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by email

Dear Ian

Re: vaccination of local government workers

1. As discussed, I thought I'd put together a quick summary of the law today as to vaccination. I should add that the law is still in a state of flux.

A safe workplace

2. It is clear that an employer has an obligation to provide a safe workplace both at common-law but also under the *Work Health and Safety Act* NSW 2011. The work health and safety legislation requires the employer to ensure so far as is reasonably practicable the health and safety at work of workers. It provides for criminal convictions and massive fines for breach of that requirement. I do not see how that requirement can be satisfied if there is a serious risk of infection from a disease that may kill the person and where it is reasonably practicable to be vaccinated.
3. I think it is strongly arguable that a workplace may not be safe if there are unvaccinated people within it given that those people are more likely to contract the virus and to pass it on. That would particularly be the case if the workplace requires the employees to work in close physical proximity or with public contact.

A reasonable and lawful direction?

4. It is clear that at common-law, an employer is entitled to take disciplinary action against an employee who fails to carry out a reasonable and lawful direction. By not complying with the direction, an employee does put themselves at risk of disciplinary action.

5. The issue as to whether a requirement for vaccination is a reasonable and lawful direction has been dealt with now on a few occasions. In *Maria Corazon Glover v Ozcare* [2021] FWC 2989¹, the Commission held that such a requirement in relation to the requirement to take a flu shot when working in Community care was lawful. Commissioner Hunt held at [242] that:

Ozcare has not physically required any employees, including Ms Glover to be vaccinated against their will. It has not held an employee down against their will and inflicted a vaccination upon them. Further, I do not consider its stated position requiring employees to be vaccinated or face termination is unlawful. I note it does not breach any ground of discrimination.

6. The Commission went on at [247] to determine that the direction was reasonable. The Commissioner held that:

In considering the reasonableness of the introduction of the revised Employee Immunisation Policy, I have had significant regard to the vulnerability and age of the clients cared for by Ozcare and its employees in community care. Thousands of elderly clients, including more than 8,000 clients aged 75 or older ought to expect that the paid worker attending their home will take every precaution not to share influenza which alone could cause them to become extremely unwell or even die. Combined with the risk of potentially contracting coronavirus, it is, understandably, an alarming concern for the client and for their family (if they have family). In any inquiry into how an Ozcare client contracted influenza if largely isolated at home with few visitors, Ozcare would no doubt be required to answer questions, if put, as to whether the Ozcare worker was vaccinated against influenza. If answering to a client or a client's family that the Ozcare worker knowingly was unvaccinated and permitted to work, this could or might expose Ozcare to legal proceedings for relevant breaches of duty of care to its vulnerable patient.

7. Similar reasoning was displayed in relation to flu vaccines in the case of *Barber v Goodstart Early Learning* [2021] FWC 2156² at [430] by DP Lake as follows:

Employer mandated vaccination is a topical question in the current pandemic. As I have said above, this decision relates specifically to the influenza vaccination in a childcare environment, where the risks and concerns are distinct. Goodstart's enterprise revolves around the care of children, who are by nature more vulnerable and in general have poor hygiene standards. This can make viral spread easier and potentially more dangerous than in other settings.

8. In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818³ at [60], Cmr McKenna held to similar effect that:

¹ <http://classic.austlii.edu.au/au/cases/cth/FWC/2021/2989.html>

² <http://classic.austlii.edu.au/au/cases/cth/FWC/2021/2156.html>

³ <https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2021fwc1818.pdf>

I find that the respondent, principally through Mr Sierp, acted in an objectively prudent and reasonable way in not permitting the applicant to work within Imaly House absent an up-to-date flu shot. I accept the submissions for the applicant that Mr Sierp did not have a detailed knowledge of the Australian Immunisation Handbook (indeed, Mr Sierp himself professed only to be “familiar” with it), but I find he acted on his best understanding of it, conditioned particularly in the context of the CMO’s Advice as set out in the Media Release.

9. I do not know of a similar case involving vaccination in relation to COVID.

However, I think that the principles set out above would apply even more strongly to COVID particularly given the added danger of the COVID virus.

10. In *Kuru*⁴, the Commission upheld the dismissal of a Ms Kuru, a nurse who was employed by an aged care home. She believed COVID 19 to be a conspiracy. The employer did not. The employer had prevented employees leaving their geographical zone in order to prevent the spread of the virus. She was dismissed for failing to follow the facility zoning directives that prohibited the interaction of staff between zones. Ms Kuru socialised without personal protective equipment while smoking with staff from other zones. The Commission held at [35] that:

I do consider the directives from Cheltenham Manor lawful and reasonable; the directives were considered having regard to available knowledge of the virus and risks to keep the staff and residents safe. The consequences for the residents were severe if insufficient risk mitigation measures were not taken.

11. Accordingly, I think that employer may in many circumstances require its workforce to be vaccinated before they attend the employer’s workplace. That conclusion is very fact specific. It would be unlikely that a person who can work entirely by themselves could be lawfully and reasonably be directed to vaccinated. The situation would be quite different if the person works in a public contact area or in close proximity with other employees. It may also not be reasonable to require a person to be vaccinated when they have some legitimate health reason for not doing so.
12. Finally, I think that the anti vaccination arguments are unlikely to attract much sympathy in any resulting litigation. I think that a judge or tribunal member hearing the matter would be very sympathetic towards the public health principles that would arise in such a case. Judges are willing to severely punish

⁴*Kuru v Cheltenham Manor Pty Ltd as trustee of the Cheltenham Manor Family Trust T/A Cheltenham Manor Pty Ltd* [2021] FWC 949 [2021] FWC 949,

employers who allow their employees to be injured at work through industrial accidents. I do not see why their position would be any different in relation to the passing on of a disease that might be even more dangerous. Further, most judges are in the age demographic most at threat. Finally, they generally do not acquire their knowledge from conspiracy theorists on the internet.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ian Latham', with a stylized flourish at the end.

Ian Latham

11 August 2021