



# **Covid-19 & Vaccines: Implications from a Workers' Compensation Perspective**

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# Overview

- What happens if a worker has an adverse reaction to the vaccine?
- Will workers be covered if they contract COVID-19 at work?
- Are employers liable for negligence where a worker contracts COVID-19?

# Statutory Claims

## *Workers' Compensation and Rehabilitation Act 2003*

- Must prove that:
  - They are a worker
  - They sustained an injury
  - The injury arose out of, or in the course of, employment
  - The employment is a significant contributing factor to the injury

# Statutory Claims

- In order to be successful in a workers' compensation claim there must be an 'event' (per s 31).
- **An adverse reaction to a vaccination required for work, or contracting Covid-19 through work would satisfy this**

# Injury

- Is there an injury?
- Injury includes a **disease contracted in the course of employment if the employment is a significant contributing factor**
- **Covid-19 falls clearly within the definition of injury.**

# Injury

- Provide test results and WC medical certificate.
- Pre-existing medical conditions that are **aggravated** by Covid-19 will also be entitled to compensation.
- Other medical complications **secondary** to Covid-19 or side effects of vaccination are also classified as an “injury”.

# Employment

***Did the disease arise out of the course of employment, and was the employment a significant contributing factor?***

# Employment

***Will workers will be covered by statutory benefits in the event of an adverse reaction to a Covid-19 vaccine when employer makes the vaccine compulsory?***



# Employment

- Not necessary for the event (i.e. having the vaccination) to occur at the workplace.
- Requirement for worker to have vaccine to continue their employment is enough.

# Employment

***Will workers be covered by workers' compensation statutory benefits if they contract COVID-19 at work?***

# Employment

- Worker was exposed to another person in the workplace who has also confirmed they have had/have the virus
- Virus was contracted in the course of the worker's employment and that employment was a significant contributing factor

# Employment

- Needs to be a **link** between the workplace events and the contraction of Covid-19.
- Worker needs to do something in the **course of their employment** which contributes to contract the infection
- Worker to establish **where and when** they caught the virus

## **Thiess Pty Ltd v Q-Comp [2010] (WC/2009/74)**

- Mining worker residing at a mining accommodation facility
- Injured his back whilst taking his washing from the clothes line
- This was seen to have **arisen in the course of his employment.**



## **Turner v Gebie Civil & Construction (2019) NTLC 010**

- FIFO worker on Groote Eylandt in the NT sustained serious injuries when he fell from a cliff while fishing on his day off.
- **Within course of his employment because**
  - The accident happened during an interval or interlude in his employment (a rest day) within an overall period of work
  - It was found that the employer *induced or encouraged* him to engage in that activity

# **Workers Compensation Nominal Insurer v Hill [2020] NSWCA 54**

- Worker was working from home.
- Victim of domestic violence - murdered by partner before her official work start time.
- **Within course of her employment because:**
  - often took calls earlier than her official start time
  - likely working when she was killed
  - partner had delusions about the way she performed her work duties
  - partner killed her because of these delusions

# Common Law Claims

- **Are there any situations where an employer may be liable for negligence where a worker contracts COVID-19?**
- **Could employers make the vaccination mandatory in order to guard against common law claims?**

# ***Jang v Australia Meat Holdings 2001 QCA 51***

- Worked in abattoir and contracted Q fever in **1993**
- Vaccine available at the time but not compulsory
- **1992** – process started to determine whether the workforce could be vaccinated against Q fever
- **1994** - a compulsory vaccination program was in place, in the meantime, the Plaintiff contracted the disease.

# *Jang v Australia Meat Holdings 2001 QCA 51*

1. There should have been a compulsory vaccination program **(not accepted)**
2. The employer should have warned about the dangers of QFever and its prevalence in abattoirs **(not accepted)**
3. The employer should have told the plaintiff to seek advice from his GP **(successful)**



## **Black v Warwick Shire Council [2009] QSC 123**

- Backhoe operator
- Sustained QFever at one of two locations:
  - working on a dirt road that was just adjacent to a feedlot (2000 cattle, manure collection point)
  - working at a sewerage treatment plant (animal and human waste)

## ***Black v Warwick Shire Council [2009] QSC 123***

- Infection control policy
- Followed National and State guidelines, current industry knowledge
- Plaintiff was **not identified as at risk** for Qfever
- The Plaintiff lost.

## *Thomson v State of Queensland & Anor [2019] QSC 95*

- Carpenter
- Worked at Southport High School to upgrade cattle yards on the school farm
- Contracted Q fever and secondary psychological condition.

## **Thomson v State of Queensland & Anor [2019] QSC 95**

- School was aware of the risk of QFever
- School did not tell the Plaintiff or his employer about the risk
- Employer didn't do an adequate risk assessment to detect the risk and take steps to guard against the risk

# Conclusion

***Are there any situations where an employer may be liable for **negligence** when a worker contracts COVID-19?***



# Conclusion

1. Government regulations and recommendations at the time
2. Adherence to any regulations and recommendations
3. The industry type
4. The type of role the individual worker is in and their likely exposure to the virus/ members of the public
5. The information and knowledge the employer had at the time of making their decision
  - Any vulnerabilities of the worker
  - Knowledge of outbreaks in the area;
  - Knowledge of other workers displaying symptoms

# Questions



# Superannuation, Insurance and Covid-19

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# COVID-19 and Recent Government Policies

## Growing Inequality and Impact on Superannuation and Insurance

A number of issues recently have negatively impacted on the majority of Australian's superannuation, which will likely lead to significant future inequality and also impact on their insurance:

1. COVID-19 Pandemic resulting in the closure or downsizing of numerous businesses, as well as accelerating the casualisation of the workforce;
2. The implementing of the Treasury Laws Amendment (Protecting Your Superannuation) Act 2019 (PYSP) and Treasury Laws Amendment (Putting Members' Interests First) Act 2019
3. The allowance of 'Early Release of Super' for certain workers during the Pandemic (instead of providing actual government assistance).

# Default Insurance

## What Is It?

- Superannuation funds have been offering life and disability insurance to their members for more than a generation. The benefit of this type of group insurance to members is that it is not underwritten, meaning most members receive this insurance by default of their membership;
- Insurance through superannuation is usually the only life or disability insurance most Australians have and it is a statutory requirement that Trustees take out this insurance for MySuper members:

### **SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993 - SECT 68AA...**

Requirement to provide permanent incapacity benefit and death benefit by taking out insurance

- (1) Each trustee of a regulated superannuation fund must ensure the following:
  - (a) that the fund provides permanent incapacity benefit to each MySuper member of the fund;
  - (b) that the fund provides death benefit in respect of each MySuper member of the fund;
  - (c) that the benefits referred to in paragraphs (a) and (b) are provided by taking out insurance.



# Losing Your Job

## Why it impacts on insurance

Many people are probably unaware of the impact that losing your job can have on your default insurance.

### Limited Cover

Members of certain funds lose their default insurance if they cease working, even for a very short period of time. More troubling, once they recommence employment, their reinstated cover may only be 'limited over' for a certain period of time, meaning the worker is typically not insured for pre-existing injuries or illnesses.

Members who join new funds whilst unemployed or not in "active employment" (see below), are usually only given limited cover until they are "actively employed".

### 'Active Employment'

Another issue with being out of work is that most insurers require new members to be "actively employed". This term is usually defined to mean working without restriction by injury or illness, but can include numerous caveats such as not being in receipt of government payments (or entitled to claim) and frequently involved a subjective test (in the opinion of the insurer).

# Casualisation of Workforce

## Why it impacts on insurance

Not all work is “work”, according to most insurers. Many insurers define what being employed means and it frequently doesn’t include casual workers.

## Gainfully Employed

A person’s entitlement to claim usually requires that they were “gainfully employed” at the time they ceased work. This test usually requires that they’re working a minimum number of hours per week (when they cease work). Thus a reduction in working hours can disentitle a person to claim under the ‘standard’ definition of TPD (meaning they are usually assessed under the ‘ADL’ definition).

## Casual Employees

Additionally, most policies also divide members into different classes based on their employment status. Many insurers engaged by funds only cover casual employees via the ‘ADL’ definition and make them ineligible to claim under the ‘standard’ definition.

# Standard v ADL Definitions

## Why does this matter?

The type of definition a person's claim is assessed under has a significant impact on the claim's chances of success

### Standard Definition

The 'standard' definition of TPD usually requires that a person cease work due to injury or illness, be unable to work for a certain period of time (usually six months) and then, at the end of that period, they need to be so disabled that they are unable to return to work within the scope of their education, training or experience.

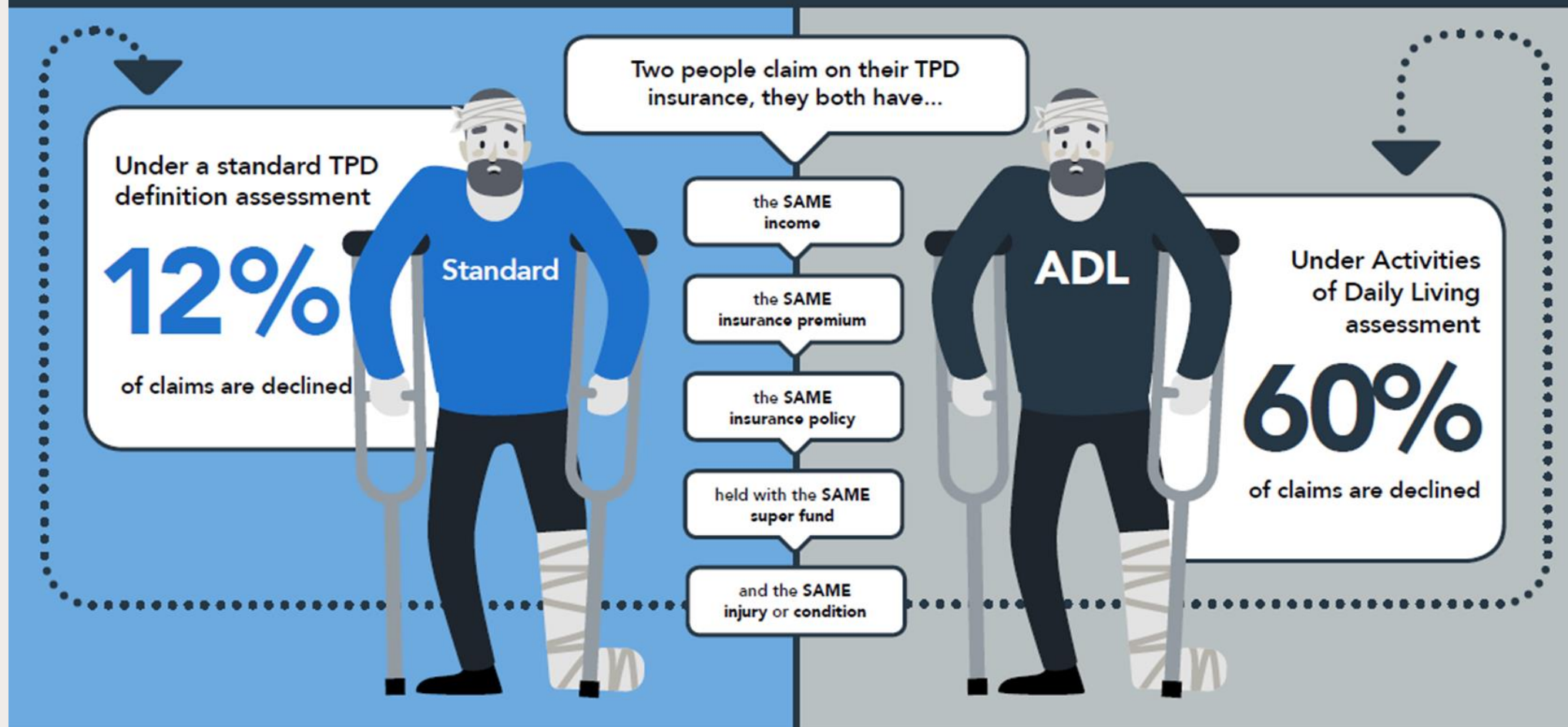
### ADL Definition

In contrast, an ADL definition requires that a person is so disabled that they're permanently unable to complete two of the five 'activities of daily living' without assistance.

Restrictive definitions such as the Activities of Daily Living (ADL) test produce **UNFAIR OUTCOMES** for consumers. Here is a comparison of claim outcomes:



**ASIC**  
Australian Securities &  
Investments Commission



(ASIC REP 633 Holes in the safety net: a review of TPD insurance claims)

# Insurers Response to Pandemic

## Temporary Agreement

- There is an increased risk of fund members falling into categories which incur the ADL definition due to the economic impacts of COVID-19.
- The Financial Services Council, which represents the life insurance industry, said its members would assess TPD claims based on a policyholder's working arrangements as at 11 March 2020 – the date the World Health Organisation declared a pandemic.
- That means that if people lose their job, are stood down or have reduced working hours due to COVID-19, this will not affect their TPD cover.
- Originally, this moratorium was in place until September but it was then extended until the end of 2020. It should be noted, some insurers extended this beyond 1 January 2021.

<https://www.afr.com/companies/financial-services/life-insurers-to-backdate-disability-cover-20200519-p54uhl>  
[file:///C:/Users/gfq/Downloads/20200519\\_FSC%20Media%20Release\\_COVID%20total%20and%20permanent%20disability%20claims%20initiative.pdf](file:///C:/Users/gfq/Downloads/20200519_FSC%20Media%20Release_COVID%20total%20and%20permanent%20disability%20claims%20initiative.pdf)  
<https://www.financialstandard.com.au/news/insurers-covid-19-response-slammed-169491995>

# Recent Legislative Changes

## Pulling Back Default Cover

- 1 April 2020: the Treasury Laws Amendment (Putting Members' Interests First) Act 2019 (PMIF)
- Members of choice super products and MySuper funds will no longer be provided with automatic death and disability insurance if:
  - they are a new member after 1 April 2020 and are under the age of 25; or
  - their account balance has not been \$6,000 or more on or after 1 November 2019
- This builds on the March 2019 Treasury Laws Amendment (Protecting Your Superannuation) Act 2019 (PYSP) which terminates a member's automatic death and disability insurance if their account is inactive (does not receive a contribution for more than 16 months).

# COVID-19 Early Release Changes

## Eligibility for Release

### Applications via the myGov website

\$10,000 before 1 July 2020, and up to a further \$10,000 from 1 July 2020

### Eligibility Criteria

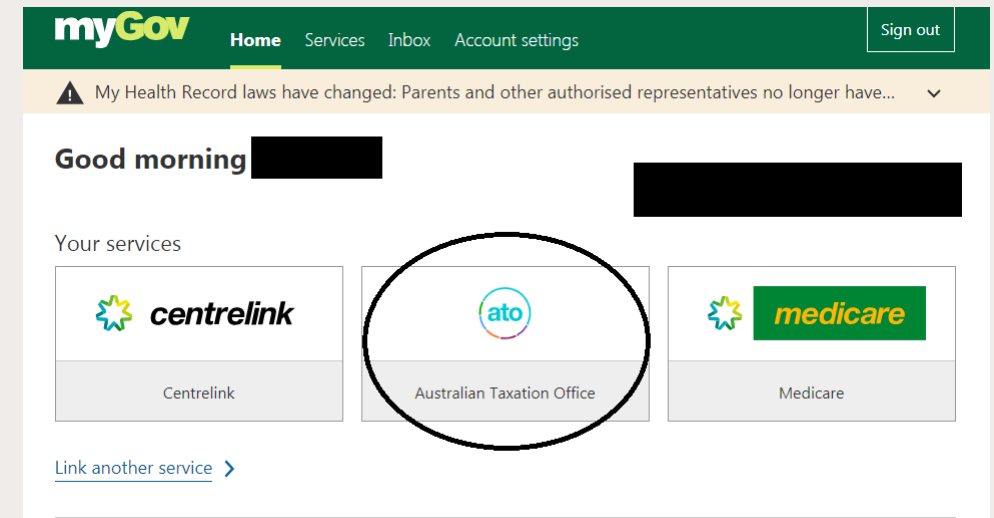
Unemployed, or eligible to receive one of the following government allowances:

- Job seeker payment
- Youth allowance for jobseekers
- Parenting payment (including single and partnered payments)
- Special benefits, or
- Farm household allowance

After 1 January 2020, either made redundant or had your working hours/turnover reduced by at least 20%.

<https://www.mauriceblackburn.com.au/blog/2020/april/1/what-you-need-to-consider-before-withdrawing-your-super/>

<https://www.mauriceblackburn.com.au/about/media-centre/newsletters/superannuation-insurance/issue-1-2020/what-you-should-know-about-the-changes-to-automatic-insurance-cover/>



# COVID-19 Early Release Changes Cont.

## Early Access Pitfalls

- Long term financial impact
  - Analysis by Industry Super Australia points out that withdrawing \$20,000 over the next year could cost a 30-year-old \$100,000 at retirement, and a 40-year-old \$63,000
- Potential loss of insurance when its needed most
- Fraud/Scams/Exploitation (including by family members and creditors)
- Penalties for ineligible claimants
  - Misunderstandings – Special Benefits/Family Tax Benefits & ‘Unemployed’
  - False declarations to the ATO

<https://www.mauriceblackburn.com.au/blog/2020/april/1/what-you-need-to-consider-before-withdrawing-your-super/>



# Hayne Royal Commission

## Where Are We At?

- More than two years have now passed and less than half of the recommendations have been implemented
- Not only has there been delay, but concerningly, many of the recommendations appear as though they are now going to be abandoned. For example, the recommendation to ban mortgage broking commissions has been abandoned.
- The government seems committed to 'winding back the clock' in the name of 'economic growth'. An example of this is the responsible lending laws which have been differed whilst the government pushes legislation to axe the reforms entirely.
- Still, there are some positive changes on the horizon with respect to life insurance and increasing rights and protections for consumers.

# Delay to Hayne Reforms

Delay, Defer, Wind back

Reforms initially meant to come into effect in December will be delayed until June 30, 2021.

- **RC Rec 1.15** - Enforceable Code Provisions: apparently happening, but not confirmed as yet;
- **RC Rec 3.1** - No other role/office for trustee (Treasury consultation closed 28 Feb 2020)
- **RC Rec 3.2** – No deducting advice fees from MySuper accounts (was to be consulted on and introduced by 30 June 2020)
- **RC Rec 3.3** – Limitations on deducting advice fees from choice superannuation accounts (was to be consulted on and introduced by 30 June 2020)
- **RC Rec 3.5** - One default account - Stapling (was to be consulted on and introduced by end-2020)

Financial Services Royal Commission Implementation Roadmap: <https://treasury.gov.au/p2019-399667>

# COVID-19 | Delay to Hayne Reforms

## Continued

- **RC Rec 4.5** - Duty to take reasonable care not to make a misrepresentation to an insurer (was to be consulted on and introduced by 30 June 2020)
- **RC Rec 4.6** - S.29(3) ICA policy avoidance onus (to be consulted on and introduced by 30 June 2020)
- **RC Rec 4.7** - Unfair Contract Terms (was to be consulted on and introduced by 30 June 2020, now being introduced in 2021)
- **RC Rec 4.8** - Claims handling to be a regulated 'financial service' (Treasury consultation closed 28 Feb 2020, being implemented in 2021)
- **RC Rec 4.13** - Universal Terms (under consultation since April 2019 by Treasury)
- **RC Rec 4.14** - Third Party Engagements (under consultation since April 2019 by Treasury)

Financial Services Royal Commission Implementation Roadmap: <https://treasury.gov.au/p2019-399667>

# Questions



# Mandatory Covid-19 Vaccinations at Work

Giri Sivaraman, Principal Lawyer



# Current Views

## Australian Government, Department of Health:

*“The COVID-19 vaccine will be voluntary and free. As safe and effective vaccines become available the Government will vaccinate as many Australians as possible for COVID-19.”*

## Safe Work Australia:

*“... most employers will not need to make vaccination mandatory to comply with the model WHS laws.”*

## Fair Work Ombudsman:

*“In the current circumstances, the overwhelming majority of employers should assume that they won’t be able to require their employees to be vaccinated against coronavirus.”*

# Lawful and Reasonable Direction

## Whether the direction is lawful

- Are there any Public Health Directions mandating vaccinations, or conversely, mandating a voluntary vaccination rollout?
- Does an employee's Enterprise Agreement or Modern Award consider vaccinations?
- Does an employee's individual employment contract consider vaccinations?

# Mandatory Vaccinations in Queensland

- *Designated COVID-19 Hospital Network Direction* (updated 18 May 2021)
- A health service employee, contractor or QAS employee who
  - Works in or enters a COVID-19 ward
  - Provides occasional or intermittent care
  - Provides emergency care to a diagnosed person or quarantined international arrival
  - Working in an ICU when diagnosed person or quarantined international arrival is receiving care
  - Transports a diagnosed person
- Must be vaccinated for COVID-19 and notify their employer.
- Must undertake surveillance testing for COVID-19
- An emergency officer can give a direction to a health service employee, contractor or QAS employee to provide evidence of being vaccinated.
- Failure to comply with direction, without reasonable excuse, is an offence punishable by up to 100 penalty units or up to 6 months imprisonment



# Other mandatory vaccination directions



- Aged Care Direction (No 29) (updated 25 May 2021)
  - Any person who does not have an up to date influenza vaccination before 30 May 2021 must not enter or remain in the premises of a residential aged care facility
  - Includes employees.
  - Only exception: a contractor making emergency repairs does not need to be vaccinated (e.g. plumber fixing toilet)
  - However, an ambulance worker, doctor or other health care worker, including a student, cannot enter premises without a influenza vaccination after 30 May 2021

# Lawful and Reasonable Direction

## Whether the direction is reasonable

- How does the vaccine work?
- What are the inherent risks of the employment?
- Does the employee work with particularly vulnerable people?
- Is the employee particularly vulnerable and does the direction accommodate the vulnerability?
- What are the relevant social circumstances that might apply?

# REASONABLENESS OF A DIRECTION

What risk will the COVID-19 vaccination eliminate?

## Risk to employees in high risk workplaces

Workplaces at the “front line” or Covid-19 suppression:

- Ports of Entry
- Quarantine Facilities
- Hospitals
- Police
- Care facilities

## Risk of transmission to others

Workplaces where there is contact with vulnerable people:

- Hospitals
- Aged Care Services

Workplaces where there is the potential for contact with people who are COVID-19 positive:

- Quarantine Facilities

## Risk to business operations

Workplaces where the health of the staff is ‘essential’:

- Emergency Services
- Hospitals
- Food / household supply shops

# Features of a Reasonable Direction

A direction regarded as reasonable will likely balance the health interests of the workforce and individual employees with the rights of employees to refuse vaccination on a legitimate basis. A reasonable direction might:

1. Identify and expressly state the risk to be mitigated within the specific workplace;
2. Include mitigation measures other than vaccination to reduce the risk non-vaccination poses;
3. Require vaccination in cases where other mitigation steps are insufficient to remove risk; and
4. Provide a mechanism by which objections can be privately raised, considered objectively and responded to.

# Unfair Dismissal

- Dismissal for failure to comply direction may be challenged in the Fair Commission as an unfair dismissal under Part 3-2 of the *Fair Work Act 2009* (Cth), if the employee is eligible to access that jurisdiction
- The statutory test is a discretionary test of whether the dismissal is “harsh unjust or unreasonable” including regard to whether:
  - there is a valid reason for the dismissal
  - procedural fairness
  - broader harshness considerations



# Unfair Dismissal – Flu Vaccine Refusal in Aged care

## *Ms Maria Corazon Glover v Ozcare [2021] FWC 2898*

### Held:

- Employer's decision to mandate the flu shot for all client-facing employees, without allowing any exemption, was lawful and reasonable
- **Commissioner Hunt at [237]:**  
*“Ms Glover’s role was not that of a widget maker in a widget factory where her status as an unvaccinated employee might not matter. In that scenario, it might be lawful for a widget factory employer to mandate influenza vaccinations for widget makers where no such government directive had been made; however, it might not be or is not likely to be reasonable in all of the circumstances.”*

# Unfair Dismissal – Child care

*Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156*

*(Application for unfair dismissal remedy)*

## Facts:

- Employee was an early childhood educator at a child care centre
- In April 2020, the Employer introduced a policy which mandated the flu shot, unless the employee has a medical condition which makes it unsafe
- Employee had a sensitive immune system, including coeliac, and had an allergic reaction to the flu shot 11 years ago
- Employer terminated her employment in August 2020 due to failure to be vaccinated to meet inherent requirements of the role

# Unfair Dismissal

## *Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156 - findings*

- The policy was lawful and reasonable
- The Employee had not provided a valid medical exemption
- Though the vaccination is not an inherent requirement of the Employee's role, her refusal to have it constituted a failure to comply with a lawful and reasonable direction, and that was a valid reason for dismissal.
- **Deputy President Asbury at [435] to [436]]:**

*“This is a case where the Employer made a logical and legal analysis of the risks and hazards in the workplace, developed a response and implemented a policy to target that risk.*

*The policy was a reasonable one and the Applicant chose not to comply. No medical exemption was substantiated and accordingly, the Applicant's employment came to an end. I am not satisfied that is unfair.”*



# Indirect discrimination

## *Anti-Discrimination Act 1991 (Qld)*

### Section 11 - Indirect disability discrimination

Where a person imposes, or proposes to impose, a term:

- a) with which the employee cannot comply;
- b) with which a higher proportion of people without the attribute can comply; and,
- c) that is not reasonable

**Note: it will not be discrimination if the offending requirement is reasonable, having regard to the circumstances of the case.**

#### **Example health exemptions for COVID-19 vaccine:**

- Pregnancy, breastfeeding or trying to conceive;
- Anaphylaxis to any vaccine ingredient.

# Questions



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