

FWC Bulletin

9 December 2021 Volume 47/21 with selected Decision Summaries for the week ending Friday, 3 December 2021.

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End of year timeframes for approval of enterprise agreement applications

December is usually the busiest time of the year for enterprise agreement applications. The Fair Work Commission does not close over the festive period, and we will continue to process and approve enterprise agreements as quickly as possible.

If you want your agreement to be approved quickly and easily, we recommend you:

Check our [Making compliant agreement applications guide \(PDF\)](#)

Make sure your application is complete and complies with all requirements

Lodge your application as early as possible

Provide contact details with your application for someone who will be available over the festive period, in case we need further information

We usually approve simple (complete and compliant) applications in about 2 weeks. More complicated or incomplete ones often take longer. If too many applications are lodged in the second half of December the increased volume may also cause delays, so we recommend you get your application in early.

Decisions of the Fair Work Commission

The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.

Summaries of selected decisions signed and filed during the week ending Friday, 3 December 2021.

- 1** ENTERPRISE AGREEMENTS – dispute about matter arising under agreement – vaccine mandate – s.739 Fair Work Act 2009 – Full Bench – applicants applied for Commission to deal with a dispute in accordance with dispute settlement procedure in *Mt Arthur Coal Enterprise Agreement 2019* – Mt Arthur Coal P/L (respondent) employs the employees at the Mt Arthur open cut coal mine (Mine) – respondent is a member of the BHP group of companies – dispute arose because on 7 October 2021, respondent announced a 'site access requirement' whereby all workers at the Mine must receive a single dose of COVID-19 vaccine by 10 November 2021 and be fully vaccinated by 31 January 2022 (and provide evidence of vaccination by these dates) – respondent agreed that the following question be arbitrated by the Commission: 'Whether the [respondent's] direction...is a lawful and reasonable direction in respect to employees at the Mt Arthur mine who are covered by the Mt Arthur Coal Enterprise Agreement 2019' – various unions and employer bodies granted leave to intervene – Full Bench considered that a number of facts had been established on the evidence before it, including that: any person infected with COVID-19 is at risk of serious illness which may lead to death; all COVID-19 vaccines currently available in Australia are effective at preventing symptomatic infection and substantially reducing risk of serious illness or death; the vaccines are safe, any adverse effects are usually mild, and there is a much higher risk of becoming ill and dying from COVID-19 than from being vaccinated; an unvaccinated person is more likely to acquire COVID-19 from another unvaccinated person rather than a vaccinated person; other measures such as masks and social distancing reduce transmission but do not reduce risk of serious illness once infected; vaccination is the best control available to combat risks posed by COVID-19; and even with high vaccination rates in the community, COVID-19 remains a significant hazard in any workplace where people may interact or use the same common spaces, and the Mine is such a workplace – noted that it was uncontentious that there was no legal basis for the site access requirement in any public health orders, the Agreement, or the express terms of employees' contracts – therefore the basis for the site access requirement must derive from the term implied by law into all employment contracts (in the absence of a contrary intention by the contracting parties) that employees must follow lawful and reasonable directions of their employer – applicants, ACTU and union interveners argued that site access requirement was not a lawful direction because: consultation requirements in Work Health and Safety Act 2011 (NSW) (WHS Act) and in Agreement were not complied with; respondent had not complied with obligations under the Privacy Act 1988; and site access requirement impairs employees' right to bodily integrity – respondent submitted that it has a duty under WHS Act and at
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common law to ensure, so far as reasonably practicable, the health and safety of employees and other persons – Full Bench accepted that the object of the site access requirement was to protect the health and safety of employees and others at the Mine, and on that basis, it was *prima facie* lawful because it fell within the scope of the employment and there was nothing illegal or unlawful about being vaccinated – noted that a direction must also be reasonable – Full Bench concluded that aspects of decision in *Woolworths* were 'plainly wrong' insofar as the Full Bench in that case said that a policy will be reasonable if a reasonable employer could have adopted it, and will only be unreasonable if no reasonable employer could have adopted it – to establish that a direction is reasonable it is not necessary to show that it is the preferable or most appropriate course of action, or is best practice or is in the best interest of the parties – Full Bench rejected respondent's submission that 'the reasonableness of a direction is determined having regard to its effect, not by the process by which it was made' – concluded that whether a direction is reasonable requires consideration of all circumstances, and in NSW this would include consideration of consultation obligations in the WHS Act – in considering respondent's consultation obligations under ss.47-49 of the WHS Act, Full Bench noted some relevant propositions from case law, including that: a right to be consulted is not a right of veto; consultation is not concerned with a likelihood of success, but must occur before a decision is made to implement a proposal; consultation is not collaborative decision-making, and all that is necessary is to give those required to be consulted a genuine opportunity to be heard before any final decision is made; and the affected party must be given a genuine opportunity to attempt to persuade the decision-maker to adopt a different course of action – respondent argued that it engaged with unions as well as employees, but Full Bench found there appeared to be no genuine attempt to consult with unions, as BHP said in its letters to the unions that 'If a decision is made to make vaccination a condition of workplace entry, we will consult with you about the implementation of that decision' – found no direct engagement with health and safety representatives, as there was no discussion of mandatory vaccination at health and safety meetings before site access requirement was announced on 7 October, and meetings that occurred after that date were not about whether the site access requirement would be introduced, but how and why it would be implemented – found that employees were not asked to contribute ideas or suggestions about decision-making process, risk assessment or rationale that underpinned decision to introduce the site access requirement – respondent submitted that final decision to implement site access requirement was made after 'no new scientific, medical or safety data was provided during the consultation process' – Full Bench found that respondent did not invite employees to contribute scientific, medical or safety data or inform them that such information may influence respondent's decision – concluded that the language of respondent's 7 October announcement demonstrates that the decision to implement the site access requirement was 'irrevocable' and was not amenable to consultation, even about dates – found that employees not given reasonable opportunity to express their views, raise work health or safety issues, or contribute to decision-making process – respondent submitted that even if there was a failure to consult in accordance with s.47, this was not determinative of the reasonableness of the direction, because there was no evidence that any further consultation might have resulted in decision not to implement site access

requirement – Full Bench rejected this argument because consultation could have affected terms of the site access requirement and consequences of non-compliance with it, and respondent's failure to meaningfully consult with employees denied them opportunity to influence respondent in its decision-making process and the possibility of a different outcome – Full Bench not persuaded that further consultation could not possibly have produced a different result – in considering respondent's consultation obligations under Agreement, Full Bench noted that the obligation was engaged if the employer made a 'definite decision' to introduce a 'major change' to '...organisation...in relation to its enterprise that is likely to have a significant effect on the employees' – Full Bench rejected Ai Group's contention that as vaccination is unlikely to result in significant adverse effects, a mandatory vaccination policy is not likely to have a significant effect on employees – accepted ACTU's argument that the site access requirement, in exposing unvaccinated employees to potential disciplinary action including dismissal, has a significant effect on employees – Full Bench found it was not necessary to express a concluded view on whether respondent complied with Agreement's consultation obligations – in relation to applicants' argument that respondent had not complied with Privacy Act, Full Bench noted that Privacy Act only allowed entities to collect health information (including a person's vaccination status) if the person consents, unless an exception applies such as where the entity reasonably believes collection is necessary to lessen or prevent a serious threat to life, health or safety of any individual, or to public health or safety – Full Bench unable to reach a concluded view, on the limited information before it, as to whether respondent breached its privacy obligations, and it was unnecessary to do so given Full Bench's conclusion regarding reasonableness of the direction – concluded that the site access requirement did not violate right to bodily integrity – distinguished *Marion's Case* by noting that the site access requirement does not purport to confer authority on anyone to perform a medical procedure on anyone else – Full Bench noted that people may choose to be vaccinated in response to various pressures including to avoid resentment from family or society or due to an employment requirement, but that does not vitiate a person's consent to vaccination or violate their right to bodily integrity [*Kassam v Hazzard*] – Full Bench accepted that practical effect of the site access requirement was to apply economic and social 'pressure to employees to surrender their bodily integrity (by undergoing medical treatment)...where they would prefer not to do so' – Full Bench concluded that this was a relevant matter in assessing reasonableness of the direction but was not determinative – noted that some employees did not wish to be vaccinated and it was important that they be heard, consulted and their views taken into account – concluded it did not need to decide whether respondent was required by WHS Act to introduce the site access requirement – to be lawful and reasonable, a direction does not need to be founded on a statutory source of power – Full Bench found that site access requirement was not a reasonable direction, because of respondent's failure to consult with employees under ss.47 and 48 WHS Act – Full Bench noted a range of considerations which otherwise weighed in favour of finding that the site access requirement was reasonable, including that it was: directed at ensuring the health and safety of workers at the Mine; a reasonably proportionate response to the risk created by COVID-19; developed having regard to the circumstances at the Mine, including that Mine workers cannot work from home and come into contact with other workers; only

implemented after respondent spent considerable time encouraging vaccination and setting up vaccination hub for workers at the Mine – if respondent had consulted employees per its consultation obligations, the above considerations would have provided a strong case in favour of conclusion that the site access requirement was a reasonable direction – noted that consultation deficiencies could be addressed by respondent now consulting employees on whether site access requirement should be imposed at the Mine, so that respondent could make a decision prior to 15 December 2021 – noted that during oral arguments, counsel for applicants argued that if issue for respondent was that relaxation of movement restrictions in NSW means virus will become endemic and risk for unvaccinated persons will increase, then Commission should stay the site access requirement 'until the new year to see whether the dire forecast' comes to pass – Full Bench noted the approach proposed by counsel was to 'wait and see if infection rates actually increase and presumably, whether significant numbers of the unvaccinated become seriously ill or die' – Full Bench considered this was not an appropriate approach, noting that: rates of infection are likely to increase over time as movement restrictions cease, which involves an increase in risk, particularly for the unvaccinated; and WHS Act framework is concerned with assessment and reduction of risk – Full Bench noted the Commission is available to facilitate any discussion between applicants and respondent regarding consultation process to be undertaken.

Construction, Forestry, Maritime, Mining and Energy Union and Anor v Mt Arthur Coal P/L t/a Mt Arthur Coal

C2021/7023

Ross J

Catanzariti VP

Saunders DP

O'Neill C

Matheson C

Melbourne

[\[2021\] FWCFB 6059](#)

3 December 2021

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- 2** MODERN AWARDS – 4 yearly review – s.156 Fair Work Act 2009 – Full Bench – after a decision issued 21 September 2021 [[\[2021\] FWCFB 5117](#)], a Full Bench issued a Revised Exposure Draft to address remaining technical and drafting matters in respect of the *Black Coal Mining Industry Award 2010* – in this matter, the Full Bench determined: amendments to certain casual provisions (including overtime, offers and requests for casual conversion and expression of overtime casual rates) in the Award to align with decisions issued by the Overtime for Casuals Full Bench (AM2017/51) on 18 August 2020 [[\[2020\] FWCFB 4350](#)] and 30 October 2020 [[\[2020\] FWCFB 5636](#)] and the Casual Terms Award Review Full Bench (AM2021/54) on 27 September 2021 [[\[2021\] FWCFB 6008](#)]; other amendments also made to align with decision issued by Payment of Wages Full Bench [[\[2020\] FWCFB 1131](#)] and to adjust for the 2020-21 Annual Wage Review decision [[\[2021\] FWCFB 3500](#)] – final variation determination to be issued shortly, with operative date of 28 January 2022 – parties to file any comments (to correct errors only) in relation to amendments by 4 pm (AEDT) on 15 December 2021.
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- 3** TERMINATION OF EMPLOYMENT – performance – ss.392, 394 Fair Work Act 2009 – application for unfair dismissal remedy – applicant, an engineer, dismissed by respondent on 9 July 2021 – applicant sought order for reinstatement or compensation – respondent opposed unfair dismissal claim and submitted, in the alternative, that no reinstatement order should be made and compensation should be nil or minimal – applicant dismissed for failure to fulfil his role in a number of areas and consistent non-performance – Commission considered *Byrne v Australian Airlines Ltd, B, C and D v Australian Postal Corporation T/A Australia Post* and *Parmalat Food Products P/L v Wililo* – Commission rejected respondent claims that applicant lacked leadership ability, adaptability and team orientation – found applicant's failure to meet deadlines, lack of timeliness, substandard quality of work, and failure to perform simpler tasks in the context of other failures constituted performance deficiencies and a valid reason for dismissal weighing against a finding of unfairness – Commission concluded applicant unfairly dismissed because his dismissal was harsh and unjust – did not matter whether respondent told applicant on 4 May 2021 that he was, or was going to be, under performance management – found that applicant was never put on a formal performance management plan, and if one was contemplated by the respondent, it was not communicated to the applicant – no established benchmark or review point against which applicant's performance was to be assessed – respondent's notification of reason for dismissal showed an unreasonable lack of particularity and added to the harshness of the dismissal – applicant denied procedural fairness because decision to dismiss was predetermined and applicant had no opportunity to respond to proposition that his performance failures warranted dismissal either at the dismissal meeting or prior to the decision being made – dismissal occurred without oral or written warnings concerning performance or that continuing performance failures could lead to dismissal – Commission considered that reinstatement not appropriate in light of applicant's performance failures and their negative impact on the employment relationship – order for compensation appropriate – Commission, allowing for development and implementation of a performance management plan followed by a fair dismissal process, projected applicant's employment would have continued 11 weeks at his rate of pay at time of dismissal – respondent ordered to pay compensation of \$21,471.15 (to be taxed as required by law) plus superannuation, additional to the already paid 4 weeks' notice in lieu, within 14 days of the date of the order.

Lakhan v Bustech Group P/L t/a BustechGroup

4 TERMINATION OF EMPLOYMENT – extension of time – merit – s.394 Fair Work Act 2009 – applicant worked in an aged care facility as a Nurse Assistant – was required by state health direction to be vaccinated against COVID-19 – was not vaccinated and did not hold an exemption certificate – dismissed by respondent as a result – unfair dismissal application lodged one day outside the 21-day statutory period – applicant contended late lodgement solely the result of representative error – Commission considered circumstances when it can grant extension of time – 'exceptional circumstances' test – 'exceptional' given ordinary dictionary meaning – 'unusual', 'extraordinary' [*Nulty v Blue Star Group P/L*] – out of the ordinary, uncommon, but need not be unique or unprecedented [*Baker v The Queen*] – ordinary factors in combination may amount to exceptional circumstances [*Griffiths v The Queen*] – Commission considered when representative error is exceptional circumstance – all conduct, including that of applicant, to be considered [*Diotti v Lenswood Cold Stores Co-Op Society*] – conduct of the applicant central to deciding whether representative error is an acceptable explanation for the delay [*Davidson's Case*] – where the applicant was blameless, representative error would constitute exceptional circumstances [*Robinson v Interstate Transport P/L*] – a person is blameless when they did not by act or omission cause or contribute to the error [*Todd Perry v Rio Tinto Shipping P/L*] – Commission considered whether applicant contributed to delay – observed applicant left only 2 working days for the unfair dismissal application to be completed and filed by her representative – found applicant's conduct not blameless – concluded this weighed against finding of exceptional circumstances – when considering whether there are exceptional circumstances justifying an extension of time, the merits of the underlying application are relevant under s.394(3)(e) FW Act – Commission may consider whether on the material before it, the applicant has a sufficient case on the merits [*Kyvelos v Champion Socks P/L*] – consideration of the merits does not require a detailed analysis [*Kornicki v Telstra-Network Technology Group*] – Commission considered material before it – as applicant was not vaccinated when legally required to be according to the state health direction, the Commission considered this appeared to pose a significant barrier to the success of the unfair dismissal application – as such, the merits of the unfair dismissal application did not support granting an extension of time – application dismissed.

Begum v Bupa Aged Care

U2021/9863
Platt C

Adelaide

[\[2021\] FWC 6405](#)
3 December 2021

Subscription Options

You can [subscribe to a range of updates](#) about decisions, award modernisation, the annual wage review, events and engagement and other Fair Work Commission work and activities on the Fair Work Commission's website. These include:

Significant decisions – This service contains details of recently issued full bench decisions and other significant decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed when decisions are published.

All decisions – This service contains details of all recently issued Commission decisions with links to the complete decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed up to twice daily.

Websites of Interest

Attorney-General's Department - www.ag.gov.au/industrial-relations - provides general information about the Department and its Ministers, including their media releases.

AUSTLII - www.austlii.edu.au/ - a legal site including legislation, treaties and decisions of courts and tribunals.

Australian Building and Construction Commission – www.abcc.gov.au/ - regulates workplace relations laws in the building and construction industry through education, advice and compliance activities.

Australian Government - enables search of all federal government websites - www.australia.gov.au/.

Federal Register of Legislation - www.legislation.gov.au/ - legislative repository containing Commonwealth primary legislation as well as other ancillary documents and information, and the Federal Register of Legislative Instruments (formerly ComLaw).

Fair Work Act 2009 - www.legislation.gov.au/Series/C2009A00028.

Fair Work (Registered Organisations) Act 2009 - www.legislation.gov.au/Series/C2004A03679.

Fair Work Commission - www.fwc.gov.au/ - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

Fair Work Ombudsman - www.fairwork.gov.au/ - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.

Federal Circuit Court of Australia - www.federalcircuitcourt.gov.au/.

Federal Court of Australia - www.fedcourt.gov.au/.

High Court of Australia - www.hcourt.gov.au/.

Industrial Relations Commission of New South Wales - www.irc.justice.nsw.gov.au/.

Industrial Relations Victoria - www.vic.gov.au/industrial-relations-victoria.

International Labour Organization - www.ilo.org/global/lang--en/index.htm
- provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational health and safety.

Queensland Industrial Relations Commission - www.qirc.qld.gov.au/index.htm.

South Australian Employment Tribunal - www.saet.sa.gov.au/.

Tasmanian Industrial Commission - www.tic.tas.gov.au/.

Western Australian Industrial Relations Commission - www.wairc.wa.gov.au/.

Workplace Relations Act 1996 - www.legislation.gov.au/Details/C2009C00075

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Out of hours applications

For urgent industrial action applications outside business hours, please refer to our [Commission offices](#) page for emergency contact details.

The address of the Fair Work Commission home page is: www.fwc.gov.au/

The FWC Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Fair Work Commission
- Practice Directions concerning the practice and procedure of the Fair Work Commission
- weekly decisions summaries
- details of procedural changes and developments within the Fair Work Commission, and
- advice regarding the rights and obligations of organisations registered under the *Fair Work (Registered Organisations) Act 2009*.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: subscriptions@fwc.gov.au.

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