first instance was incorrect and that employer response action would not be protected if it was taken merely in response to industrial action which had been 'organised' or was threatened, impending or probable, but had not actually been taken. The bench found the action will only be protected where it is taken in response to industrial action which has been engaged in by employees or an employee bargaining representative.

Employers should take note of this decision, as it is now clear that a pre-emptive employer lockout of employees will not be protected industrial action and employers may be prevented from taking such action by the FWC. Employers may also be subject to claims for reimbursement of workers unlawfully locked out. Importantly, employers can give notice they will lockout employees before the employee claim action to which the lockout is responsive to actually occurs. However, implementation of the lockout should not occur until the employee claim action has actually been engaged in.

### Key points

- Employers should not pre-emptively respond to anticipated employee industrial action as it does not constitute protected industrial action. However, employers can give notice of their intentions should the employee action actually be engaged in.
- If employees are unlawfully locked out employers risk having to reimburse workers.

## Intellectual freedom or unlawful conduct?

Outspoken academic Dr Peter Ridd not required to express his academic opinion in a respectful or courteous manner, but termination still valid.

The High Court has highlighted the importance of academic and intellectual freedom in higher education institutions, but has confirmed that the protection of intellectual freedom in an enterprise agreement is limited to the terms of the agreement and what is lawful.

Dr Ridd was considered an outspoken academic at James Cook University. In 2018, James Cook University (JCU) terminated Dr Ridd's employment because he had breached JCU's Code of Conduct, insofar as he:

- expressed his concerns about the science underpinning the Federal Governments' spending on the Great Barrier Reef in a letter to a journalist and during a television interview, in a manner that JCU considered was not respectful and courteous to his colleagues
- subsequently, failed to comply with prescribed processes and confidentiality requirements.

Dr Ridd challenged JCU's decision to terminate his employment on the basis that his conduct was protected by the intellectual freedom clause in the applicable enterprise agreement (EA).

At first instance, a single judge of the Federal Circuit Court concluded that JCU's decision to terminate was in breach of the EA. Upon appeal to the Full Federal Court, JCU was successful in overturning the single judge decision. In summary, the Full Court concluded that the EA protections of intellectual freedoms were subject to JCU's Code of Conduct and therefore no breach of the EA had occurred.

On appeal to the High Court of Australia, the High Court found that neither the single judge decision nor the Full Court decision could be entirely accepted. Rather, in summary, the High Court concluded:

- the intellectual freedom protected by the EA was not a general freedom of speech, but did protect Dr Ridd's right to express his genuinely held academic opinions relating to his area of expertise
- the EA did not require Dr Ridd to express his academic opinion respectfully or courteously but it did require him to follow applicable processes when expressing his disagreement regarding JCU's decisions, including maintaining appropriate confidentiality

- the EA protection of intellectual freedom was subject to some constraints contained in the Code of Conduct but only those constraints that had been adopted within the EA itself
- Dr Ridd's termination was lawful, essentially because Dr Ridd had engaged in some conduct that was not protected by the intellectual freedom clause in the EA and which constituted misconduct and serious misconduct.

While this case largely turned on its own facts, it presents a good reminder for employers to:

- carefully consider how policies and procedures interact with the rights and obligations of employees under an applicable enterprise agreement
- seek specific advice before taking disciplinary action against an employee for breach of a policy or procedure if there is a concern that inconsistency with an applicable enterprise agreement exists.

### Key points

- Employers should understand how their policies and procedures interact with the rights and obligations of employees under their applicable EA.
- Advice should be sought regarding concerns for breaches of policy or procedure or where there is concern there is an inconsistency with the applicable EA.

# Death of unsupervised workers leads to significant penalty

A recent decision of the Victorian County Court serves as a reminder that employers have an obligation under safety legislation to adequately supervise employees in order to provide them with a safe working environment, so far as is reasonably practicable. If an employer fails to comply with this obligation, the consequences can be serious. This was the case in *DPP v Pipecon Pty Ltd* [2021] VCC 1808, where the County Court found that the employer had not supervised its employees adequately and was convicted and fined \$550,000.

## Background

In this case, Pipecon Pty Ltd (**Pipecon**), a construction company, was undertaking work just outside of Ballarat to construct a trunk sewer system. To undertake this work, Pipecon needed to trench, lay pipes and install manholes. There were associated and preparatory works that required Pipecon's employees to work in and around excavated trenches and manhole pits. This was considered high-risk work, given the potential for a trench collapsing.

While undertaking the works, two workers were tasked with preparing a manhole. The site supervisor did not recall the workers taking the required manhole cage or trench shield to the area where they were working. The supervisor should have known or ought to have been aware that the trench was being dug without these requisite pieces of safety equipment being in place. Despite this, the site supervisor did not check on the workers. Later that morning, the trench collapsed on the two workers – one died onsite and the other later died in hospital, both due to injuries from the trench collapsing.

Pipecon was charged with a single breach of s 21(1) and 21(2)(e) of the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) for failing to supervise employees in order to provide them with a safe working environment, so far as is reasonably practicable.

Pipecon pleaded guilty to the charge.

## What did the County Court say?

The maximum penalty for the offence that Pipecon was charged with is \$1,427,130. Judge Quin noted '*such a substantial sum is indicative of how seriously a breach by a company, in failing to provide a safe system of work for employees, or in this instance, the failure to provide adequate supervision as part of that system, is regarded by Parliament and the community.*'

Judge Quin further stated:

*Adequate supervision was a reasonably practicable step that could have been taken to reduce the risk of an employee not complying with the safety system whilst engaged in trench work. In addition to the high level of risk and significant potential harm, Pipecon were experienced in carrying out this kind of trench work and ought reasonably to have known the dangers associated with it, ways to eliminate or reduce those risks to protect their employees and their safety including adequately supervising the work, without incurring prohibitive cost.*

Taking into account the sentencing provisions, Judge Quin convicted Pipecon and fined the company \$550,000. Judge Quin noted that had Pipecon not have entered a plea, her sentence would have been \$700,000.

## What does this mean for you?

Employers should take all reasonable steps to supervise its employees, especially those who work in high-risk areas. It is not enough to merely have safety policies in place – the extra step needs to be taken to supervise workers and to ensure the utmost compliance with safety measures. Employers who fail to do this, may be faced with a conviction and significant fine.

The case serves as a timely reminder to review your processes and risk assessments, and to ensure that you know what your workers are doing when engaged in high-risk activities.

## Key points

- Employers need to not only have adequate safety policies but demonstrate the extra steps they take to supervise work and ensure compliance with the safety measures.
- A regular process and risk assessment review should be undertaken by employers to ensure the safety of employees, particularly in high-risk activities.

## New on-the-spot fines for Victorian employers in breach of OH&S obligations

As part of the Victorian Government's election commitment to introduce infringement notices for certain offences under occupational health and safety laws, WorkSafe inspectors are now able to issue on-the-spot fines of up to \$1,817.40 to employers who put their workers' health and safety at risk.

### Background

From 31 July 2021, WorkSafe inspectors have the power to issue 'on-the-spot' fines to duty holders and individuals who are found to be in breach of particular provisions of the *Occupational Health and Safety Act 2004 (OHS Act)* and the *Occupational Health and Safety Regulations 2017 (Regulations)*.

Importantly, the introduction of the infringement scheme does not change or create additional obligations for duty holders. Duty holders must continue to do everything that is reasonably practicable to provide a workplace that is free from risks to health and safety. Rather, the scheme expands the broad suite of compliance and enforcement tools already available to WorkSafe and acts as an additional deterrent to non-compliance.

### When may infringement notices be issued?

There are 54 prescribed offences under the OHS Act and Regulations which an infringement notice can be issued for, including (but not limited to):

- allowing a person to perform work without the required license, registration, qualification, experience or supervision
- the use of equipment or substances that are not licensed or registered as required
- failing to meet various duties relating to the removal and storage of asbestos
- failing to keep various required records; and/or
- failing to allow the appropriate health and safety representative to have access to information regarding actual or potential hazards in the workplace.

Fines vary depending on the nature of the offence, ranging from up to \$363.48 for an individual and up to \$1,817.40 for a corporation (subject to increase on 1 July each year according to the value of a penalty unit).

Infringement notices are intended to be issued where there is some punishment warranted for the contravention, but the circumstances of the contravention do not justify prosecution. WorkSafe inspectors may also take additional remedial enforcement action, such as issuing an improvement notice, at the same time for the contravention. However, the infringement scheme suggests that prosecutions may be less likely to be pursued where an infringement notice will address the concerns of the regulator.

Infringement notices cannot be issued retrospectively; they can only be issued for offences arising after 31 July 2021.

### What happens if I have been fined?

A person issued with an infringement notice may:

- pay the penalty
- seek to have the notice reviewed by WorkSafe's Internal Review Unit
- dispute the notice and have the matter heard and determined in the Magistrates' Court.

There are additional risks associated with electing to defend an infringement notice in Court, including the possibility of a Magistrate recording a conviction (if found guilty), imposition of a greater fine than the original infringement notice and making an order for WorkSafe's costs to be paid.

### Key points

- Duty holders must continue to do everything that is reasonably practical to provide a workplace free from risks to health and safety.
- Infringement notices can be challenged however there are additional risks associated and employees should consider these before taking a challenge to the Magistrate's Court.



# A whole new WHS world

## Managing psychosocial risks in the workplace

In May 2021, SafeWork NSW introduced a Code of Practice on Managing Psychosocial Hazards at Work (the **Code**). This was the first work health and safety code of practice in Australia for the management of psychosocial hazards in the workplace. The Code commenced on 28 May 2021.

### What is a psychosocial hazard?

Psychosocial hazards at work are aspects of work and situations that may cause a stress response, which in turn can lead to psychological or physical harm.

Common psychosocial hazards include:

- role overload (high workloads or job demands) or role underload (low workloads or job demands)
- exposure to traumatic events
- role conflict or lack of role clarity
- conflict or poor workplace relationships between workers
- poor support from supervisors and managers
- bullying, harassment and workplace violence
- inadequate reward and recognition
- hazardous physical working environments
- remote or isolated work
- poor procedural justice (processes for making decisions)
- poor organisational change consultation.

### What is the Code ?

The Code provides practical guidance to persons conducting a business or undertaking (**PCBUs**) about how it can comply with its duties under the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) with respect to managing psychological hazards in the workplace.

The primary duty of a PCBU under the WHS Act is to ensure, so far as is reasonably practicable, the health and safety of its workers while they are at work in the business. Relevantly, the Code reinforces that the WHS Act defines 'health' as including both physical and psychological health.

The Code provides information and practical guidance on:

- who has duties to manage psychosocial hazards in the workplace
- what is involved in managing psychosocial hazards
- how to respond to a report of a psychosocial risk and incident
- how to support a safe return to work after work-related harm.

### How do employers comply with the Code?

The Code sets out four steps employers should undertake to manage psychosocial hazards at work, including:

- identify the psychosocial hazard
- assess and prioritise the psychosocial hazards and risks
- control psychosocial hazards and risks
- proactively implement, maintain, monitor and review the effectiveness of controls.

### Implications of the Code for employers

While compliance with the Code is not mandatory, approved codes of practice are admissible in court as evidence of what is known about a hazard, risk or control. As a result, the Code may be relied upon by the Regulator and court in determining what steps would be reasonably practicable for employers to take to meet their legislative work health and safety obligations.

Employers in NSW should review the recommendations provided in the Code and consider whether they have sufficient policies, practices and procedures in place for managing psychosocial hazards in their workplaces.

Employers in other states can expect similar codes or regulation, with Western Australian having a Code out for comment and Victoria committing to addressing psychosocial hazards in regulations in 2022.

### Key points

- Employers should review the recommendations provided in the Code and consider whether they have sufficient policies, practices and procedures in place for managing psychosocial hazards in their workplaces.
- Employers should be watching out for changing WHS laws in their state.

## Sexual harassment protections expanded

On 11 September 2021, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Amendment Act) commenced. The Amendment Act was drafted in response to the Respect@Work Report, which was delivered by Sex Discrimination Commissioner Kate Jenkins in 2020.

### Notable changes implemented by the Amendment Act

Broadly speaking, the Amendment Act aims to better protect and empower workers, particularly vulnerable workers, in respect of workplace sexual harassment, by making changes to three existing Commonwealth laws:

- the *Fair Work Act 2009* (Cth)
- the *Sex Discrimination Act 1984* (Cth)
- the *Australian Human Rights Commission Act 1986* (Cth).

### Under the Fair Work Act:

- It is now explicitly stated that sexual harassment in connection with a person's employment is not a valid reason for dismissal.
- A worker (excluding some not employed in constitutional corporations) who is sexually harassed at work can now apply for a Fair Work Commission 'Stop Sexual Harassment Order', similar to the 'Stop Bullying Order' regime.
- If a worker or their partner have a miscarriage, they are now each entitled to two days' paid compassionate leave (unpaid for casuals).

### Under the Sex Discrimination Act:

- Discrimination involving harassment on the ground of sex is now expressly prohibited. Whilst sex-based harassment is already prohibited under the Sex Discrimination Act as a form of sex-based discrimination, the Respect@Work Report found that this is not well understood.
- Sexual harassment protections are now extended to all paid and unpaid workers, including volunteers, interns and the self-employed.
- The Sex Discrimination Act now applies to allow complaints by (and against) members of Parliament, Commonwealth, state and territory judges, and state and territory public servants.

### Under the Australian Human Rights Commission Act:

- In recognition of the pressures faced by complainants in speaking up, the time period available for making a complaint to the Human Rights Commission has been extended from six months to two years.

### Key points

- The Amendment Act sends a clear signal to employers that workplace sexual harassment and discrimination is unlawful and must be taken seriously.
- We recommend that employers ensure they have updated their sexual harassment policies to account for the changes recommended in a wide range of reports released over the past two years, including providing details of all the options available for complainants.
- Employers should conduct risk assessments, record sexual harassment risks in their organisational risk register, have a prevention plan and record metrics.
- Employers should also update their training and policies to reflect the changes from the Amendment Act, particularly so that staff know they will be able to access the Fair Work Commission's Sexual Harassment jurisdiction and compassionate leave for miscarriages.

## Case studies

### Prevailing community standards: A continuing trend towards six-figure damages for egregious sexual harassment

The landmark 2014 case of *Richardson v Oracle* fundamentally changed the way in which compensation for sexual harassment has since been assessed in the Federal jurisdiction.

Courts are now to consider community attitudes regarding the impact of sexual harassment on victims – recognising that, beyond loss of employment, severe psychological injury and relationship breakdowns often flow from such conduct.

Previously, awards for general damages for pain and suffering were largely confined to low to medium five figure amounts. Post *Oracle*, awards well into the six-figures have become more and more common.

Despite operating in different statutory contexts, state and territory courts and tribunals are continuing to follow suit.

This year saw Queensland's first six-figure award for general damages in a sexual harassment case, firmly signalling the State's recognition that loss of enjoyment of life is often an important and compensable consequence of sexual harassment in the workplace.

In Victoria, awards of this magnitude are not new. However, VCAT has recently reinforced that egregious sexual harassment in the workplace can have disastrous impacts on a victim's life and awards of compensation, including for aggravated damages, should properly reflect that.

#### What does this mean for employers?

To the extent it was not already, the message is now clear. Sexual harassment often has a deleterious impact on a victim's life and significant compensation should be expected in these matters.

An issue not ventilated in either of the above proceedings is an employer's vicarious liability for sexual harassment by employees. Putting to one side the importance of keeping employees safe, if an employer does not take all reasonably practicable steps to avoid sexual harassment occurring in the workplace, they may be liable to meet any award of damages made if sexual harassment or discrimination is found to have occurred.

It is also worth noting that the new jurisdiction of the Fair Work Commission, deals with applications for stop sexual harassment orders.

Without question, this issue should be front and centre for all businesses – what are you doing to ensure sexual harassment does not occur? If it does, what are you doing about it? Do you have an appropriate policy in place? Are employees regularly trained in that policy? Do your managers and leaders model appropriate behaviour in the workplace? Are complaints taken seriously? Are victims provided adequate support? Are respondents disciplined for inappropriate behaviour, proportionately to the seriousness of the conduct?

The more proactive employers are in stamping out sexual harassment in the workplace, the better placed they will be to avoid vicarious liability for any unlawful conduct that occurs. A failure to take these obligations seriously could mean facing a significant award of damages.

#### Key points

- Employers need to have adequate policies and training in place to prevent sexual harassment in the workplace and provide a safe working environment.
- Avenues for complaints should be made clear and complainants should be taken seriously; employers should have appropriate and proportionate disciplines in place for inappropriate actions and escalate those behaviours where appropriate.

### Case study: *Golding v Sippel and The Laundry Chute Pty Ltd* [2021] QIRC 74

In this case, Ms Golding, a young, single mother of four children, for whom English is a second language, spent 14 months working at the Laundry Chute in 2017 and 2018. Mr Sippel, the owner and manager of the laundry, quickly began subjecting Ms Golding to escalating unwelcome conduct of a sexual nature (including requests for sex, touching and inappropriate comments). In text messages produced in evidence, Mr Sippel made demands for sex in exchange for a job and ultimately gave that job to someone else when she refused. After 14 months of this treatment, Ms Golding went to police and was advised to quit her job.

The Queensland Industrial Relations Commission (**QIRC**) accepted that most of the conduct alleged by Ms Golding occurred and amounted to sexual harassment and discrimination on the basis of Ms Golding's gender, in breach of Queensland's anti-discrimination legislation. Mr Sippel's claims that the text messages were 'workplace banter' and that Ms Golding had actually initiated this contact in many cases, were not well received.

Despite referring to the key principle from *Oracle* – that significant value is to be placed on the loss of enjoyment of life – the QIRC awarded a total of

approximately \$51,000 in damages – \$16,000 for economic loss, \$30,000 for general damages and \$5,000 for aggravated damages.

In awarding a low five-figure amount by way of general damages, the QIRC relied on the fact that, despite experiencing a range of adverse symptoms as a result of the harassment, Ms Golding was able to continue to engage with most of the usual aspects of her life. This was distinguished from someone whose life had been ruined or destroyed by harassment.

Ms Golding subsequently appealed to the Queensland Industrial Court who found the award of damages by the QIRC to be manifestly inadequate on all fronts. The Court imposed a revised award of \$160,000 – \$30,000 for economic loss and \$130,000 for general and aggravated damages.

The Court noted that Mr Sippel's conduct was 'extremely serious'. Over a period of 14 months, he had tormented Ms Golding, who had little choice but to work for The Laundry Chute because of her financial position. That repeated conduct ultimately resulted in a diagnosed anxiety disorder causing Ms Golding to be unable to work.

### Case study: *ZBL v Olivo (Human Rights)* [2021] VCAT 850

In Victoria, the Victorian Civil and Administrative Tribunal (**VCAT**) also awarded significant damages in the case of *ZBL v Olivo*.

The applicant, who was a French citizen in Australia on a student visa, was employed as a casual bartender at a French restaurant in Melbourne for around eight months in 2019. The respondent was an assistant manager of the restaurant.

Following after work drinks on several occasions, the applicant woke up in bed with the respondent with no memory of what had happened. The respondent was also witnessed putting a tablet into her drink on another night out. On a further occasion, after drinking a chemical-tasting glass of wine poured for her by Mr Olivo while closing the restaurant, the applicant awoke on the stairs, in the middle of a sexual act with Mr Olivo, to which she did not consent.

After reporting this to the restaurant manager, the applicant continued to be rostered to work with Mr Olivo. The manager and owners both said they would not fire him and encouraged her not to go to police.

The applicant brought a claim against both the restaurant and Mr Olivo. The applicant settled her claim against the restaurant and the hearing proceeded solely against Mr Olivo.

Mr Olivo did not participate in the proceeding beyond mediation, apparently returning to his native France.

VCAT entered judgment against him, given his failure to participate had unnecessarily disadvantaged the applicant. The applicant's evidence, and that of several witnesses, was found to be clear and compelling. The respondent had engaged in sexual harassment, in breach of Victorian equal opportunity legislation.

Despite the applicant only seeking \$100,000 in general damages, VCAT found that community standards required a more significant award of damages in this case. The nature of the sexual harassment, involving the sexual penetration of an unwilling semi-conscious female, was far more egregious and represents a significant additional serious aspect to the sexual harassment, in comparison to recent cases.

The applicant suffered PTSD, her personality profile adversely affected, her social relationships and enjoyment of life were inhibited, she had limited employment opportunities and required further psychological counselling and treatment for anxiety and distress.

The applicant was awarded \$152,000 in damages – \$120,000 in general damages, \$20,000 in special damages (being economic loss) and \$12,000 in aggravated damages. VCAT held that Mr Olivo's insidious behaviour, position of authority and the applicant's vulnerable position justified an additional award for aggravated damages.

The background of the page is a white rectangle filled with various abstract geometric shapes in shades of teal and grey. These shapes include circles, squares, triangles, and curved segments, some of which are solid and others with a speckled or textured appearance. The shapes are scattered across the page, creating a modern, artistic feel.

# COVID 2021

## Sectors subject to vaccination directions and implications

Throughout 2021, many employers will have asked themselves: can we mandate COVID-19 vaccinations for our employees (through a workplace policy)?



The answer is 'yes' if:

1. A Federal, state or territory law applies and requires employees to be vaccinated in order to perform their duties.
2. An industrial instrument or contract of employment permits the mandate.
3. It would be a 'lawful and reasonable direction' (more on this below).

### Does a law apply to our employees?

There is currently no Federal, state or territory legislation that requires anyone to be vaccinated against COVID-19. However, the state and territories have made orders or directions under public health legislation that mandates COVID-19 vaccinations for employees working in particular industries and sectors. These orders or directions are often called 'public health orders or directions'.

Employers and employees must comply with any public health orders or directions that apply to them. To the extent that there is any inconsistency between a workplace policy and a public health order or direction, the public health order or direction will prevail.

If there is a public health order or direction that applies to employees who are required to work in a shared workplace, then there is a good argument that being vaccinated becomes an 'inherent requirement' of those employees' roles (unless, of course, an exemption to vaccination applies).

It is accepted that an employer may lawfully terminate an employee's employment on the basis of their inability to perform the inherent requirements of their role and where there are no reasonable adjustments that can be made. We do however recommend that employers take a nuanced approach to this, engaging with the relevant employee and providing them with support.

The public health orders or directions are constantly changing. Therefore, we recommend that employers frequently review and keep up to date with, the public health orders or directions that apply to them.

On the following pages, we outline a general summary of the key sectors and industries that are covered by a public health order or direction as of 23 November 2021.

## Victoria

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to a very broad range of workers in occupations including:

- retail workers
- healthcare workers
- education workers
- emergency service workers
- hospitality workers
- care workers
- State & Local Government workers
- construction workers
- utility workers
- workers visiting certain ‘specified facilities’.

### Source for making orders or directions

Public health directions are made under s 200 of the *Public Health and Wellbeing Act 2008* (VIC).

## New South Wales

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health orders apply to:

- quarantine workers
- airport and air service workers
- aged care and disability service workers
- education workers
- healthcare workers.

### Source for making orders or directions

Public health orders are made under s 7 of the *Public Health Act 2010* (NSW).

## Queensland

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to:

- healthcare workers
- residential aged care workers
- quarantine workers.

### Source for making orders or directions

Public health directions are made under s 362B of the *Public Health Act 2005* (QLD).

## Tasmania

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to:

- residential aged care workers
- disability support workers
- quarantine and quarantine transport workers
- healthcare workers.

### Source for making orders or directions

Public health directions are made under s 16 of the *Public Health Act 1997* (TAS).

## Western Australia

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to:

- air service and border workers
- community care service workers
- exposed port workers
- fire and emergency services workers
- healthcare workers
- residential aged care worker
- correctional facility workers
- police workers
- meat industry workers.

The Western Australian government has indicated that it will introduce a 'mandatory COVID-19 vaccination policy for a majority of occupations and workforces', which will be introduced in a phased approach.

### Source for making orders or directions

Public health directions are made under s 167 of the *Public Health Act 2016* (WA).

## South Australia

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to:

- residential aged care workers
- healthcare workers
- in-home and community aged care workers
- disability workers
- police workers
- education and early childhood workers
- public transport workers.

### Source for making orders or directions

Public health directions are made under s 25 of the *Emergency Management Act 2004* (SA).

## Northern Territory

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to 'workers' who are likely to come into contact with 'vulnerable people' or a 'person or thing that poses a risk of infection', who work in workplaces that 'pose a high risk of infection', or who work in 'essential infrastructure or essential logistics'.

### Source for making orders or directions

Public health directions are made under s 52 of the *Public and Environmental Health Act 2011* (NT).

## Australian Capital Territory

### Industries or sectors covered by orders or directions requiring vaccination (as of 23 November 2021)

The relevant public health directions apply to:

- healthcare workers
- aged care workers
- education workers
- disability and other care workers.

### Source for making orders or directions

Public health directions are made under s 120 of the *Public Health Act 1997* (ACT).

To date government vaccine mandates have been upheld by the courts (see *Kassam v Hazzard* [2021] NSWSC 1320 and *Larter v Hazzard* [2021] NSWSC 1451). The judgments show that the courts recognise the important role that vaccines play in managing the risks associated with the COVID-19 pandemic.

The decision of *Kassam* has been appealed. As of late November 2021, the matter is before the NSW Court of Appeal.

Other Court challenges are in the pipeline and are yet to be decided. These include: *Johnston & Ors v Commissioner of Police* and *Witthahn v Chief Executive of Hospital and Health Services* (both in the Queensland Supreme Court), and *Simon Harding v Brett Sutton* and *Cetnar v State of Victoria and Ors* (both in the Victorian Supreme Court).

### So what happens if a law doesn't apply?

If a public health order or direction does not apply, and there are no contractual terms or industrial instruments that permit a vaccination mandate, then employers may mandate COVID-19 vaccinations for employees by issuing a 'lawful and reasonable direction'.

Employers have had the strongest indication yet from the Fair Work Commission in *CFMMEU v Mt Arthur Coal Mine* [2021] FWCFB 6059 that, provided consultation is complied with, it will uphold 'lawful and reasonable directions' to employees requiring them to provide proof of vaccination, and employees must comply with those directions.

This is consistent with the historical general position at law, which is that employer vaccination mandates (and the associated disciplinary action, including up to termination of employment, for failing to comply with a 'lawful and reasonable' direction) are lawful provided it is necessary, for example on health and safety grounds.

Employers must ensure that any mandatory vaccination policy:

- is the subject of consultation under both WHS/OHS requirements and any relevant industrial agreements and policies
- has considered the risk for various roles and locations, and supported the decision to proceed with a mandatory vaccination requirement with a documented risk assessment
- details exemptions
- addresses whether booster vaccinations are required
- addresses how vaccination and exemption information is collected and stored
- is developed following consideration of the timing of any requirement for workers to provide evidence of vaccination, including allowing time for workers to seek medical advice, and timed to meet requirements to attend at shared workplaces
- is consistent with flexible work policies, considering whether or not some workers are or are not able to work from home permanently, and what this would mean for training, emergency work and in person interactions with colleagues.

### Support for workers

Whether workers are subject to a mandatory vaccination requirement because of government regulation or an employer policy, employers should remember that some workers may hold strong views and be suffering considerable anxiety about the requirement to provide vaccination/exemption information.

It is important that while these workers remain employed, employers provide them with support for their psychosocial health, including access to Employee Assistance Programs (EAP) and a reasoned and proportionate approach to their predicament. It can be useful to remind their managers that the aim of mandatory vaccination directions or policies is to protect the health of the worker (and others) and that while their employment may end, they should be supported until that time.

### Key points

- Employers and employees must comply with public health orders relating to vaccinations.
- Where a public health order or direction does not apply, employers may mandate COVID-19 vaccinations for employees by issuing a 'lawful and reasonable direction', provided they consult pursuant to industrial and WHS/OHS obligations.
- If employees are vaccine hesitant, employers should provide them with support for their psychosocial health by providing services such as EAP, while they remain employed.



## No jab, no job

This year, some employers and Governments determined it was necessary to mandate COVID-19 vaccinations for certain employees.

On one hand, Government health orders and directions were issued which mandated COVID-19 vaccinations for select groups of employees. Employers were then obliged to enforce these mandates. On the other hand, some employers determined that it was necessary to mandate COVID-19 vaccinations for some or all of their employees. These employer mandates were often cited as lawful and reasonable directions and/or necessary to meet the employer's legal health and safety obligations.

At the time of writing this article, more than 88% of people Australia wide aged 16 and over are double vaccinated against COVID-19,<sup>1</sup> but vaccination mandates continue to apply to employees throughout Australia. According to the University of Melbourne, the inability to work because of vaccination mandates is likely to be one of the main incentives to get vaccinated.<sup>2</sup> Despite this, there remains a substantial number of employees who are hesitant to or refuse to be vaccinated, which has prevented them from being able to work. Consequently, legal challenges to these Government and employer mandates have ensued.

### Challenges made to vaccination mandates

Firstly, we have seen various challenges to state health orders and directions mandating vaccinations for employees, all of which have been unsuccessful to date. Specifically, the matter of *Harding & Ors v Sutton & Ors* was initiated by 129 essential workers and employers in Victoria, who work in the healthcare, construction and education sectors. The plaintiffs in this matter made an interlocutory application asking the Victorian Supreme Court to, among other things, suspend the operation of mandatory vaccination directions and restrain the Chief Health Officer from making any further directions relating to the plaintiffs. These interlocutory applications were dismissed by the court<sup>3</sup> and the substantive has been set down for trial in March 2022.

Similar challenges have also arisen in other states including the matters of *Larter v Hazzard*, *Kassam v Hazzard*, and *Henry v Hazzard* in New South Wales (which have each been dismissed by the New South Wales Supreme Court)<sup>4</sup>. Accordingly, Government mandated vaccinations have been upheld by the Courts as lawful to date.

Separately, we have also seen challenges to employer vaccination mandates. In the matter of *Construction, Forestry, Maritime, Mining and Energy Union and Matthew Howard v Mt Arthur Coal Pty Ltd*, the CFMMEU challenged the employer's mandatory COVID-19 vaccination direction, arguing that it is not lawful and reasonable, and has been directed without proper consultation. The CFMMEU also sought interim orders preventing the employer from taking steps to dismiss, discipline or otherwise prejudice the employment of any production and engineering employees who fail to present evidence of COVID-19 vaccination. These interim orders were refused<sup>5</sup>. In a decision handed down on Friday 3 December 2021 (*CFMMEU v Mt Arthur Coal Mine* [2021] FWCFCB 6059), the Fair Work Commission found that the employer had not given employees a 'reasonable opportunity to express their views...raise health and safety issues or contribute to the decision making process' pursuant to the obligations under the *Work Health and Safety Act 2011* and hence the vaccine mandate was not a lawful and reasonable direction. The Commission noted that '*had the Respondent consulted the Employees in accordance with its consultation obligations... [it] would have provided a strong case in favour of a conclusion that [the mandate] was a reasonable direction*' noting it was proportionate to the risk created by COVID-19 and was directed at health and safety, and that if followed a period of time where the employer had encouraged vaccination'. The decision is a salient reminder of the consultation obligations under WHS/OHS legislation, noting it doesn't require agreement but the duty has broad application.

Finally, in an interesting but related twist, law firm Maurice Blackburn, have confirmed that they have lodged a discrimination complaint in the Australian Human Rights Commission on behalf of a Gold Coast teenager who was allegedly dismissed after receiving a COVID-19 vaccination. Maurice Blackburn have said that they are acting pro bono for the 16 year old who was a casual employee at a pizza shop in Tweed Heads before the business allegedly told her not to report for work after receiving her first COVID-19 vaccination. The application alleges that the employer discriminated against the girl, claiming she became a health risk after receiving her vaccination and would be 'shedding particles' at work. This will be one to watch in the new year.

### Key points

- Vaccination mandates seem to be here to stay. Employers should keep an eye out for any changes to directions regarding booster shots and proof of vaccination.
- Managing the unvaccinated workforce will continue to challenge employers into 2022. Assessments about the ability of the employee to execute their duties fully, as well as the employer's obligation to provide a safe working environment should be carried out on a case-by-case basis.

<sup>1</sup> <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines/numbers-statistics>.

<sup>2</sup> <https://melbourneinstitute.unimelb.edu.au/publications/research-insights/tpn/vaccination-report>.

<sup>3</sup> *Harding & Ors v Sutton & Ors* [2021] VSC 741

<sup>4</sup> *Larter v Hazzard (No 2)* [2021] NSWSC 1451 and *Kassam v Hazzard*; *Henry v Hazzard* [2021] NSWSC 1320.

<sup>5</sup> *Construction, Forestry, Maritime, Mining and Energy Union and Matthew Howard v Mt Arthur Coal Pty Ltd* [2021] FWC 6309.

# Privacy in a pandemic

## Understanding your obligations to staff

Now that vaccination against COVID-19 is required in a variety of workplace settings, this raises questions about how employers ensure they comply with their privacy obligations.

While the relevant provisions vary across state and territory-based legislation, the generally accepted position remains that vaccination information constitutes both personal information and health information.

By way of example, employers that are governed by the *Privacy Act 1988* (Cth) (**Privacy Act**) will need to comply with the Australian Privacy Principles (**APPs**) when dealing with vaccination information – irrespective of whether that information is collected pursuant to a public health order or a self-imposed mandatory vaccination policy.

Some of the key concepts from the APPs relevant to the use of information collected from employees regarding their vaccination status is summarised below.

APP	Obligation	Recommendation
<b>APP 1 – Management</b>	Vaccination information must be managed in an open and transparent way.  Although this may not be a key legal risk for employers, it will be critical for there to be open and transparent communication with employees (particularly for individuals who have expressed concerns about disclosing their vaccination status).	Take reasonable steps to protect vaccination information, such as by implementing a privacy policy.
<b>APP 3 – Collection</b>	Vaccination information may only be collected if it is reasonably necessary for, or directly related to, one or more of the business' functions.  Consent to the collection of such information will generally be required unless, for example, this is required by a law or court order.	In order to determine whether the collection of vaccination information is necessary, undertake a two-step assessment:  – identify the function (e.g. compliance with a public health order or vaccination policy) – determine whether the vaccination information is necessary for that function (e.g. collection is reasonably necessary for an employer to discharge its duties in relation to compliance with WHS/OHS laws).
<b>APP 6 – Use and Disclosure</b>	An employer can only use or disclose vaccination information for the primary purpose for which it was collected, unless an exception applies. This may include where:  – the employee consents to the secondary use or disclosure – the individual would reasonably expect the use or disclosure of their personal information for a secondary purpose – the secondary use or disclosure is required or authorised by an Australian law or a court order.	Ensure that employees are advised of the way in which the business intends to collect, hold and use their vaccination data (e.g. compliance with a law such as WHS/OHS).  For example, while the primary purpose of collecting the information may be to comply with a public health order, a secondary purpose and use may be providing the information to clients or service users (such as to comply with a term of a commercial agreement).  Share information only on a need to know basis within and outside the organisation.
<b>APP 11 – Protection</b>	An employer must take reasonable steps to protect vaccination information from misuse, interference and loss, as well as unauthorised access, modification or disclosure.	Consider who will have access to the information, how that information will be securely stored, and the circumstances in which it will be accessed and used.

As the APPs are largely replicated across state and territory-based legislation (applying to both the public and private sectors), it is important that employers are aware of their obligations for the collection, usage and storage of employee information. While the Office of the Australian Information Commission (OAIC) continues to update its [guidance](#) on COVID-19 vaccinations and privacy considerations, please reach out to a member of the Employment, Safety & People team for specific or state-based advice.

### Health Care Identifiers

When collecting vaccination status information, a number of obligations will also be enlivened under the *Healthcare Identifiers Act 2010* (Cth) (**HI Act**) for individual health care identifiers which are located on MyGov vaccination certificates.

In particular, there is an obligation to take reasonable steps to protect healthcare identifiers from misuse and loss and also from unauthorised access, modification or disclosure.

To err on the side of caution, we recommend asking employees to undertake one of the following steps when disclosing their vaccination status:

- if providing the digital certificate from the MyGov site or Medicare app (which has the Individual Healthcare Identifier (IHI) Number), ask employees to redact the IHI before sending the certificate
- take a screenshot or photo of the vaccination certificate available on their phone (via the Apple Wallet / Android Wallet) which doesn't contain the IHI
- if employees have previously sent a certificate with their IHI on it and would like to update it, they can request that the one they have previously sent is deleted and send a new one (although this may place an administrative burden on an organisation).

### Key points

- Employers need to understand their obligations under the APPs and be clear with employees about how their information will be collected, used and stored.
- Employers should regularly check the OAIC for any updates on its guidance for COVID-19 vaccinations and privacy considerations as this can change from state to state.
- Employers should ask employees to take reasonable steps to remove their IHI when sharing their vaccination certificates with them.





## Government support in 2021

### Was JobKeeper a JobSaver?

As all good things must, the JobKeeper wage subsidy program officially came to an end on 28 March 2021. The Treasury estimates that JobKeeper supported around a million businesses and four million employees during its first phase – almost a third of Australian businesses and jobs. Now that the scheme is over, we are able to take a look at how successful JobKeeper really was, whether it created the ‘false dawn’ that some commentators predicted and how businesses and employment are travelling now.

### Unemployment fell, but so did jobs

The end of the JobKeeper wage subsidy did not have a discernible impact on employment between March and April, according to the Australian Bureau of Statistics (ABS). The unemployment rate fell by 0.2 percentage points to 5.5% – a much better outcome than the 15% predicted by Treasury in April 2020 if JobKeeper were absent. However, while unemployment fell, so did overall participation in the market, with a decrease in both the rate of employment and hours worked.

The Treasury estimates that the end of JobKeeper caused a decrease in employment of approximately 56,000 persons, while research prepared for the FWC suggests that the job losses could have ranged between 45,000 and 97,000<sup>6</sup>. However, this same research assessed that as at June 2021, aggregate labour market activity in Australia had recovered to its pre-COVID-19 levels.

### No more JobKeeper enabling directions

With the end of JobKeeper payments, so too ended the amendments to the Fair Work Act enabling employers to issue employees with ‘JobKeeper’ enabling directions, which included:

- stand down directions
- directions changing duties
- directions changing the location of work.

The repeal of these amendments meant that employers were required to go back to basics, even where business conditions worsened again as a result of further COVID-19 outbreaks and lockdowns.

<sup>6</sup> Borland, Jeff (2021), ‘An assessment of the economic effects of COVID-19 – Version 5’, Report prepared for the Fair Work Commission, 4 June 2021; accessed at <https://www.fwc.gov.au/documents/wage-reviews/2020-21/research/rr52021v5.pdf>.

## Impact of further lockdowns – where are we now?

Unfortunately, the end of JobKeeper did not coincide with the end of COVID-19 outbreaks or lockdowns. However, despite numerous calls for it to be reinstated, the Government resisted and pursued more targeted support through the balance of 2021.

Below is a snapshot of statistics from the ABS showing the state of employment at pre-pandemic levels, compared to October 2021.

	March 2020	October 2021
<b>Unemployment rate</b>	5.2%	5.2%
<b>Youth unemployment</b>	11.6%	– 13.1%
<b>Employment</b>	13,017,600 people	12,835,200 people
<b>Employment-to-population ratio</b>	62.5%	61.3%
<b>Hours worked</b>	1,785 million hours	1,727 million hours
<b>Participation</b>	66.0%	64.7%
<b>Underemployment</b>	8.8%	9.5%

It is likely that it will not be until 2023, when hopefully high vaccination rates across the country will mean that the lockdown cycle will have ceased, that we will see how businesses and the economy have truly fared through COVID-19.

### Key points

- JobKeeper was successful in supporting Australians who could not work due to the COVID-19 pandemic.
- The unemployment rate did fall, however the true impact on unemployment and workforce participation figures will not be truly known until the pandemic has ended.

## Enforcing mask mandates with the carrot or the stick?

While we hope that the days of wearing face masks in the office are behind us, the reality is that there are likely to be times over the next 12 months or so where, because of the continuing presence of the highly virulent Delta strain of COVID-19 (and now the Omicron strain, and other variants that may evolve), high community transmission rates will require the mandating of masks worn at work again.

It is also possible that other infection controls need to be mandated in workplaces to reduce infection and that the lessons learned from dealing with mask resistance is implemented.

The first step in addressing workers who are reluctant or refuse to wear a face mask when required is to understand why. Some of those reasons include:

- wearing a mask is in conflict with their belief in personal freedom and the risks that come with not wearing a mask is rationalised by enforcing this belief
- scepticism about COVID-19 and/or the effectiveness of masks
- pandemic fatigue
- medical reasons
- people don't like change because change brings uncertainty.

The most important thing employers can do here is listen to their workers and not be dismissive, as these are very real concerns that your workers may have and believe. Employers need to understand the reasons why workers are refusing to wear masks before they can respond to mask resistance.

When you know the why, the next step is the how. Positive communication in the first instance is the key to enforcing mask mandates. Responding by issuing strong directions that will have disciplinary consequences for non-compliance will rarely be effective in achieving the desired goal of compliance. Instead, employers will be more successful in achieving compliance if they have an approach that is consultative and appeals to workers on a personal level. Employers should focus on the greater health concerns that affect every member of society and the unintended consequences that may arise by workers not wearing a mask or not wearing it correctly. For example, the very real risk that by not wearing a mask in the workplace risks workers contracting COVID-19 and taking it home to their families and friends.

Employers should also listen to employees who believe they have a valid medical (or other) reason for not wearing a mask and then carefully assess those concerns and where valid, consider what alternative options are available and/or what reasonable adjustments can be made to protect that worker and their colleagues in circumstances where masks are not a viable option.

Unfortunately, despite best intentions of employers to achieve an acceptable outcome, some employees will not be persuaded to wear a mask or comply with an effective alternative arrangement no matter how much listening and consideration of options is undertaken. In those situations, employers will need to go down the path of disciplinary action that will very likely result in termination of employment. The FWC has upheld mask mandates in the recent decision of [\*Watson v National Jet Systems\* \[2021\] FWC 6182](#). Termination should be the last step, but employers should be aware that non-compliance by employees with Government issued directions or an employer policy will provide a valid basis for termination, if a fair and reasonable process is applied.

### Key points

- Conversations with workers who are vaccine hesitant or reluctant to wear masks should begin by listening to and understanding their concerns.
- Responding with positive communication that appeal at a personal level will yield better results for employers.
- Employees with medical reasons for not wearing masks or getting vaccinated need to be assessed and, where practicable, reasonable adjustments made to their working environment.
- Employers may need to consider disciplinary actions where employees are not compliant.





# Looking to 2022

## Performance management with a pandemic twist

The lockdowns that much of Australia has endured over the last 12–18 months have meant that the vast majority of us will have seen a significant change in how we work. Seemingly overnight, entire office-based workforces de-camped to studies, living rooms, kitchens, bedrooms and other places.

The traditional performance management toolkit used by HR practitioners and managers was blunted. While most welcome the re-opening of our traditional places of work as we emerge from lockdown, it is becoming increasingly apparent that remote working, in some shape or form, is here to stay. In this piece, we look to some of the key features of successfully measuring and managing the performance of a remote workforce.

The traditional measures of individual performance are typically founded on assumptions about where and when individuals work. For example, performance might have been measured physically (the sales completed by a travelling salesperson) or monitored by managers by 'osmosis' (management simply by moving around an office environment). All of that has gone out of the window with entire workforces forced to work from home.

The most important step towards ensuring your workforce remains motivated and performing at (or close to) the optimum is to grapple with measures of performance and key performance indicators (**KPIs**) that are no longer useful (or achievable). Those should be recalibrated to reflect the 'how', 'what', 'where' and 'when' of each individual's new remote or more flexible way of working.

So, the remote salesperson might not be able to roam freely, but they might still be able to 'meet' with customers and potential customers virtually and convert sales over the phone or by other means, and do so more regularly. There are obvious flow through effects of changes like this that should also be addressed. Things such as, 'what does this mean for the individual's variable compensation or commission' and 'how do these changes feed into our performance review cycle and metrics'?

A related issue is that of 'enablement' – considering whether the workforce is appropriately enabled to achieve. That may involve investing in new hardware, training or technology. But even the most delicately constructed KPIs will count for very little if employees are not then empowered with the means by which to succeed.

There is then the issue of how to monitor performance real-time, so that any issues can be addressed swiftly. Employers should resist the urge to micro-manage employees who are working remotely. 'Digital colonisation' is a term that has started to emerge in the last year or so. It describes the temptation for managers to ramp-up supervision in an attempt to mitigate the effects of not being able to 'check-in' in person.

The impact of this style of management can be hugely draining and counterproductive. It is an easy trap to fall into in the era of daily zoom 'progress calls', screen sharing and video connectivity on-demand. Careful thought should be given to establishing a framework for more regular and helpful feedback that can be used for monitoring performance, without being overbearing on individual employees who might themselves be balancing problems that are ordinarily alleviated in the office environment (things like child care, home schooling or difficult relationships at home).

### Key points

- Review the current measures you are using to assess your workforce's performance so they reflect the new ways they might be working.
- Think about what your staff need to succeed when working remotely and invest in new hardware, training or technology which would enable them to carry out their job effectively.
- Establishing a framework which facilitates regular and helpful feedback is a more effective way of monitoring performance and managing remote workers.

## The Great Resignation

In recent months, there has been increasing speculation and discussion about '[the Great Resignation](#)', a phenomenon we are told will arise as a result of employees spending time during the COVID-19 pandemic re-evaluating their careers and career choices.

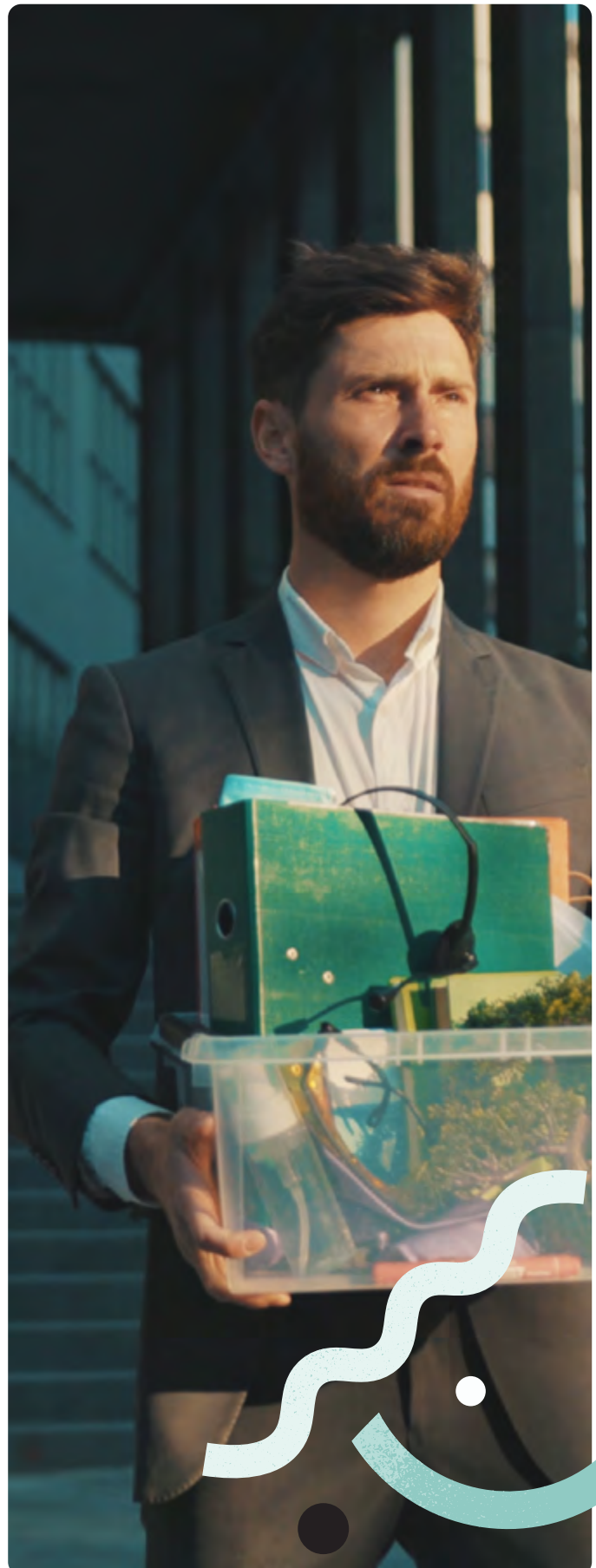
The premise seems to be that many people have realised that they are unhappy in their existing roles, and are looking to resign for greener (career) pastures. Whilst the timing of this projected mass exodus has varied, recent reports suggest that it will occur in or around March 2022.

Whether or not these predictions come to pass remains to be seen, but what is already clear is that the COVID-19 pandemic has changed (and in some ways, fundamentally changed) the way in which people work. Employers have had to move quickly to keep their businesses running, and employees have had to transition into new ways of working (including working from home) with little notice. These changes have required flexibility from both sides, and we expect that this need and desire for flexibility will continue into 2022 and beyond.

Given these rapid changes, employers should be carefully evaluating and reviewing work design, and considering whether there is a need to adjust expectations around both how work is done, and how productivity is measured. Beyond this, and to navigate through the various complexities that arise as we return to a new normal, employers will benefit from consulting with employees to understand and manage their concerns and desires when it comes to the work that they do and how and where they do it, and where appropriate, making changes to address those matters. It is likely that, to the extent employees are re-evaluating their careers, consultation on these issues will be critical to retaining staff and maximising productivity.

### Key points

- Review how and where work can be done, and how you measure productivity with a more flexible workforce.
- Talk to your employees to understand their concerns and desires so you can put measures in place to retain (or attract) staff.



## 'You may feel a sharp pain': Managing the un-vaxxed workforce

Managing the un-vaccinated has been the thorny issue of 2021 for some employers. For most others, as offices splutter back to life, 2022 will be the year this issue rears its head.

In some organisations, staff vaccination is mandated by public health orders. In others, employers have issued directions to staff that they must be vaccinated in order to attend work. We address public health orders and what makes a lawful and reasonable direction separately in this publication ([see page 27](#)).

This is an untested area and while we expect there to be some more concrete guidance from courts and tribunals as time rolls on, the practical points employers should bear in mind when approaching this issue reflect the same key pillars for introducing a lawful and reasonable direction in the first place:

- It starts with safety. What is the risk of allowing unvaccinated staff to work on company premises or other workplaces or meet with clients? A thorough and bespoke risk assessment is required and should be continually reviewed.
- You can consider both health and safety, and potential workers compensation and business interruption issues.
- Do you need your workers in the office, meeting clients, or attending events for at least some of their working time? For most employers, the answer to this question is probably yes!
- Have you arrived at the conclusion that vaccination should be mandated for staff attending work? If so, consult, consult, consult with your workforce, health and safety committees and any industrial organisations before issuing the direction. Consultation will be required under WHS/OHS legislation and may also be required under applicable industrial instruments.
- Consultation doesn't mean agreement – listen, consider mindfully and allow enough time for workers and unions to contribute to the consultation process.
- Implement a policy on vaccination and a procedure which includes how unvaccinated workers will be managed.
- What can be built into the policy and procedure to minimise disruption? Given the current skills shortage faced by many employers, it could make commercial sense to include a grace period during which the vaccine hesitant have a final opportunity to get vaccinated and, where possible, introduce interim measures for these workers to mitigate risks in the meantime, this could include continuing work from home or authorised leave without pay for a short period.
- What can be built into your policy and procedure to minimise legal risk? This isn't one size fits all. If termination of employment is the only option, then ensure there is a fair process for all workers. A way to do this is by issuing a show cause notice which invites workers to respond as to why their employment should not be terminated on notice. Mindfully consider the responses and determine if termination of employment is still appropriate to minimise the risk of successful unfair dismissal or discrimination claims. Take advice on this if needed.

### Key points

- Employers need to remember their obligation is to provide a safe workplace. As we move forward, this will continue to be expectation for workplaces and should be continually reviewed as directions change.
- Consult and communicate openly and clearly with your employees about any changes regarding vaccination requirements, office attendance and / or expectations about how they are to fulfill their job requirements.
- Consider what amendments to your policies and procedures need to be made, and allow your employees time to ensure they are compliant.



## Another significant year in Workplace Health and Safety

While prosecution and regulator activity was subdued in some jurisdictions, with employees working from home, 2021 was a significant year in developments in workplace health and safety.

As with 2020, many employers continue to adapt to new ways of supporting employee psychosocial health and wellbeing, particularly during lockdowns and/or periods of home-schooling. In May, the Workplace Relations Ministerial Council agreed to a range of recommendations from the [Boland Review](#), and significantly, agreed that the model Work Health and Safety Regulations should be amended to address psychological injury. The same month, SafeWork New South Wales produced a [Code of Practice for Managing Psychosocial Hazards At Work](#), while Western Australia provided a draft [Code](#) for comment in August. We can expect further codes and regulations in this area in 2022.

Preventative safety measures are also now best practice to address sexual harassment, in line with a range of thought leadership reports. It is timely then for employers to review (or plan for) a risk assessment for psychosocial/mental health risks early in 2022, particularly if workers are returning to a shared workplace after a significant absence, with an eye to ensure your safety strategies are risk based, supported by evidence and consistent across your organisation.

2021 also saw continued attention on industrial/workplace manslaughter with new legislation passed in the ACT and a new bill introduced in New South Wales (following the implementation of workplace manslaughter in Victoria in 2020). We have also seen prosecutions of individuals and officers following fatalities, most notably in the prosecution in the ACT Supreme Court in relation of a death of a worker at the Canberra Hospital construction site where both individuals of Multiplex and RAR Cranes were prosecuted (noting Maddocks acted for an employee charged under the WHS Act). The latter case also considered the liability issues associated with contractor management, a continuing issue in workplace health and safety law.

Employers should ensure that their safety risk registers accurately address significant risks, and that Boards and Executives are properly briefed, so that the risk of complacency is minimised. Duty holders must also understand their respective obligations for contractors and their employees, with appropriate allocation of responsibilities reflected both in contractual documents and operating practices.

Consultation continues to be an oft-neglected safety duty. While safety regulators are not taking enforcement action over this, unions and workers are calling out failures to consult in industrial forums, notably recently in relation to vaccination mandates.

Lastly, we are starting to see significant increases in regulator activity with the issuing of Improvement and Prohibition Notices addressing a wide range of physical and psychosocial risks. Safety practitioners expect 2022 to be a busy year responding to notices, investigations and possibly prosecutions in the case of breach. While many HR and Safety practitioners will be having a well-earned holiday over the festive season, we recommend that the new year be a time of audit, assurance and renewal, to ensure your organisation is meeting its obligations.

### Key points

- Employers should review their sexual harassment policies and training, as well as conduct a risk assessment for psychosocial and mental health risks early in 2022.
- Safety risk registers need to accurately address significant risks and Boards and Executives should be properly briefed to reduce chances of complacency.
- Auditing and reviewing your organisation's safety obligations and practices will be key to avoiding improvement and prohibition notices in 2022 as regulator activity starts to increase.



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