

The COVID-19 vaccine: Employment and IR implications

## Our presenters

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# The vaccine roll-out

# The vaccine roll-out

- **Phase 1a:** Quarantine and border workers; Front line health care; Aged care and disability staff and residents
- **Phase 1b:** Adults 70+ yrs; Other health care workers; Aboriginal and Torres Strait Islander people 55+ yrs; Adults with a medical condition or disability; Critical and high risk workers (e.g. defence, police, fire, emergency services, meat processing)
- **Phase 2a:** Adults 50+; Aboriginal and Torres Strait Islander people 18+ yrs; other critical and high risk workers
- **Phase 2b:** Balance of adult population
- **Phase 3:** Under 18, if recommended

# The vaccine roll-out

- Each person will need two doses of the vaccine
- The roll-out will commence with Phase 1a participants receiving the vaccine in 30-50 hospital hubs and in residential aged care and disability facilities
- The hospital hubs will have the ability to handle the cold chain requirements of the Pfizer vaccine which needs to be stored at -70 degrees C
- Later the COVID-19 vaccine will be available from GPs and pharmacies (particularly the AstraZeneca vaccine, which is expected to shortly be approved by the Therapeutic Goods Administration)

# The vaccine rollout

- The roll-out is likely to commence in late-February and continue for 6-12 months, depending upon vaccine supply
- Apart from a few specified industries (e.g. residential aged care) and types of occupations, the rollout is based on the age and vulnerability of individuals
- The rationale is that it would not be appropriate to, say, give a 25-year old construction worker with no health issues access to the vaccine ahead of a 60-year old office worker. The risk of serious illness from the virus is heavily based on the age and health of an individual
- This means that for most workplaces different workers will have access to the vaccine at different times, and many workers will not have access to the vaccine for several months

**Can an employer  
make the vaccine  
mandatory?**



# Government policies

- The Federal Government has no intention of passing laws or issuing Public Health Orders making COVID-19 vaccinations mandatory
- The Australian Health Protection Principal Committee (AHPPC), which consists of all State and Territory Chief Health Officers and is chaired by the Australian Chief Medical Officer, does not currently recommend that Public Health Orders are issued making vaccinations mandatory in any sector, even residential aged care
- The Federal, State and Territory Governments have agreed, through the National Cabinet, that Public Health Orders will not be issued requiring COVID-19 vaccinations for any workers at this point

# Government policies

- If any State or Territory Government proposes to make vaccinations mandatory in any sector at a later stage, the proposal will be considered by the National Cabinet in an endeavour to achieve a consistent approach
- In the trials for the COVID-19 vaccines, the focus has been on how effective the vaccines are in preventing illness in the person who is vaccinated – not on whether vaccinations prevent transmission from one person to another. More research is needed on this before any conclusions can be reached
- This means that for the time being other risk control measures such as social distancing, hygiene, rostering etc will need to be maintained

# **Ai Group is working closely with Governments on the vaccine roll-out**

- Ai Group is working closely with the Federal and State Governments on the vaccine rollout
- Regular discussions with key Ministers and Department officials
- We are working with the FWO and Safe Work Australia on advisory materials for employers and employees

# Can an employer make the vaccine mandatory?

- In the absence of any Public Health Order, the issue of whether an employer can make the vaccine mandatory comes down to – *Would it be 'lawful and reasonable' for the employer to issue a direction to an employee to have the vaccine?*
- This question raises a large number of issues concerning common law rights and duties of employers and employees, WHS laws, the Fair Work Act, anti-discrimination laws, the terms of industrial instruments and contracts of employment, and other issues

**Can an employer  
make the vaccine  
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IR and WHS issues**

# Lawful and Reasonable Directions

- Common law right for an employer to be able to issue lawful and reasonable directions, and for an employee to comply with such directions.
- What constitutes a lawful and reasonable direction will vary depending on the specific circumstances of the employer and employee:
  - What is the nature of the employer's industry?
  - What work is the employee performing, and does the employee have any legitimate reasons why they cannot have the vaccine?
  - What other controls does the employer have in place or could the employer deploy to manage the risks associated with COVID?
  - What existing expectations have been established concerning mandated vaccinations in other circumstances?
- Little case law available in the context of COVID-19, some guidance however may be available from other vaccination cases.

# Reference points outside of the COVID-19 context

- *Arnold v Goodstart Early Learning Limited [2020] FWC 6083*
  - Employee dismissed from employment for refusing to have an influenza vaccination in accordance with the employer's vaccination policy.

*“ ... it is my view that it is at least equally arguable that the Respondent's policy requiring mandatory vaccination is lawful and reasonable in the context of its operations which principally involve the care of children, including children who are too young to be vaccinated or unable to be vaccinated for a valid health reason. Prima facie the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care, while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants.” (Asbury DP)*

# Reference points outside of the COVID-19 context

- *Arnold v Goodstart Early Learning Limited [2020] FWC 6083*  
– ***How does it advance the issue?***
  - Industry of the employer was an active consideration
  - Duty of care to individuals that the employee was going to come in direct contact with as a result of performing the inherent requirements of the role
  - No reasonable modification identified which would permit the inherent requirements of the role to be performed
  - Employee did not offer any medical basis for the refusal to be vaccinated
  - Employer had a policy concerning vaccination for influenza



# Reference points outside of the COVID-19 context

- There are a number of other cases that are presently before the Fair Work Commission as unfair dismissal proceedings concerning refusal of influenza vaccination by employees.
- The parallels between this issue and the COVID vaccine have been noted by the Fair Work Commission:
  - *Barber v Goodstart Early Learning* (heard in late January 2021, decision not yet issued)
  - *Glover v Ozcare* [2021] FWC 231

# The COVID context may yield different results

- Can expect that the case law on this issue will start to develop rapidly once the vaccine roll-out commences.
- Important to consider your specific circumstances and as needed get specific advice
- Active considerations may include:
  - Ongoing medical information about the efficacy of the vaccine to prevent transmission
  - Federal or State Government determinations concerning mandating the vaccine for particular sectors or employees
  - Other control measures, individual employee circumstances, any express obligations you may have established in contracts or enterprise agreements.

# Considering the WHS Context

- Employers have a duty under WHS laws to eliminate, or if that is not reasonably practicable, to minimise, the risk of exposure to COVID-19 in the workplace
- Vaccinations should be considered as only one part of the WHS protocols that an employer has at its disposal
- To meet your duties under WHS laws and minimise the risk of exposure to COVID-19 in your workplace, you must continue to apply all reasonably practicable COVID-19 control measures including: physical distancing, good hygiene and regular cleaning and maintenance.

# Considering the WHS Context

- Assessing the COVID vaccine from a WHS perspective:
  - undertake a risk assessment for your business
  - consider how the vaccine will help to manage those risks, taking into account, for example, availability and any evidence about the vaccine reducing transmission of COVID-19
  - consult with workers and HSRs about COVID-19 and how the vaccine might impact your workplace
  - determine whether it is reasonably practicable to require vaccination in all the circumstances

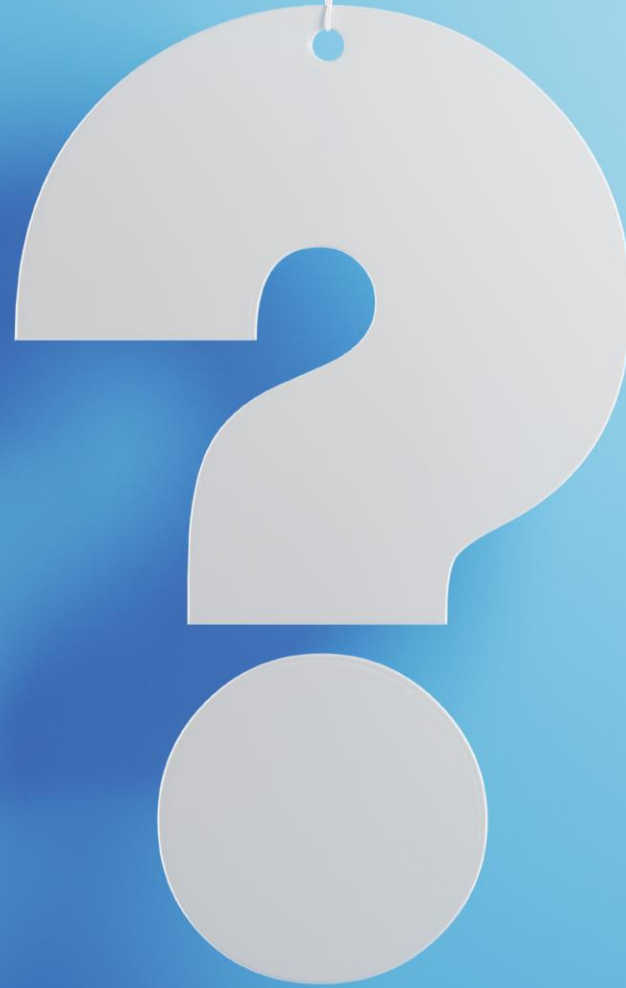
# Other issues to consider

- It is important to consider in detail and potentially obtain specific advice about your individual circumstances if you are considering making mandatory the COVID-19 vaccine:
  - Unfair dismissal
  - Discrimination
  - General Protections
  - An employee's refusal to get vaccinated and their reasons for refusal could be critical
  - Privacy and Health Records obligations
- Enterprise Agreements, express contractual terms/policies on requirements to obtain COVID-19 vaccinations may support a more direct means of requiring employees to be vaccinated
- If we are going to be living with COVID-19 for some time, what are the medium term strategies that could be applied?

## Other issues to consider

- If mandatory vaccination is not a viable option for you as an employer, what strategies might be available to encourage vaccination?
  - Voluntary vaccination policy
  - Support for employees to access vaccination during work time
  - HR strategies to encourage vaccination

# Questions





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