



STATEMENT

Fair Work Act 2009

s.739 - Application to deal with a dispute

Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard

v

Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal
(C2021/7023)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 17 DECEMBER 2021

Application for Commission to deal with a dispute in accordance with a dispute settlement procedure in an enterprise agreement

Background

[1] On 7 October 2021, Mt Arthur Coal Pty Ltd (*Mt Arthur*) issued a direction to employees that as a condition of site entry employees are required to:

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

(the **Site Access Requirement**)

[2] Following the direction to comply with the Site Access Requirement, the Applicants raised a dispute under the *Mt Arthur Enterprise Agreement 2019 (EA)* in relation to the Site Access Requirement.

[3] The dispute was referred to the Fair Work Commission for arbitration and the Commission was asked the question:

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

[4] The Commission convened a five member Full Bench to determine the question and on 24 and 25 November 2021, the Commission heard the matter.

[5] On 3 December 2021, the Commission delivered its decision¹ which determined that the answer to the question was “no”.

[6] The Commission held that the Site Access Requirement was prima facie lawful:

“[85] We accept that the object and purpose of the Site Access Requirement is to protect the health and safety at work of Mt Arthur’s employees and other people at the Mine. On that basis, the Site Access Requirement is prima facie ‘lawful’ because:

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

[7] The Commission also held that the Site Access Requirement was not reasonable. The major and determinative factor that led to the conclusion that the Site Access Requirement was not reasonable was due to deficiencies in consultation:

“[251] In all the circumstances we find that, on balance, the Site Access Requirement was not a reasonable direction. The determinative consideration has been that we are not satisfied that there was consultation in accordance with ss.47 and 48 of the WHS Act.

[...]

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

[...]

[265] Mt Arthur’s failure to comply with its consultation obligations under the WHS Act is the major consideration which led us to conclude that the Site Access Requirement was not a lawful and reasonable direction. The consultation deficiencies we have identified can be addressed by Mt Arthur consulting the Employees in relation to the question of whether or not the Site Access Requirement should be imposed at the Mine. Any subsequent dispute will need to be determined having regard to the particular circumstances at the time.”

[8] The Commission found that the scientific and medical evidence supported the Site Access Requirement:

¹ *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Mt Arthur Coal Pty Ltd* [2021] FWC 6059 (*Decision*)

“[29] There are a number of general factual propositions which are uncontentious and which we accept have been established on the evidence before us:

- 1. COVID-19 involves a high burden of disease, greater than influenza.*
- 2. Any infected person is at risk of developing serious illness from the virus, which may lead to death.*
- 3. The risks posed by COVID-19 have changed with the rapid rise of the Delta variant which is more infectious and has more severe health effects than previous variants.*
- 4. All COVID-19 vaccines currently available in Australia are effective at preventing symptomatic infection, including from the Delta variant.*
- 5. All COVID-19 vaccines currently available in Australia substantially reduce the risk of serious illness or death, including from the Delta variant.*
- 6. All COVID-19 vaccines currently available in Australia are safe and any adverse effects are usually mild. There is a much higher risk of developing serious complications and dying from acquiring COVID-19.*
- 7. An unvaccinated person is more likely to acquire COVID-19 from another unvaccinated person, rather than a vaccinated person.*
- 8. While other measures, such as mask wearing, and social distancing, are demonstrated to reduce the transmission of COVID-19, the effectiveness of these measures depends on people applying them consistently or correctly. They do not provide a substitute for the constant protection offered by vaccines, nor do they reduce the risk of developing serious illness once somebody acquires an infection.*
- 9. Vaccination is the most effective and efficient control available to combat the risks posed by COVID-19.*
- 10. Even with high vaccine rates in the community, COVID-19 will remain a significant hazard in any workplace in which there is a possibility that people will interact or use the same common spaces (even at separate times). The Mine is clearly such a workplace.*
[...]

[61]...higher rates of vaccination do decrease the risks to an unvaccinated person. However, as Professor McLaws and Witness R5 made clear in their evidence, higher rates of vaccination do not remove the risk of COVID-19 infection for unvaccinated workers. That is because unvaccinated workers are at risk of catching COVID-19 from other unvaccinated workers and fully vaccinated workers, who can acquire COVID-19 and efficiently transmit the disease to others. Indeed, unvaccinated people are more likely to acquire COVID-19 compared with vaccinated people. Further, unvaccinated workers on a work site increase the risk of spreading COVID-19 to vaccinated workers

and other unvaccinated workers. In turn, those persons are at risk of spreading COVID-19 outside the workplace to their families and friends.

[62] *We are also satisfied on the basis of the expert evidence given by Professor McLaws and Witness R5 that the rates of infection of COVID-19, in the Hunter Region and throughout Australia, are likely to increase over time as movement restrictions ease, with the result that it is inevitable that everyone who works on the Mine will come into contact with someone – probably many people – who are infected with COVID-19. Witness R5 went on to express his opinion that ‘with reopening the virus will spread through Australia, and [although] the timing in the given locations [is] not exact, but in time it will spread to all locations, and be present in all work places’. When COVID-19 does so spread, those who remain unvaccinated are at greatest risk of acquiring COVID-19, becoming seriously ill or dying from acquiring COVID-19, and infecting other people with whom they come into contact.”*

[9] Notwithstanding the deficiencies with consultation, there were a number of considerations that supported a finding that the Site Access Requirement was otherwise reasonable:

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

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

[10] The Commission suggested a process for further consultation that would enable a decision about whether to adopt a site access requirement and if so, the terms of such a requirement:

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

Any subsequent dispute will need to be determined having regard to the particular circumstances at the time.

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

[11] The Commission offered its assistance to the parties to facilitate discussions between them regarding the consultation process to be undertaken.²

Jurisdiction

[12] The Applicants contend that there is no jurisdiction for the Commission to issue this Statement. They submit that the proceedings in C2021/7023 are *functus officio*; the question posed for arbitration has been determined, and there has been no further directions or consequential orders issued by the Full Bench relating to the consultation process to be followed at Mt Arthur following the determination of the question for arbitration.

[13] Mt Arthur contends that while the Commission answered the question for arbitration in the negative, it made itself available to facilitate further discussions between the parties regarding the consultation process to be undertaken. Mt Arthur accepted that invitation and the Applicants have played an active part in consultation generally and in four conferences before me on 8, 10, 13 and 15 December 2021 regarding that process. Those conferences were held in the context of the existing dispute, as evidenced by the Notice of Listing dated 6 December 2021, and did not represent a “further, or consequential arbitration process” as alleged by the Applicants.

[14] Mt Arthur also submits that the Commission has broad powers under sections 592 and 595 of the *Fair Work Act 2009* (Cth) to conduct conferences and deal with disputes as it considers appropriate. It can and does express opinions and make recommendations, and routinely issues statements in relation to proceedings before it as a matter of course. The exercise of those powers is conventional.

[15] I do not accept the Applicants’ submission that the Commission does not have jurisdiction to issue this Statement. The Full Bench pointed out in the Decision, the deficiencies in the consultation process undertaken by Mt Arthur and then offered the Commission’s assistance to facilitate discussions concerning further consultation. That offer was made in connection with the dispute which is the subject of these proceedings. Such disputes often

² Decision at [269].

evolve during proceedings in the Commission.³ This dispute has evolved. Mt Arthur accepted the Commission's offer of assistance and the Applicants participated, without objection, in four conferences convened by the Commission. Even now, the Commission's file in relation to this matter has not been closed because issues may arise between the parties in the context of the dispute. For example, the CFMMEU has raised a concern about whether any employees who are stood down in connection with their decision not to be vaccinated and their subsequent non-compliance with the Site Access Requirement, will be paid for the balance of their period of being stood down. The Commission has offered its assistance to conciliate any such issue if it cannot be resolved by the parties in the coming days. Further, I accept that the Commission has broad powers to conduct conferences and deal with disputes as it considers appropriate. I have used those powers to convene and conduct four conferences with the parties since the Decision was published.

Reasons for issuing this Statement

[16] The Applicants have been given an opportunity to comment on a draft version of this Statement (save for the sections dealing with jurisdiction and the reasons for issuing the Statement). They have not made any specific suggestions in relation to the draft Statement, other than to say the Commission does not have jurisdiction to issue it and to submit that there is no public interest that requires consultation that takes place at one work site be the subject of a Statement by the Commission.

[17] I am of the view that issuing this Statement is permissible and appropriate, and would have significant utility, for the following reasons:

- The consultation process commenced by Mt Arthur on 6 December 2021 was a significant endeavour undertaken with employees and their representatives, including the Applicants. The Commission played a key role in that process.
- The process of consultation is significant for all of the parties, and for Mt Arthur's employees.
- There has been considerable interest in this matter from third parties, including the interveners and the interests that they represent. It would serve the public interest if they were to have access to the Statement, which sets out the steps that have been taken by the parties to consult regarding the site access requirement in light of the Full Bench's Decision.
- The Statement is a factually accurate record of the context of the discussions facilitated by the Commission, the steps that have been undertaken by Mt Arthur in the consultation process, and statements about the resolution of that process that were acknowledged and agreed to by the Applicants during the conferences.
- It is a matter of importance to the parties and Mt Arthur's employees that there be a record of this kind.

³ *MUA v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [19]-[23]

How did the parties progress with consultation in light of the Decision?

[18] On 3 December 2021, Mt Arthur withdrew the direction to employees covered by the EA to comply with the Site Access Requirement.

[19] On 3 December 2021, Mt Arthur requested the assistance of the Commission to facilitate an urgent discussion regarding the process of consultation with its employees to determine whether a site access requirement should be adopted for its employees and if so, the terms of such a requirement.

[20] On 6 December 2021, Mt Arthur held toolbox talks with employees and confirmed that further consultation would occur regarding a proposed site access requirement and encouraged employees to participate in that consultation process.

[21] On 6 December 2021, Mt Arthur provided a proposed Consultation Plan to the Applicants. The Consultation Plan addressed areas that the Commission considered needed to be met in order for a decision to be made about whether a site access requirement should be adopted at the Mine for Mt Arthur's employees, and if so, the terms of such a requirement.

[22] On 6 December 2021, the Commission held a conference during which the Consultation Plan was discussed.

[23] On 6 December 2021, Mt Arthur emailed all of its employees, enclosing a letter, announcing the further consultation that would occur in relation to a proposed site access requirement that would require employees to:

- have at least a single dose of an approved COVID-19 vaccine by 15 December 2021; and
- be fully vaccinated by 31 January 2022,

(the **Proposed Site Access Requirement**).

[24] On 7 December 2021, Mt Arthur held further toolbox talks with employees and in relation to the Proposed Site Access Requirement.

[25] On 7 December 2021, Mt Arthur sent an email to all employees enclosing the consultation plan, the Decision and its summary of that decision, a FAQ document, and a safety and health rationale summary document.

[26] On 7 December 2021, the "Mt Arthur Coal Consultation" hub went live, which was a central hub on Mt Arthur's intranet that contained all of the materials relevant to the Proposed Site Access Requirement.

[27] On 7 December 2021, the Applicants confirmed that they agreed with the proposed Consultation Plan and advised that they considered that the question of whether Mt Arthur meets its obligations to consult will depend on the quality and genuineness of the consultation itself.

[28] A copy of the Consultation Plan is at Appendix A to this Statement.

[29] On 8 December 2021, Mt Arthur held further toolbox talks with employees and in relation to the Proposed Site Access Requirement.

[30] On 8 December 2021, Mt Arthur and the Applicants met to discuss the Proposed Site Access Requirement. The Applicants provided materials for the consideration of Mt Arthur.

[31] On 8 December 2021, Mt Arthur undertook consultation meetings with employees who had been stood down due to their non-compliance with the Site Access Requirement.

[32] On 8 December 2021, Mt Arthur and the Applicants participated in a report back conference before me in relation to the consultation that had so far occurred regarding the Proposed Site Access Requirement.

[33] On 8 December 2021, Mt Arthur held further toolbox talks with employees and in relation to the Proposed Site Access Requirement.

[34] On 9 December 2021, Mt Arthur held further toolbox talks with employees and in relation to the Proposed Site Access Requirement.

[35] On 9 December 2021, Mt Arthur held consultation meetings with Department and Site HSE Committees.

[36] On 9 December 2021, Mt Arthur provided the Applicants with a record of the meeting that took place on 8 December 2021.

[37] On 10 December 2021, Mt Arthur held further toolbox talks with employees and in relation to the Proposed Site Access Requirement.

[38] On 10 December 2021, Mt Arthur provided the Applicants a written response to the specific matters raised by the Applicants for further consideration during their meeting on 8 December 2021.

[39] On 10 December 2021, Mt Arthur provided the attendees at the various Department and Site HSE Committee meetings with records of those meetings containing responses to each of the matters raised for further consideration during those meetings.

[40] On 10 December 2021, Mt Arthur and the Applicants participated in a second report back conference before me in relation to the consultation that had so far occurred regarding the Proposed Site Access Requirement.

[41] Between 10 and 12 December 2021, where appropriate, Mt Arthur provided individual written responses to consultation contributions provided by individual employees in relation to the Proposed Site Access Requirement.

[42] On 12 December 2021, the Applicants confirmed that they did not require a further meeting with Mt Arthur.

[43] On 12 December 2021 at 8:00pm, the further consultation process formally concluded and Mt Arthur proceeded to make a decision on the proposal.

[44] On 13 December 2021, Mt Arthur confirmed the conclusion of the consultation process, and the commencement of the decision making phase of the process, with the Applicants.

[45] On 13 December 2021, Mt Arthur and the Applicants participated in a third report back conference before me in relation to the consultation that had so far occurred regarding the Proposed Site Access Requirement.

[46] On 13 December 2021, Mt Arthur sent an email to all employees providing an update on the status of the consultation and that Mt Arthur had now transitioned to the decision-making phase of the process.

[47] On 14 December 2021, Mt Arthur, taking into account all material available to it, made a decision that a site entry requirement should be adopted and that it should take the form of the Proposed Site Access Requirement.

[48] On 14 December 2021, Mt Arthur announced to all employees that it had made the decision to introduce the Proposed Site Access Requirement. Shortly thereafter, Mt Arthur separately forwarded this announcement to all Health and Safety Committees and the Applicants.

[49] On 14 December 2021, Mt Arthur issued letters to stood down employees regarding the decision to introduce a site access requirement and the next steps for those employees, which included providing the stood down employees with a period of seven days to consider whether they would comply with the new site access requirement.

[50] On 15 December 2021, Mt Arthur and the Applicants participated in a final listed report back conference before me in relation to the decision made by Mt Arthur regarding the Proposed Site Access Requirement.

Observations

[51] The Decision provided a pathway for the parties to move forward through consultation conducted through a variety of appropriate forums.

[52] Mt Arthur responded to the Decision by withdrawing the direction to employees to comply with the Site Access Requirement and commencing a period of further consultation with its employees in relation to the Proposed Site Access Requirement.

[53] The Consultation Plan was agreed following a discussion facilitated by the Commission.

[54] The Applicants maintained the view that whether Mt Arthur meets its obligations to consult would depend on the quality and genuineness of the consultation itself.

[55] The CFMMEU also maintained its position that it:

- encourages members to get vaccinated when they are able, subject to medical advice from their doctor;
- does not support mandatory vaccination in mining and energy workplaces; and
- considers decisions about mandatory vaccination for any group of workers should be made by health authorities and not by individual employers or employer associations.

[56] Notwithstanding the difference of views, through conferences in the Commission the parties worked together to ensure that the further consultation progressed in accordance with the Consultation Plan and were able to promptly identify and resolve any issues pertaining to the process of consultation.

[57] The parties have actively participated in the consultation process and in conferences in the Commission during the period of consultation.

[58] The Applicants requested a final meeting after the time fixed by the Consultation Plan in the event there were matters raised by members which needed to be discussed. Mt Arthur agreed to this on the basis that it would not result in the time for decision under the Consultation Plan being extended. Mt Arthur considered that this was important in light of the NSW Government's proposal to relax COVID-19 related restrictions from 15 December 2021.

[59] As a result of the conferences held by the Commission, the parties reached the agreed position that:

- the Consultation Plan had been followed and completed; and
- every employee and health and safety representative had received a reasonable opportunity to make every contribution to consultation that they wished to make, and to say everything that they wished to say, in a way that meant their contribution could be considered in making a decision.



DEPUTY PRESIDENT

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Appendix A

This consultation plan has been prepared to address the additional consultation outlined in the decision of the [Full Bench in CFMMEU & Anor v Mt Arthur Coal Pty Ltd \[2021\] FWC 6059](#).

The timeframe for the consultation plan has been prepared in line with the Full Bench's comment that Mt Arthur Coal could consult and be in a position to make a decision about whether to impose a site access requirement prior to 15 December 2021, acknowledging the extensive consultation conducted to date.

Consultation Action	Detailed Actions	Date
<p>1. Announcement of fresh consultation process in response to FWC decision</p>	<p>Email from General Manager (or delegate) to Mt Arthur employees using their BHP email addresses and personal email addresses ordinarily used for communications.</p> <p>Mt Arthur representatives will email and text all of the stood down employees and make sure that they have received a copy of the email to all staff regarding the further consultation process (or make arrangements to provide a copy).</p> <p>A copy of the email will also be posted to the WHS noticeboard.</p> <p>Note: throughout the consultation process, Mt Arthur will communicate through announcements to its employees in the same way.</p>	<p>6 December 2021</p>

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| 2. | Ongoing discussions with work groups | Prestart & other work group meetings – during consultation, leaders will draw to the meeting's attention: the announcement and the consultation process as it progresses and remind employees of the request that they participate in consultation until it concludes at 8pm on 12 December 2021. | From 7 December 2021 |
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| 3. | Confirmation of consultation process | Email from General Manager (or delegate) to Mt Arthur employees confirming the consultation process and timeline set out here was discussed with the CFMMEU during a FWC facilitated discussion on 6 December 2021. | 7 December 2021 |
|----|---|--|-----------------|
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4. **Documentation access**
1. Attached with this consultation plan are the following 'key documents' to employees:
 - a. Full Bench Summary of Decision (PDF) and this [link to Full Decision of Full Bench](#);
 - b. FAQ Document;
 - c. Safety & health rationale summary document.
 2. Employees are reminded of the wealth of information available through the intranet (**DWS**) that is relevant to vaccination and managing the risks associated with COVID-19.
 3. The following documents are uploaded to the [Mt Arthur Coal Consultation Hub](#) including:
 - a. The Options Analysis and 15 September 2021 Memo; ASAP & ongoing
 - b. The Full Decision of the Full Bench;
 - c. Memorandum of Dr Gary Krieger dated 16 September 2021;
 - d. Witness statements of Professor Mary-Louise McLaws dated 16 and 23 November 2021;
 - e. Extracts of the WHS Act (NSW).
- Mt Arthur will also provide additional information during consultation.
- If you cannot access these documents or need assistance to obtain these documents please contact Phoebe Thomas, Principal Business Performance, or your line manager.
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5. **FWC Report Back**
- The parties will participate in short report-back sessions with the Fair Work Commission to continue the consultation process. The purpose of these sessions is to promptly identify any divergence between the parties regarding the process of consultation.
- 8 December 2021 at 2:45pm.
 - 10 December 2021 at 9:00am.
 - 13 December 2021 at 9:00am.
 - 15 December 2021 at 9:00am.
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6.	Call Health and Safety Committee Meeting and Department HSE Meetings	<p>Mt Arthur urgently convene a special meeting of the Health and Safety Committee to discuss whether a site access requirement should be adopted and if so the terms of such a requirement.</p> <p>Mt Arthur will also urgently convene special meetings of each of the Mine Production, Maintenance and CHPP HSE Committees to participate in consultation.</p>	ASAP on or after 6 December 2021
7.	Call Union engagement meeting in relation to the current dispute	<p>Mt Arthur will invite CFMMEU to a meeting to discuss whether a site access requirement should be adopted and if so the terms of such a requirement consistent with the FWC's decision.</p>	ASAP on or after 6 December 2021
8.	Hold Special Health and Safety Committee Meeting and Department HSE Meetings	<p>Mt Arthur will hold a special HSC meeting.</p> <p>Mt Arthur will hold hold special Department HSE meetings.</p> <p>Mt Arthur will prepare and provide a record to all attendees. The record will include a questions and answer document.</p>	<p>HSC meeting on or about 8 December 2021</p> <p>HSE Department meetings as soon as practicable on or after 8 December 2021</p>

9.	Hold Union Engagement Meeting	<p>Mt Arthur will meet with representatives of the CFMMEU in line with the invitation outlined above.</p> <p>Mt Arthur will collate the feedback received during the meeting with the CFMMEU and provide a record to all attendees.</p>	On or about 8 December 2021
10.	Close of consultation	<p>The deadline for employees to provide their thoughts, ideas, and suggestions along with any medical, scientific, or safety materials for Mt Arthur's consideration.</p>	8.00pm on 12 December 2021
11.	Final Decision	<p>Mt Arthur will make a final decision about whether a site access requirement should be adopted and if so the terms of such a requirement.</p> <p>The decision will be made having regard to all of the thoughts, ideas and suggestions along with any scientific, medical or safety data or other information provided by employees and their representatives during the consultation process.</p> <p>Mt Arthur will communicate the decision all Mt Arthur employees, the SHSC (and HSRs) and the CFMMEU. The communication will include a summary of how Mt Arthur Coal took into account and weighed up relevant matters.</p>	14 December 2021