DECISION

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)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER O'NEILL
COMMISSIONER MATHESON

MELBOURNE, 3 DECEMBER 2021

Application for Commission to deal with a dispute in accordance with a dispute settlement procedure in an enterprise agreement – Mt Arthur Coal Enterprise Agreement 2019 – Site Access Requirement – COVID-19 vaccination requirement – arbitration to determine dispute – whether direction is lawful and reasonable – consultation obligations under ss.47–49 of the Work Health and Safety Act 2011 (NSW) – failure to reasonably consult with employees – Site Access Requirement not a lawful and reasonable direction – Commission available to facilitate discussion re consultation process.

1 Introduction

[1] This decision concerns a dispute at the Mt Arthur open cut coal mine (**Mine**) which is about 5 kilometres south of Muswellbrook in the Hunter Valley in New South Wales. Mt Arthur Coal Pty Ltd (**Respondent** or **Mt Arthur**) employs the employees who work at the Mine. Mt Arthur is a wholly owned subsidiary of Hunter Valley Energy Coal Pty Ltd, which operates the Mine. Mt Arthur and Hunter Valley Energy Coal Pty Ltd are members of the BHP group of companies (**BHP**).

[2] The *Mt Arthur Coal Enterprise Agreement 2019* (**Agreement**), which was approved by the Fair Work Commission (**Commission**) under the relevant terms of the *Fair Work Act 2009* (**FW Act**), applies to production and engineering employees who work at the Mine. Mt Arthur employs about 724 employees who work at the Mine and who are covered by the Agreement; it also employs about 256 employees who work at the Mine but are not covered by the Agreement. In addition to Mt Arthur employees who work at the Mine, there are about 1,000 other workers at the Mine who are employed or engaged by other entities. The dispute before us only concerns the 724 employees who work at the Mine, are employed by Mt Arthur and who are covered by the Agreement (**Employees**).

[3] Mt Arthur manages the Mine and controls who is permitted to enter, and the conditions on which they do so.[1]

[4] The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) represents about 700 of the Employees. Mr Matthew John Howard, one of the Applicants, is the secretary of the Bayswater Lodge of the CFMMEU. The Bayswater Lodge is the name of the local group of members of the CFMMEU who are employed by Mt Arthur to work at the Mine.

[5] The dispute concerns an announcement by Mt Arthur on 7 October 2021, of a requirement or direction that all workers at the Mine must be vaccinated against COVID-19 as a condition of site entry (**Site Access Requirement**). The Site Access Requirement requires the Employees 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.

[6] Mt Arthur has also directed that the Employees provide it with evidence of their compliance with the Site Access Requirement by those dates.[2]

[7] The Employees were informed that if they attend the Mine after midnight on 9 November 2021 they will not be permitted access to the Mine unless they have provided Mt Arthur with evidence that they have had at least a single dose of an approved COVID-19 vaccine.

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[1] Respondent Submissions, 16 November 2021 at [14], citing Exhibit R6, Witness Statement of Witness R4 dated 16 November 2021 at [5].

[2] Respondent Submissions, 16 November 2021 at [7].

[8] The CFMMEU and Mr Howard (**Applicants**) have made an application under s.739 of the FW Act seeking that the Commission deal with the dispute under the dispute resolution procedure in the Agreement (**Application**).

[9] The dispute resolution procedure in the Agreement is located in clauses 22.1–22.3. Clause 22.2(e) provides that, 'as a last resort', a dispute may be referred to the 'appropriate industrial authority for conciliation and if the matter remains unresolved arbitration'.

[10] It is uncontentious that the Commission is the 'appropriate industrial authority' referred to in clause 22.2(e); that conciliation has not resolved the dispute; and that the Commission has jurisdiction to determine the dispute.

[11] The Applicants proposed, and the Respondent agreed that, the following question be arbitrated by the Commission:

> '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.'

[12] Accordingly we have proceeded to arbitrate that question.

[13] On 2 November 2021, the Applicants applied to the Commission for interim relief in the following terms:

> 'Until the determination of the Full Bench by arbitration of dispute C2021/7023, it is ordered that Mt Arthur Coal Pty Ltd take no steps to dismiss, discipline or otherwise prejudice the employment of any production and engineering employees who fail to present to Mt Arthur Coal Pty Ltd evidence of being vaccinated against COVID-19.'

[14] Although not expressly stated, the Applicants sought to permit unvaccinated Employees from working at the Mine without satisfying the Site Access Requirement, until the Full Bench delivered its decision.

[15] Mt Arthur gave undertakings in the following terms to the Commission in support of its opposition to the application for interim relief:

> '1. In the event that an employee to whom the Agreement 2019 applies (Employee) refuses to comply with the requirement that they have at least a single dose of an approved COVID-19 vaccine by 10 November 2021 (***Site Access Requirement***), Mt Arthur will not implement the outcome of any disciplinary process associated with the Employee's refusal to comply with the Site Access Requirement until:
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> (a) the decision of the Full Bench in this matter is delivered; and
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> (b) the relevant Employee who is subject to the disciplinary process has had an opportunity to consider their position in light of the decision of the Full Bench.
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> 2. If the outcome of the present dispute, whether determined by the Full Bench or, if an application is made for judicial review of the decision of the Full Bench, the court to which the application for judicial review is made, is that the Site Access Requirement was not a lawful and reasonable direction for Mt Arthur to give an Employee, then Mt Arthur will, in respect of each Employee who has refused to comply with the Site Access

> Requirement and not worked for Mt Arthur in the period between 10 November 2021 and the date on which the Full Bench delivers its decision in this matter (***Interim Period***), compensate the Employee for any unpaid wages that the Employee would have been paid if the Site Access Requirement had not been imposed on them and they worked for Mt Arthur in their usual position during the Interim Period. For the avoidance of doubt, this obligation to compensate an Employee for lost wages does not apply to any part of the Interim Period during which the Employee was paid annual leave or long service leave.'

[16] The application for interim relief was heard by Deputy President Saunders on 9 November 2021. The Deputy President issued a decision dismissing the application for interim relief on the same day.[3]

[17] We are conscious of the need to determine the dispute quickly. For that reason, while we have taken all submissions into account we have not canvassed a number of matters raised in the submissions, as it was not necessary to do so in order to determine the dispute.

2 The Proceedings

[18] On 1 November 2021, we issued a Statement[4] which set out directions for the filing of submissions and evidence and noted that given the potential significance of this matter we proposed to draw the Application to the attention of peak union and employer bodies and the Minister, and to grant them leave to intervene if they wished to do so.

[19] The following unions and employer bodies were granted leave to intervene:

- The Australian Manufacturing Workers' Union (**AMWU**)
- The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**)
- The Australian Council of Trade Unions (**ACTU**)
- Australian Industry Group (**Ai Group**), and
- The Australian Chamber of Commerce and Industry (**ACCI**).

[20] The directions were amended on 9 November 2021. Initial submissions were received from the following parties:

- the Applicants (9 November 2021)
- AMWU and CEPU (**Union Interveners**) (9 November 2021)
- ACTU (11 November 2021)
- Ai Group (16 November 2021)
- ACCI (16 November 2021), and
- Mt Arthur (16 November 2021).

[21] Submissions in reply, and submissions responding to questions posed by the Full Bench in the Background Paper were received from the following parties:

- Applicants (reply submissions 23 November 2021; submissions responding to Background Paper 23 November 2021)

[3] [2021] FWC 6309.

[4] [2021] FWCFB 6039.

- AMWU and CEPU (23 November 2021)
- ACTU (23 November 2021)
- Ai Group (23 November 2021)
- ACCI (supplementary submissions 19 November 2021; further supplementary submissions 23 November 2021), and
- Mt Arthur (reply submissions 23 November 2021; submissions responding to Background Paper 23 November 2021).

[22] The Applicants filed witness statements by:

- Applicant Witness 1 (A1)[5] (Production Operator)
- Matthew Howard[6] (Production Operator), and
- Peter Colley[7] (National Research Director of the Mining and Energy Division).

[23] The Union Interveners filed a witness statement by Samantha Angela Boardman.[8]

[24] The Respondent filed witness statements by:

- Respondent Witness 1 (R1)[9] with annexures (Vice President of HSE Minerals Australia for BHP)
- Respondent Witness 2 (R2)[10] (Principal Employee Relations within the Minerals Australia Employee Relations team)
- Respondent Witness 3 (R3)[11] (Principal Operations Performance, Mt Arthur)
- Respondent Witness 4 (R4)[12] (General Manager, Mt Arthur Coal)
- Respondent Witness 5 (R5)[13] (registered specialist in occupational and environmental medicine engaged by BHP Group Limited as a full-time consultant)
- Respondent Witness 6 (R6)[14] (Mining Engineering Manager, Mt Arthur), and
- Professor Marylouise McLaws[15] (Professor of Epidemiology, Hospital Infection and Infectious Diseases Control, University of New South Wales (UNSW)).

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[5] Exhibit A4, Witness Statement of Witness A1 dated 3 November 2021; Exhibit A5, Second Witness Statement of Witness A1 dated 23 November 2021.

[6] Exhibit A2, Witness Statement of Matthew John Howard dated 3 November 2021; Exhibit A3, Second Witness Statement of Matthew John Howard dated 23 November 2021.

[7] Exhibit A1, Witness Statement of Peter John Colley dated 3 November 2021; Exhibit A12, Second Witness Statement of Peter John Colley dated 22 November 2021.

[8] Exhibit AMWU/CEPU 1, Witness Statement of Samantha Angela Boardman dated 23 November 2021.

[9] Exhibit R2, Witness Statement of Witness R1 dated 16 November 2021.

[10] Exhibit R3, Witness Statement of Witness R2 dated 16 November 2021.

[11] Exhibit R4, Witness Statement of Witness R3 dated 16 November 2021.

[12] Exhibit R6, Witness Statement of Witness R4 dated 16 November 2021.

[13] Exhibit R10, Witness Statement of Witness R5 dated 16 November 2021; Exhibit R11, Second Witness Statement of Witness R5 dated 23 November 2021.

[14] Exhibit R14, Witness Statement of Witness R6 dated 16 November 2021.

[15] Exhibits R12, Witness Statement of Professor Marylouise McLaws dated 16 November 2021; Exhibit R13, Supplementary Statement of Professor Marylouise McLaws dated 23 November 2021.

[25] The Respondent also filed a:

- Guide to Medical Evidence in support of its written submissions dated 16 November 2021, and
- Note as to the Admissibility of the evidence of Witness R5 and Professor McLaws dated 15 November 2021.

[26] A Background Paper prepared by Commission staff was provided to the parties. The Background Paper included a summary of the submissions filed up to 19 November 2021, and a consultation timeline prepared on the basis of the Applicants' and Respondent's evidence and submissions addressing the duty to consult in the *Work Health and Safety Act 2011* (NSW) (**WHS Act**). Parties were invited to comment on any inaccuracies in the submissions summary or the Timeline. We have taken the comments received into account.

[27] We are unable to publish the Background Paper at this point in time as to do so would be inconsistent with the terms of the Confidentiality Order made in these proceedings. In accordance with that Order the names of certain individuals have been anonymised in this decision.

[28] We begin by dealing with some evidentiary matters before considering an employee's obligation to comply with a direction by their employer.

3 The Evidence

[29] There are a number of general factual propositions which are uncontentious and which we accept have been established on the evidence before us:[16]

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.

[16] The hearing was conducted on 24 and 25 November 2021, prior to the World Health Organisation designating variant B.1.1.529 (the Omicron variant of COVID-19) as a variant of concern.

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.[17]

[30] The Applicants challenged the admissibility of the evidence of Professor McLaws and aspects of the evidence of Witness R5. It is convenient to deal first with the challenge to Witness R5's evidence.

[31] In reply, the Respondent submits that the Applicants' contention that the evidence of Witness R5 is inadmissible because he is not independent 'seems [to be] an invocation of the bias rule'.[18] It does not dispute that Witness R5 is engaged by it or that he was involved in giving advice that led to the imposition of the Site Access Requirement, but submits that: [19]

- The Commission is not bound by the bias rule, which is a rule of evidence, but in any event, the possibility that expert evidence may be tainted by bias goes to the weight the evidence should be given, not its admissibility.

- Relevant considerations in deciding whether to admit and rely on the evidence are that the evidence is unchallenged and is supported by the unchallenged evidence of Professor McLaws and is consonant with orthodox scientific and medical consensus.

- Witness R5's evidence is substantially about the fact and content of the advice that he contributed to the decision to introduce the Site Access Requirement, which is not strictly opinion evidence and therefore outside the scope of the bias rule.

- Witness R5's opinions were not subject to challenge in cross-examination.[20]

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[17] See the Respondent's Guide to the Medical Evidence; Transcript, 25 November 2021 at PN1610.
[18] Respondent Note as to the Admissibility of the Evidence of Witness R5 and Professor McLaws at p 1.
[19] Respondent Note as to the Admissibility of the Evidence of Witness R5 and Professor McLaws.
[20] Transcript, 25 November 2021 at PN1730.

[32] We begin with the last point set out above. The argument advanced by the Respondent invokes the rule in *Browne v Dunn*[21] which was described in *MWJ v The Queen*[22] in the following way:

> 'The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit.'[23]

[33] In their Outline of Submissions in Reply the Applicants submit (at [27]) 'the Commission should not accept… that the views of Witness R5 in his statement as expert opinions because he is employed by BHP and therefore is not impartial'. The Applicants' Outline of Submissions in Reply was filed *before* the Respondent's evidentiary case closed. In our view the requisite notice was given and hence the issue of fairness does not arise.

[34] Section 591 of the FW Act provides that the Commission is not bound by the rules of evidence and procedure and, pursuant to s.590, the Commission *'may inform itself in relation to any matter before it in such manner as it considers appropriate'.* Further, s.577(a) provides that the Commission must perform its functions and exercise its powers in a manner that 'is fair and just'.

[35] While the Commission is not bound by the rules of evidence, those rules, including the rules relating to expert evidence, are not irrelevant[24] and they provide general guidance as to the manner in which the Commission chooses to inform itself.[25] Further, it is uncontroversial that we are not bound to accept expert evidence even if there is no contrary expert evidence.[26]

[36] The Applicants submit that Witness R5 is not impartial,[27] and that he was an actor integral in the advice given to Mr Basto to introduce the Site Access Requirement. The Applicants contend that the circumstances here are analogous to those in *McMartin v Newcastle Wallsend Coal Company Pty Ltd* (*McMartin*).[28]

[37] While there is some divergence in the authorities, we think a fair summary of the basis on which expert evidence is admitted at common law is that:[29]

- the expert has specialist knowledge or expertise
- the evidence given is within the expert's field of specialist knowledge or expertise
- the evidence given is something about which the tribunal of fact needs assistance from a third party, as opposed to relying upon its general knowledge and common sense

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[21] (1893) 6 R 67.

[22] [2005] HCA 74.

[23] [2005] HCA 74 at [38].

[24] *Hail Creek Coal Pty Ltd and CFMEU re Hail Creek Preference of Employment Order 2003* (2004) 143 IR 354 at [48]-[50]; *Four yearly review of modern awards* [2015] FWCFB 6509 at [8]-[13].

[25] *Hail Creek Coal Pty Ltd and CFMEU re Hail Creek Preference of Employment Order 2003* (2004) 143 IR 354.

[26] *Malone on behalf of the Western Kangoulu People v State of Queensland* [2021] FCAFC 176 at [122]-[125].

[27] Applicant submissions in reply, 23 November 2021 at [2].

[28] [2003] NSWIRComm 292 at [58]-[60].

[29] See Australian Law Reform Commission, *Uniform Evidence Law (ALRC Report 102)* at 9.25, citing I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002) at p 2.

- the expert's contribution should not have the effect of supplanting the function of the tribunal deciding the issue before it, and

- the admissibility of the evidence depends upon proof of the factual basis of the opinion.

[38] The *Evidence Act 1995* (Cth) (**Evidence Act**) provides that opinion evidence tendered to prove the existence of a fact is not admissible,[30] although there are exceptions.[31] Section 79 provides that a person's opinion evidence is admissible if the person has specialised knowledge (based on their training, study or experience), and their opinion is wholly or substantially based on that knowledge.

[39] The Evidence Act provides other grounds for excluding evidence, including a general discretion under s.135 to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

[40] The Applicants submit that we should follow the approach in *McMartin* and exclude the evidence of Witness R5. In our view the circumstances in *McMartin* are distinguishable from the matter before us.

[41] *McMartin* concerned the admissibility of an expert witness's statements in a criminal prosecution for contraventions of the *Occupational Health and Safety Act 1983* (NSW) following the Gretley Colliery disaster. The expert witness gave evidence and was cross-examined during a *voir dire*. He was an employee of the Department of Mineral Resources (DMR) and had made recommendations in relation to the granting of a mining-related 's.138 application' by the defendants. His evidence was that the DMR's failure to effectively review and consider the s.138 application was a secondary but substantial cause of the disaster. Although the DMR was not a defendant, Staunton J observed that she would be required to consider the role of the DMR and its officers in determining the culpability of the defendants. Her Honour observed that to be admissible, the witness' evidence had to pass the tests in both ss 79 and 135 of the Evidence Act, and alsos.137, which provides that in a criminal proceeding, the court *must* refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.[32] Her Honour found that the expert's evidence was 'tainted by real perceptions both as to partiality and advocacy of his own and the DMR's cause',[33] concluding at [80]:

> 'Even if Mr Anderson's evidence was otherwise strictly admissible, taking into account the background and contextual circumstances in which his opinions are based, I am of the view that there is a real danger of unfair prejudice to the defendants that outweighs its likely probative

[30] *Evidence Act 1995* (Cth), s.76.
[31] *Evidence Act 1995* (Cth), Part 3.3.
[32] *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2003] NSWIRComm 292 at [76].
[33] *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2003] NSWIRComm 292 at [60].

> value. Accordingly, I would exclude Mr Anderson's statements under s137 of the Evidence Act.' [Emphasis added]

[42] The circumstances in the matter before us are quite different. In particular, even if the Evidence Act did apply to the Commission, s.137 only applies to criminal proceedings and hence has no application in the present context.

[43] There is no rule of law that an expert's opinion evidence is automatically inadmissible because they are an employee of a party or otherwise have an interest in the outcome of a case. In our view, such matters go to the weight to be given to the expert's evidence, as May LJ observed in *Field v Leeds City Council*:

> '…there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect its weight but that is another matter.'[34]

[44] A similar view was expressed by Ormiston J in *FGT Custodians Pty Ltd v Fagenblat*:

> 'In my opinion, to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an "interested" witness from being competent to give expert evidence.'[35]

[45] We are not persuaded that the evidence of Witness R5 is inadmissible on grounds of impartiality, but we accept that Witness R5's relationship with the Respondent is relevant to the weight we give to his opinion.

[46] As to the evidence of Professor McLaws, the Applicants submit that the Professor was only asked by the Respondent's solicitors to give evidence of the reasonableness of their decision and that instruction invited a lack of impartiality,[36] and, further, the Respondent's solicitors did not explain the requirement for opinions of experts to set out the reasons, assumptions and material facts on which they are based.

[47] The Respondent submits that the Applicants' contention that the evidence of Professor McLaws is inadmissible focuses on the basis rule. It submits that:

- the Commission is not bound by the basis rule, having regard to ss 590(1) and 591 of the FW Act, ands.79 of the Evidence Act does not incorporate the common law basis rule
- Professor McLaws' statement meets thes.79 requirement that evidence is presented so that it is possible for the Commission to determine the opinions based on her specialist knowledge
- relevant considerations in deciding whether to be informed by the evidence are that the evidence is unchallenged and is supported by the unchallenged evidence of Witness R5, and is consonant with orthodox scientific and medical consensus

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[34] *Field v Leeds City Council* [1999] EWCA Civ 3013 at [31].

[35] *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 at [26].

[36] Transcript, 25 November 2021 at PN1562 and PN157.

- the Professor is a Professor of Epidemiology, Healthcare, Infection and Infectious Diseases Control at the University of New South Wales, whose extensive experience and qualifications are set out in her statement, and who has read and agreed to be bound by the Expert Witness Code of Conduct, and

- the Professor's opinions about the nature of the COVID-19 virus and its transmissibility and morbidity are directly relevant to the question of the nature and extent to which vaccination might be a practicable health and safety control.

[48] The instructions given to Professor McLaws are set out in a letter dated 8 November 2021[37] which, under the heading 'Instructions for expert report' states:

> 'You are being engaged to provide confidential and privileged expert services for the purpose described above in connection with the Proceedings.
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> Your retainer will involve you providing an expert witness statement, which will be prepared following conferences with HSF and Counsel. Your retainer also involves you appearing at the hearing of the Proceedings to give evidence if required. Your statement will provide evidence in relation to the risks of COVID-19 infection and transmission, the effectiveness of the COVID-19 vaccine as a control to reduce those risks and the reasonableness of BHP's decision to implement the Site Access Requirement at the Mt Arthur Mine in light of those risks and controls.'[38]

[49] The point advanced by the Applicants is that the instruction to 'provide evidence in relation to … the reasonableness of BHP's decision to implement the Site Access Requirement at the Mt Arthur Mine' taints Professor McLaws' evidence.

[50] As can be seen from the terms of the engagement letter, Professor McLaws' 'expert witness statement' was not confined to the 'reasonableness of BHP's decision to implement the Site Access Requirement at the Mt Arthur Mine'; it was also to provide evidence in relation to:

- the risks of COVID-19 infection and transmission; and

- the effectiveness of the COVID-19 vaccine as a control to reduce those risks.

[51] In the course of oral argument, counsel for the Applicants raised no problem with Professor McLaws' evidence in respect of these two areas because the Professor's evidence in respect of those matters was uncontroversial.[39]

[52] The engagement letter is inelegantly drafted and could be construed to give the impression that the instruction was to provide evidence in support of the reasonableness of the Site Access Requirement. However, the Applicants elected not to cross examine Professor McLaws in relation to this or any other issue. In the result, we consider that it is appropriate to give some weight to Professor McLaws' opinion evidence in relation to the reasonableness of the Site Access Requirement. But our determination of that question will be assessed on the basis of all the circumstances of the case. The other deficiency in the engagement letter concerns

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[37] Exhibit A10, Letter to Professor McLaws dated 8 November 2021.

[38] Exhibit A10, Letter to Professor McLaws dated 8 November 2021 at 2.2.

[39] Transcript, 25 November 2021 at PN1630-1638.

the absence of any express instruction that the opinions expressed are to set out the basis for that opinion.

[53] In a recent decision,[40] a Full Bench attached little weight to particular opinions in an expert report where the basis of the opinion was not expressed, noting that:

> 'A bare expression of opinion, absent any sufficient explanation of the basis of that opinion, is normally given little weight. As observed in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh*:[41]
>
> > 'the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'[42]

[54] We propose to adopt the same course in these proceedings. We will give little weight to opinions expressed in Professor McLaws' witness statement where the basis of the opinion is not expressed.

[55] The practical application of the observations we have made about the evidence of Witness R5 and Professor McLaws presents some difficulty. The scope of the evidentiary challenge and the matters in contest are far from clear.

[56] The Applicants advanced a global submission which did not sufficiently particularise the aspects of Witness R5's evidence that were challenged. The Applicants accept that Witness R5's evidence regarding the factual matrix, including the advice he gave and his involvement in BHP's decision-making process is not tainted by the challenge to his impartiality – it is only his expert opinion evidence which is challenged.[43] But the dividing line between these two aspects of Witness R5's evidence is unclear. There is also a lack of clarity about the actual factual matters in dispute.

[57] Ultimately, we do not need to resolve these general issues in relation to the expert evidence because the Respondent only seeks to rely on ten propositions which it says are supported by the evidence adduced from Witness R5 and Professor McLaws, and only one part of those ten propositions is contested by the Applicants. The uncontested propositions are set out in [27] above. The Applicants contend that the following part of proposition 10 is not supported by the expert evidence relied on by the Respondent:

> 'The idea that higher rates of vaccination decrease the risks to an unvaccinated person inform the submissions of the CFMMEU, the AMWU and the CEPU. This idea is a dangerous fallacy that, if accepted, would put everyone at risk.'

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[40] *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383.

[41] [1953] SC 34 at [40] (Lord President Cooper) cited in *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383 at [172].

[42] *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Award 2010* [2021] FWCFB 2383 at [172]. This extract was cited with approval in *Re Horticulture Award 2020* [2021] FWCFB 5554 at [153].

[43] Transcript, 25 November 2021 at PN1562.

[58] The Respondent contends that the above proposition is supported by Professor McLaws' evidence and, in particular, [9], [59], [60], [69] and [70] of her first statement; and by Witness R5's evidence, in particular, [2], [11a] and [18] of his first statement. The relevant parts of Professor McLaws' first statement are in the following terms (references omitted):

> '9. 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). Mt Arthur Mine is clearly such a workplace…
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> 59. In my opinion there is misguided belief amongst certain parts of the population that when the community reaches a certain level of vaccination, the unvaccinated will be protected from infection. Emphatically, that is not the case with COVID-19. Recent studies have demonstrated that fully vaccinated people have breakthrough infections and have a peak viral load similar to unvaccinated cases, although vaccination does accelerate viral clearance. But those vaccinated can efficiently transmit the disease among themselves and to unvaccinated people.
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> 60. Despite this, the evidence still demonstrates that there is a greater likelihood that unvaccinated people acquire COVID-19 compared with vaccinated people. This is because even though the viral load is the same in both the vaccinated and unvaccinated upon acquiring the infection, there is massive accelerated clearance of the viral load in the vaccinated because of the antibodies from the vaccine.
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> 69. As such, in the case of the Mt Arthur Coal Mine the risk of infection for unvaccinated workers will not disappear because they are still at risk of catching COVID-19 from fully vaccinated and unvaccinated workers. Importantly, unvaccinated workers on a work site will increase the risk of spreading COVID-19 to vaccinated workers and other unvaccinated workers. Even one unvaccinated person still poses a significantly higher risk or acquiring the infection and transmitting it to other vaccinated people.
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> 70. I have been shown a table that sets out a summary of the issues contained in the submissions of the Unions filed in these proceedings. A copy of this table is attached to this statement and marked MLM-34. I make the following observation in respect of the issues identified in that table:
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> a. At point 3: Direction should have regard to the circumstances of a particular workplace rather than a particular employer. As set out above, Delta is highly transmissible and as the first case of Delta in NSW demonstrates (the driver) one only need have 'fleeting' exposure to the next generation of cases. This has also been reported in the UK. Therefore, if staff are required to work in a similar geographic location the risk is still present. Even if staff are working in different areas but who may walk past, share a lunchroom, transportation etc can be at risk of acquiring infection from the unvaccinated staff. The unvaccinated staff too can be at risk of acquiring infection at work from 'fleeting' exposure to a vaccinated staff with infection.
>
> b. At point 4: Higher rates of vaccination take-up decrease the risk of COVID-19 spreading in the workplace, making mandated vaccination less necessary. Unvaccinated people at the workplace or places of mass gatherings are still at risk of acquiring infection from an asymptomatic but infected vaccinated person. The risk is lower than acquiring infection from another unvaccinated staff but household outbreaks report that unvaccinated people are at higher risk of infection (in a mixed household) than vaccinated people. The unvaccinated worker also has a risk of transmitting infection to the vaccinated staff. While the majority of vaccinated staff will have a mild infection there is a risk of the vaccinated and now infected staff from the unvaccinated staff taking the infection home and causing severe infection in unvaccinated persons.

c. At point 5: The level of community transmission in the geographic area of the workplace and in the community in which the workforce is located in. Unvaccinated people at the workplace or places of mass gatherings are still at risk of acquiring infection from an asymptomatic but infected vaccinated person. The risk is lower than acquiring infection from another unvaccinated staff member but household outbreaks report that unvaccinated people are at higher risk of infection (in a mixed household) than vaccinated people. The unvaccinated worker also has a risk of transmitting infection to the vaccinated staff. While the majority of vaccinated staff will have a mild infection there is a risk of an infected vaccinated staff, infected from an unvaccinated staff, taking the infection home and causing severe infection in unvaccinated persons.

d. At point 6: Use of alternative control measures. My opinion in respect of each widely accepted control measure are set out below.'

[59] Paragraphs [2], [11a] and [18] of Witness R5's first statement are as follows:

'2. I make this statement on the basis of my knowledge, experience and belief except where otherwise indicated. Where I make statements based on information provided by others, I identify the source of that information and believe such information to be true and correct…

11a. First, following the rollout of COVID-19 vaccines globally, I studied reports of fully vaccinated individuals contracting COVID-19. An example of one such report that I reviewed, published in the Centers for Disease Control and Prevention's Morbidity and Mortality Weekly Report, is attached to this statement and marked AMD-3. Another article I reviewed, published by Owen Dyer in the peer-reviewed medical journal, The BMJ, is Attachment 2b of Annexure AMD-6 to this statement. The identification of fully vaccinated individuals contracting COVID-19, otherwise known as "breakthrough infections", indicated that it is unlikely that it would be possible to attain herd immunity through vaccination. Herd immunity occurs when a significant proportion of the population becomes immune to a disease (in this case, COVID-19), such that the spread of the disease from person to person is unlikely. I formed the opinion that, in the absence of herd immunity, there was a significant risk that unvaccinated and vaccinated workers in a BHP workplace would encounter COVID-19 even if the vast majority of workers were vaccinated. I thought this was especially so given the intent of the nation to reopen (see (c) below), which will lead to widespread infection…

18. These risks were not new, and had been present since the beginning of the pandemic in Australia in March 2020. However, the other members of the HSE Team and I were of the view that these risks were heightened by the factors I have outlined above at paragraph 11, including the emergency of the Delta strain of the virus. I advised the HSE Team that, in my view, COVID-19 posed a substantial risk to health and safety, and would continue to do so for unvaccinated people even after it became endemic and vaccination rates became high.'

[60] The Respondent also contends that the contested proposition is supported by the following subsidiary propositions, which the Respondent submits are supported by the evidence given by Professor McLaws and Witness R5:

1. Herd immunity will never be achieved.

2. A vaccinated person can be infected with COVID-19.

3. A vaccinated person who is infected can efficiently transmit the virus.

4. Vaccination shortens the period when a person is infectious, for which reason vaccination reduces the overall risk of infection.

5. Notwithstanding that vaccination reduces the overall risk of infection, there is still a risk that an unvaccinated person will be infected.

6. Once a vaccinated person is infected, there is a substantially reduced risk of serious illness or death.

7. Once an unvaccinated person is infected, there is no such control against the risk of serious infection or death. Vaccination is the only protection against serious illness or death, the only control that protects against serious illness or death once a person is infected.

8. Vaccination is the most effective control measure currently available.

[61] We accept that these subsidiary propositions are supported by the expert evidence given by Professor McLaws and Witness R5. However, we do not accept that the contested proposition is supported by the expert evidence or the subsidiary propositions. The starting point in this analysis is proposition 7 at [29]above (which is not contested): an unvaccinated person is more likely to acquire COVID-19 from another unvaccinated person, rather than a vaccinated person. It follows, as a matter of logic, from this proposition that higher rates of vaccination decrease the chance that an unvaccinated person will acquire COVID-19 because an unvaccinated person is less likely to acquire COVID-19 from a vaccinated person than an unvaccinated person.[44] In this sense, 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.[45] 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

[44] Transcript, 24 November 2021 at PN1365-1366.

[45] Exhibit R12 at [58]-[69]; Exhibit R10 at [11], [18], [24], [30]; Transcript, 24 November 2021 at PN1367-1389 & PN1415-1418.

present in all work places'.[46] 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.[47]

[63] We deal with other aspects of the evidence later in this decision.

4 The Duty to Obey Lawful and Reasonable Directions

4.1 The duty

[64] None of the Parties submit that there is anything in public health orders, the Agreement or the express terms in the Employees' contracts that would provide the legal basis for the Site Access Requirement. It follows that the basis for the Site Access Requirement must derive from the term implied into all contracts of employment to the effect that employees must follow the lawful and reasonable directions of their employer.[48] Such a term is implied, by law, in the absence of a contrary intention by the parties.[49]

[65] The seminal decision concerning the requirement of employees to follow their employer's lawful and reasonable directions is *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday*[50] (*Darling*) in which Dixon J summarised the common law position as follows:

> 'Naturally enough the award adopted the standard or test by which the common law determines the lawfulness of a command or direction given by a master to a servant. If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable.
>
> In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.'

[66] Recently the Full Federal Court in *One Key Workforce Pty Ltd v CFMEU*[51] adopted a slightly different formulation of the implied term:

> 'the duty of the employee at common law is to obey lawful orders. The "standard or test" by which the common law determines whether the order is lawful is one of reasonableness: *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621. Dixon J explained at 621–2:
>
> > If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.

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[46] Transcript, 24 November 2021 at PN1417.

[47] Exhibit R12 at [58]-[69]; Exhibit R10 at [11], [18], [24], [30]; Transcript, 24 November 2021 at PN1367-1389 & PN1415-1418.

[48] *Thompson v IGT (Australia) Pty Limited* [2008] FCA 994 at [48]; *McManus v Scott-Charlton* [1996] FCA 1820 at [21]; *King v Catholic Education Office Diocese of Parramatta* [2014] FWCFB 2194 at [26]-[29].

[49] *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317 at [23].

[50] (1938) 60 CLR 601.

[51] [2018] FCAFC 77; (2018) 262 FCR 527; (2018) 277 IR 23 at [187].

> As Finn J observed in *McManus v Scott-Charlton* (1996) 70 FCR 16 at 21:
>
> > The need for some such limitation is patent: employment does not entail the total subordination of an employee's autonomy to the commands of the employer. As was said by the President in *Australian Tramway Employees' Association v Brisbane Tramways Co Ltd* (1912) 6 CAR 35 at 42:
> >
> > > A servant has to obey lawful commands, not all commands. The servant does not commit a breach of duty if he refuse[s] to attend a particular church, or to wear a certain maker's singlets. The common law right of an employee is a right to wear what he chooses, to act as he chooses, in matters not affecting his work.
>
> There are obvious, and powerful, considerations of civil rights and liberties and of due process which inform this. These need not be laboured here although they are of no little significance in the resolution of this case.'[52]

[67] Whether expressed as a 'lawful and reasonable' direction or a 'lawful' direction in which the test for determining lawfulness is whether the direction is reasonable, may simply be a matter of semantics. In each case the direction must be 'lawful' and 'reasonable'. The weight of authority supports the use of the expression 'lawful and reasonable';[53] it is the expression used in the arbitral question posed by the Applicants and acceded to by the Respondent; and it is the formulation we have decided to adopt.

4.2 Some general observations

[68] It is uncontentious that a lawful direction is one which falls within the scope of the employee's employment. There is no obligation to obey a direction which goes beyond the nature of the work the employee has contracted to perform,[54] though an employee is expected to obey instructions which are incidental to that work.[55]

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[52] (1938) 60 CLR 601 at 621–2.

[53] See, for example, *McManus v Scott-Charlton* (1996) 70 FCR 16; *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165 at 170 per Fox J, with whom Sheppard J agreed (Northrop J not deciding); *Bayley v Osborne* (1984) 10 IR 5 at 8 per Davies J; *Izdes v L.G. Bennett & Co. Pty Ltd t/as Alba Industries* (1995) 61 IR 439 at 449 per Beazley J; *King v Catholic Education Office Diocese of Parramatta* [2014] FWCFB 2194 (2014) 242 IR 249 at [24]; *Austal Ships Pty Ltd* Print P3975 (AIRC Full Bench 13 August 1997) at [7].

[54] *Price v Mouat* (1862) 11 CBNS 508; 142 ER 895 (employee hired as lace buyer not bound to obey orders to perform work of lace carder); *Bampton v Viterra Ltd* (2015) 123 SASR 80; 251 IR 261; [2015] SASCFC 87; BC201505246; *Mackie v Wienholt* (1880) 5 QSCR 211 (cook not bound to obey order to work in dairy); *McCarthy v Windeyer* (1925) 26 SR (NSW) 29; 42 WN (NSW) 175 (sub-editor not bound to obey orders to do work of a lower grade); *Truth & Sportsman Ltd v Moldsworth* [1956] AR (NSW) 924 (B-grade journalist not bound to obey order to work at a lower grade); *Commissioner for Government Transport v Royall* (1966) 116 CLR 314; [1967] ALR 313 (employee incapacitated by injury and entitled to salary during the period of incapacity does not lose the right to receive salary because of his refusal to perform duties within his residual capacity but not within the duties of his pre-injury classification). See also *Hackshall's Ltd v McDowell* [1930] AR (NSW) 620 (where the court had to consider whether an order to a bread cart deliverer to work outside the normal area was outside the scope of the contract).

[55] Such as to work reasonable overtime: *Anthony v NSW Fresh Food & Ice Co Ltd* [1946] AR (NSW) 64 (the determination of 'reasonable overtime' was to be made by reference to the particular industry).

[69] Further, employer directions which endanger the employee's life or health, or which the employee reasonably believes endanger his or her life or health, are not lawful orders;[56] unless the nature of the work itself is inherently dangerous, in which case the employee has contracted to undertake the risk.[57]

[70] The order or direction must also be 'lawful' in the sense that an employee cannot be instructed to do something that would be unlawful; such as a direction to drive an unregistered and unroadworthy vehicle.[58]

[71] Employees are only obliged to comply with employer directions which are lawful *and* reasonable.

[72] Reasonableness is 'a question of fact having regard to all the circumstances'[59] and that which is reasonable in any given circumstance may depend on, among other things, the nature of the particular employment.[60] The approach to the task of assessing the reasonableness of a direction to an employee was identified by Dixon J in *Darling*, as follows:

> 'But what is reasonable is not to be determined so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award governing the relationship, supply considerations by which the determination of what is reasonable must be controlled. When an employee objects that an order, if fulfilled, would expose him to risk, he must establish a case of substantial danger outside the contemplation of the contract of service.'[61]

[73] It is convenient to deal here with Ai Group's reliance on the passage below from *Woolworths Ltd (t/as Safeway) v Brown* (*Woolworths*) [62] in support of its submission that '[a] high bar exists for a finding that a direction is unreasonable'[63]:

> 'What is reasonable will depend upon all the circumstances including the nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument governing the relationship. A policy will be reasonable if a reasonable employer, in the position of actual employer and acting reasonably, could have adopted the policy. That is, a policy will only be unreasonable if no reasonable employer could have adopted it. A policy will not be unreasonable merely because a member of the Commission considers that a better or different policy may have been more appropriate. As the Full Bench observed in the XPT case, albeit in a somewhat different context, its not the role of the Commission "to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable.' (Emphasis added)

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[56] *Turner v Mason* (1845) 14 M & W 112 at 118; 153 ER 411 per Alderson and Rolfe B; *Bouzourou v Ottoman Bank* [1930] AC 271, PC; *Ottoman Bank v Chakharian* [1930] AC 277; (1929) 99 LJPC 97; 142 LT 465, PC; *Robson v Sykes* [1938] 2 All ER 612, KB; *Re Dismissal of Fitters by BHP* 1969 AR (NSW) 399.

[57] *McDonald v Moller Line (UK) Ltd* [1953] 2 Lloyd's Rep 662.

[58] *Kelly v Alford* [1988] 1 Qd R 404; *Gregory v Ford* (1951) 1 All E.R. 121, see also *Morrish v Henlys (Folkestone) Ltd* [1973] 2 All E.R. 137.

[59] *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601 at 616 (Starke J), 623-624 (McTiernan J); *NSW Trains v Australian Rail, Tram and Bus Industry Union* [2021] FCA 883 at [208], [214] (Flick J).

[60] *See for example, Downe v Sydney West Area Health Service* (No 2) [2008] NSWSC 159 at [423]-[429].

[61] (1938) 60 CLR 601 at 622. See also *NSW Trains v Australian Rail, Tram and Bus Industry Union* [2021] FCA 883 at [217] (Flick J).

[62] (2005) 145 IR 285 at [35].

[63] Ai Group submission in reply, 16 November 2021 at [31].

[74] The Applicants, the ACTU and the Union Interveners submit that the emphasised part of the passage from *Woolworths* should not be followed.

[75] There are cogent reasons to depart from the emphasised passage in the extract from *Woolworths*. We begin by observing that the posited test of reasonableness - 'if a reasonable employer, in the position of actual employer and acting reasonably, could have [made the direction]' - raises more questions than it answers. How does one discern what a 'reasonable employer' 'acting reasonably' could do? The posited test does not shed any light on the issue to be determined and, as the Union Interveners put it, 'places a gloss on the question of reasonableness without helping to answer the question'.[64]

[76] In our view, the emphasised extract from *Woolworths*, set out above, is plainly wrong. No authority is cited in support of the formulation adopted by the Full Bench; it travels well beyond the observations of Dixon J in *Darling*; and it does not sit conformably with a similarly expressed test in the administrative law context. As to the last point, the High Court plurality in *Minister for Immigration and Citizenship v Li* (*Li*) held:

> 'The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it ...'[65]

[77] It appears uncontroversial that in order to establish that a direction is reasonable, it is *not* necessary to show that the direction in contention is the preferable or most appropriate course of action or in accordance with 'best practice' or in the best interest of the parties. It is also uncontentious that in any particular context, there may be a range of options open to an employer within the bounds of reasonableness. As the Respondent submits:

> 'In assessing whether any direction is reasonable, it is necessary to bear in mind that within the boundaries of an employer's power of direction there is an area of 'decisional freedom' within which the employer has a genuinely free discretion. That area is co-extensive with what was once more commonly called 'managerial prerogative'. Within that area, reasonable minds might differ as to what decision is best or most desirable, but any decision or outcome within that area is within the bounds of reasonableness.'[66]

[78] The availability of a range of reasonable directions in response to a particular set of circumstances sits conformably with the following observation of the plurality in *Li*,[67] albeit the point arose in different context:

> '… there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a

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[64] AMWU/CEPU submission in reply, 23 November 2021 at [9].

[65] *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [68] per Hayne, Kiefel and Bell JJ.

[66] Respondent's Answers to the Background Paper, 23 November 2021, Question 10, p 8. Also see the oral submissions of the ACTU: Transcript, 25 November 2021 at PN1685; and the Union Interveners: Transcript, 24 November 2021 at PN1490-1493.

[67] (2013) 249 CLR 332.

court's view as to how a discretion should be exercised for that of a decision-maker.'[68] (Footnotes omitted)

[79] Nor is it seriously contested that a direction lacking an evident or intelligible justification is not a reasonable direction an employee is obliged to obey, but that is not the only basis upon which unreasonableness can be established. [69] As we have said, reasonableness is a question of fact having regard to all of the circumstances. Contrary to Ai Group's submission, there is no 'high bar', or any other type of bar or gloss to be put on the requisite assessment. It is an objective assessment of the reasonableness of the direction, having regard to all of the circumstances.

[80] We observe that the approach we have adopted in this matter is consistent with the following observation of the Full Bench in *Briggs v AWH Pty Ltd*:[70]

'The determination of whether an employer's direction was a reasonable one (there being, as earlier stated, no contest in this case that AWH's direction was lawful) does not involve an abstract or unconfined assessment as to the justice or merit of the direction. It does not need to be demonstrated by the employer that the direction issued was the preferable or most appropriate course of action, or in accordance with "best practice", or in the best interests of the parties. The proper approach to the task is that identified by Dixon J in *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* in the following terms:

> But what is reasonable is not to be determined, so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled.'[71]

[81] We would also observe that courts and tribunals have taken a broad view of what might constitute a lawful and reasonable direction in particular circumstances, including but not limited to:

- a direction that an employee refrain from wearing a caftan while performing duties (and so being visible to co-workers and the public)[72];
- a direction to remove an eyebrow ring whilst at work[73]

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[68] (2013) 249 CLR 332 at [66].

[69] *Mac v Bank of Queensland Limited* [2015] FWC 774 at [90]; applying *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [76].

[70] [2013] FWCFB 3316. See too, in the discrimination law context concerning whether a requirement or condition is 'reasonable'; *Sklavos v Australiasian College of Dermatologies* (2017) 256 FCR 247 at [80]; *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 87 at 112-113.

[71] [2013] FWCFB 3316 at [8].

[72] *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165. Although Fox J at 172 expressed doubt that, as a general proposition, employees could be directed to dress to a standard acceptable to the employer and confined his decision to the particular direction and circumstances concerned.

[73] *Woolworths v Brown* (2005) 145 IR 285.

- where there is a genuine indication of need for it, requiring an employee, on reasonable terms, to attend a medical examination in order to determine their fitness for work;[74]

- requiring an employee to provide a medical report indicating diagnosis and likely capacity and time to return to ordinary duties (rather than just providing a medical certificate)[75]

- an order that a senior employee not make public comments about decisions the employer has made in relation to its business[76]

- a direction that an employee not privately contact a co-worker, after the employee had been counselled in relation to sexual harassment of the co-worker,[77] and

- a direction to an employee to maintain the confidentiality of information gathered and recorded during disciplinary processes.[78]

5 Is the Site Access Requirement a lawful and reasonable direction?

5.1 The Submissions: general consideration

[82] The Applicants, the ACTU and Union Interveners advance 4 broad lines of argument in support of their contention that the Site Access Requirement is *not* a lawful direction:

- its introduction was announced without complying with the consultation requirements in the WHS Act

- the Respondent has not complied with the consultation obligations in the Agreement

- the Respondent has not complied with its obligations under the *Privacy Act 1988* (Cth) (Privacy Act), and

- the Site Access Requirement impairs the Employees' right to bodily integrity.

[83] The Applicants, the ACTU and Union Interveners also rely on these and other grounds in support of the contention that the Site Access Requirement is not reasonable.

[84] The Respondent's primary contention is that it has a duty under the WHS Act and at common law to ensure, so far as is reasonably practicable, the health and safety of its employees and other persons. A direction that has as its object and purpose protecting the health and safety at work of Mt Arthur's employees and other people at the Mine is lawful, as it is within the

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[74] *Blackadder v Ramsey Butchering* [2002] 118 FCR 395.

[75] *AIPIA v Qantas* (2014) 240 IR 342; but compare *Wildman v IMCD* [2021] FCCA 1161, where a direction was found to be unreasonable in the circumstances.

[76] *Lane v Fasciale* [1993] VicSC 311 (10 June 1993) (direction to principal to stop campaigning against the decision to close his school).

[77] *McManus v Scott-Charlton* (1996) 70 FCR 16.

[78] *James Cook University v Ridd* (2020) 298 IR 50.

scope of the Employees' employment, and 'axiomatically… [is] reasonable, substantially for the same reasons':[79]

> 'That is, a direction will always be reasonable when, as in this case, the object and purpose of the direction is compliance with the employer's statutory and common law duties.'[80]

[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.[81]

[86] It is convenient to note here that the ACTU contends that '[t]he lawfulness of a direction is not exhausted by considering whether the subject matter of the direction falls within the scope or subject matter of the employment, but extends further to a consideration of the employment (and other) laws that bear upon that subject.'[82] A similar point is made by the Applicants and the Union Interveners.[83]

[87] We note that there appears to be no judicial authority directly on the point. We will discuss what is required for a direction to be lawful at Chapter 5.2.3 of this decision, in the context of our consideration of the Respondent's compliance with the consultation requirements in the WHS Act. For reasons which will become apparent, we do not feel it necessary to express a concluded view on this point.

[88] On the question of whether a direction is reasonable, the Respondent submits that this depends upon the content and effect of the direction.[84] The application of this proposition in the context of the present matter is, so the Respondent contends, that the requirement that a direction be reasonable does not include as an incident:

- an obligation to consult under s.47 of the WHS Act about a direction that relates to work health and safety matters, or
- an obligation to consult (if there be any) that has as its source other than under the WHS Act.

[89] This is said to be so 'because the reasonableness of a direction is determined having regard to its effect, not by the process by which it was made'.[85]

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[79] Respondent Submissions, 16 November 2021 at [117].

[80] Respondent Submissions, 16 November 2021 at [117]. Also see [78] and [87].

[81] ACCI Submissions, 16 November 2021 at 3.12.

[82] ACTU Outline of Submissions, 11 November 2021 at [8].

[83] See, for example, Applicants Submissions, 9 November 2021 at [18]-[19]; Reply Submissions of the AMWU and CEPU, 23 November 2021 at [54]-[55].

[84] Transcript, 24 November 2021 at PN1517.

[85] Respondent's Answers to the Full Bench's Questions, 23 November 2021, p7.

[90] The Respondent acknowledges that the *outcome* of consultation unders.47 of the WHS Act may inform an inquiry into the reasonableness of a direction, but that 'the fact of consultation will never be determinative'.[86]

[91] ACCI takes a more nuanced approach. It submits that no one external factor is determinative of whether the direction in a particular case is reasonable:

> 'A range of factors will be considered when assessing the reasonableness of a direction, one of which may be the extent of consultation undertaken. The greater consultation afforded to employees, the more likely consultation is to become a factor supportive [of] the reasonableness of the direction.'[87]

[92] The obligation on an employee to obey a direction depends on it not only being lawful, but also reasonable. As Dixon J observed in *Darling*:

> 'the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service *and are reasonable*.'[88] [Emphasis added]

[93] The duty of an employee to obey a direction by his or her employer does not arise simply because a direction might be within the scope of employment and involves no illegality.

[94] We do not accept the submission put by the Respondent. It proceeds as a false legal premise and seeks to give determinative weight to the asserted purpose and object of a direction to the exclusion of any other consideration, including the impact of the direction on the rights and interests of the Employees.

[95] We agree with ACCI that a range of factors will bear on whether a direction is reasonable. As we have mentioned, the reasonableness of a direction is a question of fact having regard to *all* the circumstances, which may include whether or not the employer has complied with any relevant consultation obligations.

[96] Whether a particular direction is reasonable is not to be determined in a vacuum, it requires consideration of all the circumstances, including the nature of the particular employment, the established usages affecting the employment, the common practices that exist and the general provisions of any instrument governing the relationship.[89] In NSW, this would include consideration of obligations in the WHS Act, which governs employment relationships in that jurisdiction. The assessment of reasonableness and proportionality is essentially one of fact and balance and needs to be assessed on a case-by-case basis.[90] The assessment will include, but not be determined by, whether there is a logical and understandable basis for the direction.[91]

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[86] Ibid. Similarly, Ai Group contends that a failure to engage in consultation in accordance with the requirements of the WHS Act would not render the direction unlawful or unreasonable, see Ai Group's submission in response to the Background Paper, 23 November 2021 at [9].

[87] Further Supplementary Submissions of ACCI, 23 November 2021 at [10.5]

[88] (1938) 601 at 621–622. See also *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3)* (1990) 35 IR 70 at 73-78 (Hungerford J); *McManus v Scott-Charlton* (1996) 70 FCR 16 at 21 (Finn J); *Thompson v IGT (Australia) Pty ltd* (2008) 173 IR 408–409 at [49]-[51] (Goldberg J).

[89] *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday & Sullivan* (1938) 60 CLR 601 at 622 (Dixon J).

[90] *McManus v Scott-Charlson* (1996) 70 FCR 16 at 30 (Finn J)

[91] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 112.

[97] In considering whether the Site Access Requirement is a lawful and reasonable direction, we turn first to consider Mt Arthur's consultation obligations in the WHS Act and under the Agreement, before turning to the arguments concerning compliance with privacy obligations and the right to bodily integrity.

5.2 Mt Arthur's Consultation Obligations

5.2.1 WHS consultation requirements

[98] It is uncontentious that the introduction of the Site Access Requirement and its implementation enlivened the consultation obligations in the WHS Act.[92] Sections 47 to 49 of the WHS Act are set out below:

> **47 Duty to consult workers**
>
> (1) The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety.
>
> Maximum penalty—
> (a) in the case of an individual—230 penalty units, or
> (b) in the case of a body corporate—1,155 penalty units.
>
> (2) If the person conducting the business or undertaking and the workers have agreed to procedures for consultation, the consultation must be in accordance with those procedures.
>
> (3) The agreed procedures must not be inconsistent with section 48.
>
> **48 Nature of consultation**
>
> (1) **Consultation** under this Division requires—
>
> (a) that relevant information about the matter is shared with workers, and
>
> (b) that workers be given a reasonable opportunity—
>
> (i) to express their views and to raise work health or safety issues in relation to the matter, and
>
> (ii) to contribute to the decision-making process relating to the matter, and
>
> (c) that the views of workers are taken into account by the person conducting the business or undertaking, and
>
> (d) that the workers consulted are advised of the outcome of the consultation in a timely manner.
>
> (2) If the workers are represented by a health and safety representative, the consultation must involve that representative.
>
> **49 When consultation is required**
>
> Consultation under this Division is required in relation to the following health and safety matters—
>
> (a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking,

[92] Applicant Submissions, 9 November 2021 at [38]-[39]; Ai Group Submission at [88]; ACCI Submission at [3.2] and [3.4]; Respondent Submission, 16 November 2021 at [97]-[98]; ACTU Outline of Submissions, 11 November 2021 at [10] and [14].

(b) when making decisions about ways to eliminate or minimise those risks,

(c) when making decisions about the adequacy of facilities for the welfare of workers,

(d) when proposing changes that may affect the health or safety of workers,

(e) when making decisions about the procedures for—

(i) consulting with workers, or

(ii) resolving work health or safety issues at the workplace, or

(iii) monitoring the health of workers, or

(iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking, or

(v) providing information and training for workers, or

(f) when carrying out any other activity prescribed by the regulations for the purposes of this section.

[99] The WHS Act is based on the work health and safety model laws, which have been enacted in all jurisdictions except Victoria and Western Australia.[93]

[100] The Work Health and Safety Bill 2011 (Cth) Explanatory Memorandum provides some limited guidance on the content of the duty to consult in s.48, as follows:

> '153. Subclause 48(1) establishes the requirements for meaningful consultation. It requires PCBUs to: share relevant information about work health or safety matters (listed in clause 49) with their workers; give workers a reasonable opportunity to express their views; and contribute to the decision processes relating to those matters. It also requires PCBUs to take workers' views into account and advise workers of relevant outcomes in a timely manner.
>
> 154. Subclause 48(2) provides that consultation must involve any HSR that represents the workers.
>
> 155. Consulting with HSRs alone may be sufficient to meet the consultation duty, depending on the work health or safety issue in question.' [Emphasis added]

[101] The Mine is a 'mine' within the meaning of s.6(1) of the *Work Health and Safety (Mines And Petroleum Sites) Act 2013* (NSW) (the Mine Safety Act). Section 4(1) of the Mine Safety Act stipulates that the Act is to be construed with and as if it formed part of the WHS Act. A 'mine safety and health representative' elected pursuant to s.38 of the Mine Safety Act has all the functions of a health and safety representative (HSR) under the WHS Act for the workgroup at the mine 'as if the workgroup comprised all the workers at the mine:' s.42(1).[94]

[102] The Respondent must comply with s.47(1) of the WHS Act, which requires it to consult, so far as reasonably practicable 'with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety'.[95]

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[93] Section 35 of the Victorian *Occupational Health and Safety Act 2004* is in similar terms to s.48 of the WHS Act. Western Australia has enacted new legislation based on the model laws, which is due to commence in early 2022.

[94] ACTU Outline of Submissions, 11 November 2021 at [9].

[95] ACTU Outline of Submissions, 11 November 2021 at [10]-[11].

[103] Consultation is treated by the WHS Act as a matter of substance which is to occur prior to implementation. Section 48(2) requires that the consultation involve a HSR, who in the context relevant here is a 'mine safety and health representative'. [96]

[104] This consultation requirement is extended by s.70(1) of the WHS Act. This includes an obligation under s.70(1)(c) on the Respondent to allow a HSR access to information 'relating to' hazards (including associated risks) at the workplace affecting workers in the workgroup (which having regard to the definition of a 'mine safety and health representative' in the Mine Safety Act, extends to all the workers at the Mine) and the health and safety of the workers in the workgroup (again, all the workers at the Mine).[97]

[105] There appears to be limited authority directly relating to the consultation requirements in ss.47-49 of the WHS Act.[98]

[106] Many cases on consultation arise in the context of consultation obligations under industrial instruments. The Parties' submissions refer to the following cases in respect of the obligation to consult and what that entails:

- *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* (2010) 198 IR 382; (2010) 268 ALR 514
- *Consultation clause in modern awards* [2013] FWCFB 10165
- *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2016) 262 IR 176; [2016] FCA 1009
- *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company Pty* (1998) 88 IR 202
- *CPSU v Vodafone Network Pty Ltd* [2001] AIRC 1189; PR911257 (14 November 2001)
- *Felton v BHP Billiton Pty Ltd* [2015] FWC 1838
- *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18
- *QR Limited v Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150
- *Sinfield v London Transport Executive* [1970] Ch 550.

[107] Some additional cases have been identified that deal with the meaning of consultation:

- *Brasell-Dellow v Queensland (Queensland Police Service)* [2021] QIRC 356
- *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FWA 3945

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[96] ACTU Outline of Submissions, 11 November 2021 at [12].

[97] Ibid.

[98] Two cases which discuss the consultation obligation in s.48 of the WHS Act are: *Felton v BHP Billiton Pty Ltd* [2015] FWC 1838, at [53]-[78] and *Brasell-Dellow v Queensland (Queensland Police Service)* [2021] QIRC 356, at [123]–[131]. See also *Nazih Beydoun & Ors v Northern Health & Ors* [2021] FWC 6341.

- *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431
- *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208
- *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 172
- *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93.

[108] The following propositions may be drawn from these cases about what constitutes consultation:

- the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation[99]
- a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account[100]
- the consultation needs to be real; it must not be a merely formal or perfunctory exercise[101]
- even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences[102]
- the party to be consulted [must] be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon[103]
- while the word 'consultation' always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility[104]
- a right to be consulted, though a valuable right, is not a right of veto[105]

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[99] *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [212].
[100] *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 178–179.
[101] *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 101.
[102] *QR Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150, [81].
[103] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].
[104] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].
[105] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].

- the consultation obligation is not concerned with a likelihood of success of the process, only to ensure that it occurs before a decision is made to implement a proposal[106]
- an ordinary understanding of the word "consult" would suggest that the obligation to consult does not carry with it any obligation either to seek or to reach agreement on the subject for consultation. Consultation is not an exercise in collaborative decision-making. All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made[107]
- the requirement to consult affected workers would … not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their views taken into account when a decision is made[108]
- genuine consultation would generally take place where a process of decision-making is still at a formative stage[109]
- the opportunity to consult must be a real opportunity not simply an after thought[110]
- consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal[111]
- there is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?'. Only in the latter case is there 'consultation'[112]
- it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent 'consultation' is robbed of this essential characteristic[113]
- any offer to consult in relation to the matter was in the context that the respondent had already made an irrevocable decision, then the party had not, to use his Honour's words, consulted about the decision in any meaningful way.[114]

[109] The list set out above does not purport to be an exhaustive statement of the elements underpinning the content of an obligation to consult. We also observe that some industrial instruments and the model consultation term provide that the trigger for an obligation to consult is the making of a definite decision. As we note below, the specific requirement to consult is determined by the context.

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[106] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] FCA 1431 at [60].
[107] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2016] FCA 1009 at [60].
[108] *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211].
[109] *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211].
[110] *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company* Pty (1998) 88 IR 202, 217.
[111] *Sinfield v London Transport Executive* [1970] 1 Ch 550, 558.
[112] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [45].
[113] *Consultation clause in modern awards* [2013] FWCFB 10165 at [35].
[114] *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company* Pty (1998) 88 IR 202 at 218.

[110] The Background Paper asked the Parties whether they consider the above propositions to be an accurate reflection of the case law and whether they are relevant to the Commission's task in considering whether the Respondent's consultation process was conducted in accordance with ss.47-49 of the WHS Act.

[111] While generally observing that the Commission must start with the words of the statute itself in considering the content of the WHS Act consultation requirements, the Applicants, ACTU and AMWU/CEPU agree that the propositions are accurate and relevant to the Commission's task.[115] While ACCI expresses caution in generalising the nature of consultation obligations - given the obligation to consult is first and foremost determined by the terms in the relevant instrument that gives rise to the obligation[116] – it agrees that the propositions were relevant to the Commission's task here.[117]

[112] The Respondent submits that the propositions are accurate insofar as they relate to consultation under industrial instruments, but having regard to the purpose and text of Division 2 of Part 5 of the WHS Act, they are only of incidental relevance to the question of compliance with ss.47-49 of the WHS Act.[118] Ai Group submits that it cannot be assumed that all of the propositions are entirely relevant to the consultation requirements in the WHS Act, and urges caution so as not to read into the obligation to consult in the WHS Act any additional requirement that is either not consistent with, or which expands upon, the requirements of s.47.[119]

[113] While we accept that the metes and bounds of the Respondent's obligation to consult is delineated by the terms of the WHS Act, we consider that the propositions outlined above contain contextual material that is relevant to an understanding of ss.48 and 49 of the WHS Act and will have regard to them on that limited basis.[120] Of course, we recognise that the content of any specific requirement to consult is determined by the context, including:

- the precise terms in which such a requirement is expressed in the applicable industrial instrument, contract or legislation, including the circumstances in which the obligation is enlivened,[121]
- the factual context in which the requirement arises, including the size and nature of the business and the nature of the change which is the subject of the consultation and the impact of that change on the persons who are required to be consulted, and
- whether the factual circumstances dictate a quick response.

[114] As to the last point, if there was a surge in COVID-19 cases such that the risk of transmission substantially increased or if a new, more transmissible or virulent, COVID-19

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[115] See, for example, the submissions of the Applicants at [11]-[12], ACTU at [44]-[48] and AMWU and CEPU at [13].

[116] ACCI Further Supplementary Submissions. 23 November 2021 at [4.1]-[4.16].

[117] ACCI Further Supplementary Submissions. 23 November 2021 at [5.1]-[5.2].

[118] Respondent's Answers to the Full Bench's Questions at pp.3-5 (responses to questions 4 and 5).

[119] Ai Group Submission in response to the background paper, 23 November 2021 at [4]-[7] (responses to questions 4 and 5).

[120] See ACTU Submissions in response to the Full Bench's questions and in reply, 23 November 2021 at [46].

[121] For example, under the model consultation term in Schedule 2.3 to the FW Regulations, the consultation obligation arises where the employer 'has made a definite decision to introduce a major change …'

variant became prevalent then such circumstances may warrant a truncated consultation process. This is recognised in the qualification in s.47 of the WHS Act that consultation take place 'so far as is reasonably practicable'.

[115] The *NSW Government Code of Practice Work Health and Safety Consultation, Cooperation and Coordination* (the Code,[122] which is based on a national model code of practice developed by Safe Work Australia) was approved in August 2019 under s.274 of the WHS Act. The Code is at Attachment PJC-13 to the Witness Statement of Peter John Colley. Section 3, titled 'What is effective consultation?', discusses each of the elements in s.48 of the WHS Act.

[116] The Foreword to the Code explains that:

- the Code is intended to be read by a PCBU, and provides practical guidance for PCBUs on how to effectively consult with workers who carry out work for the business or undertaking and who are (or are likely to be) directly affected by a health and safety matter,

- following an approved code of practice will assist the duty holder to achieve compliance with the health and safety duties in the WHS Act and Work Health and Safety Regulation (WHS Regulation), but compliance with those duties may be achieved by following another method if it provides an equivalent or higher standard of work health and safety than the code, and

- codes of practice are admissible in court proceedings under the WHS Act and WHS Regulation, and courts may rely on the code in determining what is reasonably practicable in the circumstances to which the code of practice relates.

[117] Section 275 of the WHS Act provides that codes of practice approved under s.274 are admissible in proceedings for an offence against the WHS Act. It provides:

> **275 Use of codes of practice in proceedings**
>
> (1) This section applies in a proceeding for an offence against this Act.
>
> (2) An approved code of practice is admissible in the proceeding as evidence of whether or not a duty or obligation under this Act has been complied with.
>
> (3) The court may—
>
> (a) have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates, and
>
> (b) rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.
>
> Note—
>
> See section 18 for the meaning of *reasonably practicable*.
>
> (4) Nothing in this section prevents a person from introducing evidence of compliance with this Act in a manner that is different from the code but provides a standard of work health and safety that is equivalent to or higher than the standard required in the code.

[122] Available at: https://www.safework.nsw.gov.au/__data/assets/pdf_file/0013/50071/Work-health-and-safety-consultation,-cooperation-and-coordination-COP.pdf

[118] The Background Paper included two questions for the parties about the Code:

- *What is the status of the NSW Code of Practice in these proceedings, since this is not a 'proceeding for an offence against this Act' (s.275)?*

- *Should the Commission take into account the content from the NSW Code of Practice, and in particular in Section 3 of the Code, in informing itself about the content of the duty in s.48 of the WHS Act and whether the Respondent has complied with the duty to consult?*

[119] In responses to these questions, there was no dispute between the Parties about whether the Commission can consider the Code. The Applicants submit that the Commission should take the Code into account, in informing itself about whether the duty to consult applies and whether the Respondent complied with that duty.

[120] The Respondent submits that s 275 of the WHS Act does not, in terms, apply to this arbitration, but accepts that the Commission is entitled to form a view about Mt Arthur's compliance withs.47 and says it would be artificial for it to do so without having any regard to the Code. However, it submits that the Code should be used with great circumspection, and not as a substitute for the language of Division 2 of Part 5 of the WHS Act.[123]

[121] There is similarly no dispute between the ACTU, the Union Interveners, and ACCI that, while the Code does not create a separate source of obligations and the Commission is not bound to consider it, the Commission can take it into account in determining whether consultation requirements have been complied with. The ACTU further submits that s.275(4) of the WHS Act appears to view the Code as a minima.

[122] Ai Group's primary contention is that failure to engage in consultation as required by the WHS Act would not render the direction unlawful or unreasonable, and by extension any assessment of whether the Respondent has undertaken consultation in accordance with the Code is not determinative of the question before the Commission, or indeed necessary. However, Ai Group accepts that it is open to the Commission to have regard to the Code, noting the Commission's broad powers under s.590 of the FW Act.

[123] Section 275 is clearly not directly applicable in the present context, these not being proceedings for offences under the WHS Act and WHS Regulation. However, nothing in the terms of s.275 precludes the use or admissibility of codes of practice in other contexts. In any event, the Commission is not bound by the rules of evidence and can inform itself in relation to a matter in such manner as it considers appropriate.[124]

[124] We consider that the Code does not create separate consultation obligations and a PCBU could comply with its WHS consultation obligations without following the Code. Section 275(4) plainly recognises that a PCBU could comply with the WHS Act in a way that is different to the standard required in the Code. Noting, however, that codes of practice are intended to

[123] Respondent's Answers to the Full Bench's Questions, 23 November 2021 at p 5 (response to question 6).

[124] FW Act ss.590 and 591.

provide practical guidance to assist duty holders to meet the requirements of the WHS Act,[125] we consider that the Code is relevant to our consideration of whether the Respondent met its consultation obligations under the WHS Act.

[125] Relevantly and in summary, the Code explains that:

- consultation is required when identifying hazards, assessing risks and deciding on measures to eliminate or minimise those risks, and is a two-way process between the PCBU and its workers

- consultation requires that relevant information is shared with workers to enable informed and constructive discussions. This information should be provided early on so workers and HSRs have enough time to consider matters and provide feedback. Relevant information may include health and safety policies and procedures, technical guidance about hazards, risks and risk control measures, and risk assessments. The information should be presented in a way that can easily be understood by the workers

- consultation requires that workers are given a reasonable opportunity to express their views, raise health and safety issues, and contribute to the decision-making process relating to the health and safety matter. The time the consultation process takes will depend on the complexity of the health and safety matter, how many people are being consulted, the accessibility of workers and the methods of consultation

- consultation requires that the views of workers are taken into account. This does not require consensus or agreement, but PCBUs must allow workers to contribute to health and safety decisions. Workers should be advised of the outcome of any consultation in a timely manner

- if workers are represented by an HSR, consultation must include that HSR, and if the PCBU and workers have agreed to consultation procedures, the consultation must be in accordance with those procedures, and

- it is good practice to keep records to demonstrate compliance with consultation requirements.

5.2.2 The consultation obligations in the Agreement

[126] The Agreement at clause 30 incorporates by reference the model consultation term provided for in Schedule 2.3 of the *Fair Work Regulations 2009*. The obligation to consult under this term is engaged if the employer has made a 'definite decision' to introduce a 'major change' to 'production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees.' Clause (9)(a) of the model consultation term provides that a major change is likely to have a significant effect on employees if it results in the termination of employment of employees.

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[125] See the Explanatory Memorandum to the *Work Health and Safety Bill 2011* (Cth) at 902. Sections 275 of the WHS Act and the *Work Health and Safety Act 2011* (Cth) are in the same terms, and were enacted to achieve harmonization of work, health and safety laws across Australia.

[127] The phrase 'major change in production, workplace location, program, organisation, structure or technology' has its origins in the *Termination, Change and Redundancy Case* (*TCR case*).[126] In the *TCR case*, a Full Bench of the Australian Conciliation and Arbitration Commission determined to include a term in an award that required:

> '… consultation take place with employees and their representatives as soon as a firm decision has been taken about major changes in production, program, organization, structure or technology which are likely to have significant effects on employees.'[127]

[128] Each of the identified areas speak to the manner in which the business undertaken by the employer is being carried out and the phrase 'a decision to introduce major change to production, program, organisation, structure or technology' is to be understood in that context.[128] We agree that for the Site Access Requirement to come within the ambit of clause 30, it must be a [major] change 'to … organisation'. Whether the subject-matter of the Requirement falls within that description is a question of fact, based on the circumstances.

[129] In construing the phrase 'organisation' in a similar TCR clause (but which also included the term 'work organisation') in *Port Kembla Coal Terminal Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (*Port Kembla*)[129], Rangiah J, who dissented in the outcome, said:

> 'In my opinion, the phrase 'major change … to … work organisation' refers to the change in the manner in which work is done, managed, arranged or otherwise organised in PKCT's enterprise. The phrase 'major change…to…organisation' has a broader meaning that extends to the way the enterprise itself is arranged, managed or organised. His Honour decided that cl 7 applies because there was a major change to the way in which reductions in the workforce are achieved. Such change was not a change to the manner in which work is done, arranged, managed or otherwise organised, but was a change to the way an aspect of the enterprise is managed. In my opinion, the change identified by his Honour falls within the description of 'organisation'.'[130] [Emphasis added]

[130] In contrast, Jessup J stated that he did not agree that the change (the adoption of forced redundancies and making of 3 employees redundant):

> 'would amount to a change to "production, program, organisation, structure, technology, shift arrangements, work organisation or the level of outsourcing". Only by a very strained reading of the words could the change identified by his Honour be so described. On appeal, counsel for the respondents submitted that the change was to "organisation", but, save to propound the point, they really advanced no focussed argument as to how it was so. The change identified by his Honour was not, in my view, a change in organisation.'[131]

[131] White J agreed with the reasons of Jessup J (in this aspect of the decision) subject to 2 qualifications; the first concerning the meaning of the term 'work organisation' in the consultation clause:

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[126] *Termination, Change and Redundancy Case* [1984] 8 IR.

[127] *Termination, Change and Redundancy Case* [1984] 8 IR at [52].

[128] See *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Jemena Asset Management Pty Ltd* [2016] FWC 6494 (Gostencnik DP, 7 October 2016) at [30].

[129] (2016) 248 FCR 18.

[130] Ibid at 386.

[131] Ibid at 186.

> 'That is a term of variable meaning. At its widest, it could mean something like "the way in which things are done" in PKCT's terminal operations, including its employee allocations. On that construction, the change implemented by PKCT may have amounted to a change in "work organisation" because there was some change in the way it would conduct its operations. However, it is not necessary to express a concluded view about this because, even if that be an appropriate construction, it is difficult to characterise the change in the way in which PKCT organised the way things were done in its operations in the present case as "major" …'[132]

[132] It seems to us that 2 out of the 3 judges in *Port Kembla* adopted a broad interpretation of the term 'work organisation'.

[133] We acknowledge there is room for debate as to the correct approach to the meaning of 'organisation' in the model consultation term, but we consider that the better view is that the introduction of the Site Access Requirement is a change to organisation within the meaning of clause 30 of the Agreement (and the model consultation term). The Respondent has introduced a new requirement for all workers at the Mine which has the effect of excluding a category of workers from the workplace (namely, those not vaccinated by the specified dates). Such a requirement falls within the notion of how the Mine itself is managed or organised.

[134] We also consider that the Site Access Requirement constitutes a 'major change to … organisation … in relation to its enterprise that is likely to have a significant effect on the employees.' Ai Group submits that a mandatory vaccination policy should not be viewed as a policy that is likely to have a significant effect on employees, as vaccination is unlikely to result in significant adverse effects.[133] Contrary to Ai Group's view we find the ACTU's analysis more persuasive, namely that the Site Access Requirement, which makes vaccination a condition of entry to the Mine and exposes unvaccinated employees to potential disciplinary action including dismissal, has a significant effect on employees.[134]

[135] The only parties to address this issue were the ACTU, the Respondent and Ai Group. We note that the ACTU contends, contrary to the position put by the Respondent, that any consultation undertaken after the announcement of the Site Access Requirement on 7 October 2021 was consultation post implementation, as the Site Access Requirement had already been implemented by way of a direction to the Employees.[135] It is on this basis that the ACTU submits that Mt Arthur has not complied with its consultation obligations under the Agreement. The Respondent argues that clause 30 of the Agreement does not apply, or if it is held to do so, then it has satisfied its requirements.[136]

[136] We note that the issue of compliance with clause 30 of the Agreement and the effect of any alleged non-compliance was not advanced by the Applicants or the Union Interveners.[137] In the circumstances and in view of the finding made below about the Respondent's compliance with the duty to consult in the WHS Act, it is not necessary to express a concluded view on this

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[132] Ibid at 498.

[133] Ai Group Reply Submission, 16 November 2021 at [103].

[134] ACTU Submissions in response to the Full Bench's questions and in reply, 23 November 2021 at [30].

[135] ACTU Submissions in response to the Full Bench's questions and in reply, 23 November 2021 at [34]-[38].

[136] Respondent's Submissions, 16 November 2021 at [109]-[111].

[137] In Ai Group's Reply Submission, 16 November 2021 at [95]-[106], Ai Group submits that clause 30 of the Agreement does not apply to the direction to vaccinate and any failure to comply with the clause does not remove an employer's capacity to issue a lawful and reasonable direction.

point. We would observe, however, that based on the analysis in Chapter 5.2.3 below it appears to us that Mt Arthur substantially met its obligation under the Agreement in that it consulted the Employees *after* it had made a definite decision to introduce the Site Access Requirement.

5.2.3 The Respondent's obligation under s.47 of the WHS Act to consult with the Employees in relation to the Site Access Requirement.

[137] The Respondent submits that there was compliance with the requirements of s.47 of the WHS Act. The Respondent identifies 3 distinct phases in relation to the Site Access Requirement which the Respondent characterises as follows:

- the options phase which was prior to 31 August 2021
- the assessment phase from 31 August 2021 until 7 October 2021, and
- the implementation phase from 7 October 2021 until 10 November 2021.

[138] The Respondent submits that during the 'options phase', it commenced an education program and promoted COVID-19 vaccination to all of its employees across its Australian operations, including those employed by Mt Arthur.[138] This included the regular circulation of announcements and videos that informed employees of the health and safety benefits of vaccination, exposed common myths about COVID-19 vaccines, and provided information about how employees could book their vaccination appointments.[139]

[139] On 21 August 2021, an 'Options Analysis' was submitted to the MinAu EMT senior leadership team (of which Mr Basto, President of Minerals Australia, was a member), which led to a recommendation that COVID-19 vaccination be a condition of entry to BHP workplaces in Australia. The recommendations in the Options Analysis, including the proposal that COVID-19 vaccination be a condition of entry to BHP workplaces in Australia, were supported by Mr Basto and the rest of the senior leadership team, subject to preliminary steps that included: the completion of a risk assessment to inform the implementation plan; the processes for considering those with genuine medical contraindications to COVID-19 vaccines, and undertaking further workforce engagement and consultation.[140]

[140] The 'assessment phase' commenced on 31 August 2021, with BHP's announcement that it was 'actively assessing whether to make vaccination a condition of entry to BHP workplaces in Australia', and that a risk-based assessment would be commenced of the proposed Site Access Requirement.[141] The Respondent submits that, during the assessment phase:

- BHP set up a central mailbox for the use of all employees (Vaccine Mailbox), including those at the Mine, and expressly invited their questions and comments regarding the proposed introduction of the Site Access Requirement.[142] Approximately 480 inquiries to the Vaccine Mailbox were received and responded to between 31 August 2021 and 7 October 2021 across all BHP assets, with approximately 20 of that total coming from Mt Arthur's employees.

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[138] Respondent Submissions, 16 November 2021 at [28].
[139] Respondent Submissions, 16 November 2021 at [29].
[140] Respondent Submissions, 16 November 2021 at [35]-[36].
[141] Respondent Submissions, 16 November 2021 at [37].
[142] Respondent Submissions, 16 November 2021 at [39].

- Correspondence was received from a number of unions regarding the proposed Site Access Requirement, including the CFMMEU, the ETU, the AMWU and the RTBU. BHP responded to each of the union's concerns in writing and also met with union representatives, where requested, to further discuss the Site Access Requirement.[143]
- Employees provided feedback through other avenues.
- Members of BHP's COVID-19 Vaccination Working Group assessed and collated the questions and comments received from employees and their representatives, and briefed Witness R1 on the volume and themes being expressed across the various BHP entities, including at Mt Arthur.[144]

[141] The implementation phase commenced on 7 October 2021 with BHP's announcement that the Site Access Requirement would be implemented at all of BHP's workplaces across Australia (including at the Mine).[145]

[142] The Respondent submits that during the implementation phase:

> 'BHP and Mt Arthur Coal then continued its process of consultation and engagement with workers under the WHS Act, now focusing on the implementation of the Site Access Requirement (which was not due to commence operating at Mt Arthur Coal until 10 November 2021).'[146]

[143] The Respondent submits that this process was 'substantially the same as that which occurred between 31 August 2021 and 7 October 2021. However, it was focused on the application of the Site Access Requirement at BHP's assets, including the Mine, rather than whether it should be introduced at all.'[147]

[144] As to whether there has been compliance with s.47, the Respondent submits that this is partly a legal issue as to the location and content of the duty to consult under s.47, and partly a factual issue as to what relevantly happened and whether it met the requirements of s.47.[148] The content of the duty is comprehensively set out in s.48 of the WHS Act and does not confer any 'right of veto' on employees.[149]

[145] In summary, the Respondent submits that:

- The response to and management of COVID-19 by BHPs assets, including the Respondent, has been led and co-ordinated by BHP.[150]
- BHP took steps to educate its workforce and promote vaccination when it became available, including by providing a COVID-19 Vaccine Information Hub on its intranet, available to all employees.[151]
- At the Mine, the Respondent employs the following COVID-19 controls:

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[143] Respondent Submissions, 16 November 2021 at [40].
[144] Respondent Submissions, 16 November 2021 at [41].
[145] Respondent Submissions, 16 November 2021 at [45].
[146] Respondent Submissions, 16 November 2021 at [48].
[147] Respondent Submissions, 16 November 2021 at [49].
[148] Respondent Submissions, 16 November 2021 at [102].
[149] Respondent Submissions, 16 November 2021 at [103].
[150] Respondent Submissions, 16 November 2021 at [25].
[151] Respondent Submissions, 16 November 2021 at [29].

- physical distancing protocols
- hygiene protocols, including hand hygiene, cough etiquette, cleaning and disinfection and working in split teams
- personal protective equipment
- screening questionnaire for workplace entry including return to work criteria
- occupancy limits
- the requirement to return a negative rapid antigen test as a condition of entry to the Mine.[152]

- An 'Options Analysis' submitted on 21 August 2021 led to a recommendation that COVID-19 vaccination be a condition of entry to BHP workplaces in Australia. This was supported by BHPs senior leadership team, subject to preliminary steps including:
  - completion of a risk assessment to inform the implementation plan
  - the processes for considering those with genuine medical contra-indications to COVID-19 vaccines, and
  - undertaking further workforce engagement and consultation.[153]
- Between 31 August 2021 and 7 October 2021, BHP and the Respondent began a process of consultation and engagement with employees and their representatives under the WHS Act about the proposed Site Access Requirement. This process included engaging with unions and setting up the Vaccine Mailbox. All feedback, including from the Respondent's employees, was collated and considered.[154] The feedback was considered by Witness R1, who should be taken to have been the agent of BHP and the Respondent for the purposes of compliance with s.48 of the WHS Act.[155]
- The Site Access Requirement announced on 7 October 2021 explicitly addressed the circumstances of employees who could not be vaccinated, stating:

  > 'People with medical concerns or those with conditions listed as contraindications or precautions in the ATAGI Clinical Guidance on COVID-19 Vaccination will be asked to follow a medical review process.
  >
  > If through this process the person is confirmed to have a condition which prevents the person from being vaccinated, BHP will review their individual circumstances on a case-by-case basis, and BHP will consider accommodating such circumstances.'

- BHP and the Respondent continued consultation during the 'implementation phase' between 7 October and 10 November 2021.[156]

[146] The Applicants contend that, despite statements by BHP to the contrary, the announcement of the introduction of the Site Access Requirement was made without any real

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[152] Respondent Submissions, 16 November 2021 at [31]-[32]. This was current as at the date of the submission.
[153] Respondent Submissions, 16 November 2021 at [36].
[154] Respondent Submissions, 16 November 2021 at [38]-[43].
[155] Respondent Submissions, 16 November 2021 at [104(d)].
[156] Respondent Submissions, 16 November 2021 at [48].

consultation and was presented to the employees of Mt Arthur as a *fait accompli*. The announcement on 7 October 2021 was not that BHP 'may', 'proposed to' or 'intended to' introduce the Requirement. The announcement was that the Requirement "*will be introduced*". The Applicants say this is the case whether it was BHP, or Mt Arthur, who gave the direction as to mandatory vaccination.

[147] It is clear that BHP and Mt Arthur provided employees with a substantial amount of information about COVID-19 both prior to and during the assessment phase. This information included updates on the local COVID-19 situation, local vaccination rates and various communications and measures to encourage employees to get vaccinated. However, it seems to us that BHP and Mt Arthur appear to have proceeded on the basis that consultation was not required prior to a decision being made to introduce the Site Access Requirement. This is illustrated by the announcement from Mr Basto on 31 August 2021, which included the following:

> 'We understand that this will generate a lot questions, and potentially some concern, and are committed to ongoing discussion and engagement with you about the details of the finalised policy should a decision be made to introduce such a requirement.'[157] [Emphasis added]

[148] The Applicants point to the language used in this announcement as demonstrating that there was not going to be any consultation before a decision was made to introduce the Site Access Requirement.[158]

[149] The Respondent submits that the Vaccine Mailbox was open to all employees of BHP, including the Employees and HSRs at the Mine, and that employees were 'expressly invited [to provide] their questions and comments regarding the proposed introduction of the Site Access Requirement.'[159]

[150] Despite BHP's communications noting that they were committed to ongoing engagement with their workforce, it does not appear that employees were asked to contribute ideas or suggestions in relation to the decision-making process or the risk assessment or rationale that underpinned the decision to introduce the Site Access Requirement. Although substantial information was provided about COVID-19, little if any information was provided to Employees about the risk assessment that was undertaken, such as an evaluation that the existing control mechanisms were of limited effectiveness. We agree with the Respondent that it was not obliged to provide the particular Risk Assessment document requested by the Employees and others.[160]. However, we consider that information that explained how the Respondent had taken into account and weighed up matters including those set out in s.18 of the WHS Act, was relevant information

[151] It is worth noting that during the assessment phase, BHP only received 20 emails to the Vaccine Mailbox from employees at the Mine which, for example, included individual employees' concerns about their own health and BHP's responsibility for adverse reactions to a vaccination.

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[157]Statement of Witness R3 at PT-33.

[158] Transcript, 25 November 2021 at PN1652.

[159] Respondent Submissions, 16 November 2021 at [39].

[160] Respondent Submissions, 16 November 2021 at [104(B)(i)].

[152] The Respondent also points to a 'parallel process of engagement with unions'[161]. However, there does not appear to have been a genuine attempt to consult with the unions during the assessment period. Responses from BHP to each of the union letters appear to be substantially in the same terms and end with the following:

> 'At this point in time, no decision has been made as to whether vaccination will be a condition of entry to BHP workplaces. If a decision is made to make vaccination a condition of workplace entry, we will consult with you about the implementation of that decision.'[162]

[153] There also appears to have been no direct engagement with health and safety representatives during the assessment phase. There was no discussion of mandatory vaccination at any health and safety meetings held before the announcement of the Site Access Requirement on 7 October 2021[163]. The meetings that occurred after that date were not about whether the Site Access Requirement would be introduced, but rather about how and why it would be implemented[164].

[154] The Respondent's evidence is that the final decision to implement the Site Access Requirement was made on 30 September 2021, when the Site Access Requirement was endorsed by BHP's Executive Leadership Team.[165] It submits that:

> 'Consultation with workers informed the approach to vaccination at both BHP and Mt Arthur. As no new scientific, medical or safety data was provided during the consultation process, it did not alter the assessment and recommendation for COVID-19 vaccination as a workplace entry requirement to be considered a reasonably practicable safety control.'[166]

[155] We note however, that the Respondent did not invite the Employees to contribute scientific, medical or safety data or inform them that such information may influence its assessment and recommendation for COVID-19 vaccination as a workplace entry requirement. Further any such information would not be the only relevant information that might be obtained by the Respondent from a consultation process with the Employees.

[156] The decision to implement the Site Access Requirement, announced to employees by email from Mr Basto on 7 October 2021, included the following:

> 'Based on the findings of our assessment, the Company *will introduce* a requirement for COVID-19 vaccination as a condition of entry to BHP workplaces in Australia for all workers and visitors.' [emphasis added]
>
> …
>
> **NSW:** Considering the current COVID-19 outbreak in NSW and the State Government plan to ease restrictions, workers and visitors to BHP workplaces in NSW will be required to have their first vaccination dose by **10 November 2021** and be fully vaccinated by **31 January 2022**.'

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[161] Respondent Submissions, 16 November 2021 at [40].

[162] See for example MM-5 to the Statement of Witness R2.

[163] Applicant Submissions at [47], citing Statement of Witness A1 dated 3 November 2021 at [21].

[164] Applicant Submissions at [48], citing Howard Statement dated [48] to [61] Witness Statement A1 at [27] to [66].

[165] Statement of Witness R1 at [66].

[166] Statement of Witness R1 at [69].

[157] We accept the Applicants' submission that the language of this announcement demonstrates that the decision was 'irrevocable' and ' not amenable to consultation'; 'it wasn't even amenable to consultation about dates.'[167] For the reasons set out later, we are satisfied that the terms of this announcement, coupled with Witness R4's evidence that after 7 October 2021 he did not have a choice other than to introduce the Site Access Requirement at the Mine, mean that the decision communicated to employees on 7 October 2021 was not open for reconsideration.

[158] Ai Group submits that the Respondent has met its obligations to consult under ss.47 and 48 of the WHS Act. Ai Group submits that the Respondent:

- shared relevant information through the emails of Mr Basto and Witness R4 on 31 August 2021,
- gave employees a reasonable opportunity to express their views and contribute to the decision process by gathering feedback through the Vaccine Mailbox, interacting with employees and engaging with unions,
- took the employees' views into account through briefings on sentiment and themes that emerged in engagement with employees, and
- advised employees of the outcome of the consultation in a timely manner in the email from Mr Basto on 7 October 2021. [168]

[159] Ai Group submits further that in order to be eligible for election as a HSR, s.60(a) of the WHS Act requires the representative to be a member of the work group. On this basis it was contended that Ai Group's submissions pertaining to the degree to which workers were consulted in relation to the Site Access Requirement applies with equal force to HSRs.

[160] ACCI and the ACTU do not make submissions about whether the Respondent has complied with its obligations to consult in accordance with ss.47 and 48. The Union Interveners submit that the extent of the consultations in this matter is principally a matter for the parties rather than the Interveners, however, they make a number of observations:

- Mr Basto, the decision maker, was not called to give evidence(We deal with this point later)
- the responses to the unions were perfunctory and in standard form and evidence a lack of genuineness
- BHP refused to provide the risk assessment supporting the Requirement, and
- there appears to have been scant if any genuine consultation with HSRs.[169]

[161] In contrast with the assessment phase, the 'implementation phase' that followed the announcement of the Site Access Requirement on 7 October 2021, included:

- toolbox meetings with employees
- meetings of the various health and safety committees
- the provision of some information about the risk assessment underpinning the Site Access Requirement (the BHP Rationale document), and
- meetings between the unions and BHP to discuss concerns about implementation of the Site Access Requirement.

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[167] Transcript, 25 November 2021 at PN1649.
[168] Ai Group Submission in response to the background paper, 23 November 2021 at [18] - [27].
[169] AMWU and CEPU Reply Submissions, 23 November 2021 at [27] - [31].

[162] These meetings and interactions which occurred after the announcement of the Site Access Requirement on 7 October 2021 are much more closely aligned with what would be expected during a consultation process pursuant to ss. 47 and 48 of the WHS Act in that Employees were provided with an opportunity to meaningfully engage with the relevant issues and their feedback was sought and considered. However, this was in relation to implementation and occurred *after* a definite decision had been made to implement the Site Access Requirement.

[163] Before concluding our view as to whether Mt Arthur met its consultation obligations, it is necessary to deal with an issue raised by counsel for the Applicants during the course of oral argument. Counsel for the Applicants invited us to draw a *Jones v Dunkel*[170] inference in respect of the Respondent's failure to call Mr Basto, President of BHP Minerals Australia:

> 'Mr Basto, who was present in the Brisbane office yesterday, has not been called as a witness, and a Jones v Dunkel inference can be drawn that his evidence would not have assisted the respondent generally, but, in particular on the question of whether the decision of 7 October was irrevocable it also wouldn't have assisted the respondent.'[171]

[164] The Union Interveners also remark upon the failure to call Mr Basto, in the course of their written reply submissions filed on 23 November 2021:

> 'It is telling, then, that Mr Basto has not given evidence. A factor in consultation is whether or not the person who made the decision was actually open minded during the process and the extent to which he or she engaged with those being consulted and their ideas. It is only Mr Basto who can ultimately speak to his own state of mind; and he has chosen not to give evidence. This means that the Full Bench can more comfortably draw adverse inferences against the respondent that are available on the evidence where Mr Basto could have been expected to give contrary evidence. This is not a case where a party can explain away its decision not to call a person because sufficient evidence has already been given by others about the subject matters which the missing witness could have given evidence about. There is no accumulation rationale here, because it is only Mr Basto who can give evidence of his state of mind.'[172]

[165] The rule in *Jones v Dunkel* has been aptly described as 'a rule of common sense and fairness in relation to the fact finding process.'[173] As the 'rule' is fundamentally concerned with issues of fairness, the Commission will give consideration to its application in an appropriate case. It applies in circumstances where a party fails to call a witness, where it would be natural for them to do so, or where the party might be reasonably expected to call the witness.[174] The rule was considered extensively in *Tamayo v Alsco Linen Service Pty Ltd*[175] and we adopt the observations there made.

[166] A breach of the 'rule' may lead to the drawing of an adverse inference. The inference that may be drawn is ordinarily that the uncalled evidence would not have helped the party's

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[170] (1959) 101 CLR 298.

[171] Transcript, 25 November 2021 at PN1651.

[172] Reply Submissions of AMWU and the CEPU, 23 November 2021 at [28].

[173] *Xiu Zhen Huang v Rheem Australia Pty Ltd* Print 954993, 9 February 2005 per Lawler VP, Leary DP and Deegan C at [33]; applied in *Hyde v Serco Australia Pty Limited T/A Serco Australia Pty Limited* [2018] FWCFB 3989.

[174] See decision of the Full Bench in *Tamayo v Alsco Linen Service Pty Ltd*, Print P1859, 25 February 1997.

[175] Print P1859, 4 November 1997 per Ross VP, Drake DP and Cargill C. Also see *Hyde v Serco Australia Pty Limited T/A Serco Australia Pty Limited* [2018] FWCFB 3989.

case; not an inference that the uncalled evidence would have been positively unfavourable to the party's case or positively favourable to the opposing party's case;[176] though it may result in a more ready acceptance of the opposing party's evidence on the fact in question. Whether such an adverse inference is drawn is a matter of discretion; an adverse inference is not *required* to be drawn by the unexplained failure to call a witness.

[167] The rule is most usually invoked in relation to the unexplained failure of a party to call a witness who is in that party's 'camp'. A party is not necessarily expected to call their own employees, though the more senior employee the more reason for concluding that the employee's knowledge is available to his or her employer rather than any other party.[177] The significance of the inference depends on the closeness of the relationship of the absent witness with the party who did not call the witness. Considerable significance may attach if the absent witness is either the party or a senior executive of a corporate party closely involved in the circumstances in question and present during the hearing of the case.[178]

[168] Mr Basto is the President of BHP Minerals Australia and as the Respondent's submissions make clear, it was Mr Basto 'who made the final decision to implement the Site Access Requirement'.[179] This was confirmed by Witness R4 during cross-examination:

> 'Counsel: You didn't have any choice other than to introduce it at Mt Arthur did you?
>
> Witness R4: That's correct, when Mr Basto had made that decision and announcement, that's correct.'[180]

[169] Mr Dalheimer confirmed that Mr Basto was present in Brisbane on the day Mr Dalheimer and Witness R4 gave evidence.[181]

[170] The *Jones v Dunkel* point is taken in the context of the following argument advanced by the Applicants:

> 'The suggestion in some of the evidence of lower level managers, who were answerable to Mr Basto, that they were open to revisit this decision should be treated as irrelevant. They weren't in a position to revisit the decision. Alternatively we suggest that the evidence should be rejected. It's not supported by any contemporaneous documents such as minutes or records of meetings that occurred after 7 October.'[182]

[171] Counsel for the Respondent did not address the Applicants' *Jones v Dunkel* point, despite the opportunity to do so during his oral submissions in reply.

[172] We will draw the inference that the uncalled evidence would not have assisted the Respondent's case. We also find that once the Site Access Requirement decision was announced on 7 October 2021, neither BHP nor Mt Arthur had an open mind as to whether the

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[176] *Brandi v Mingot* (1976) 12 ALR 551 at 559-560 per Gibbs ACJ, Stephen, Mason and Aickin JJ; *R v Buckland* [1977] 2 NSWLR 452 at 457.
[177] *Earle v. Castlemaine District Community Hospital* (1974) VR 722 at 728 and 734.
[178] *Dilosa v. Latec Finance Pty Ltd* (1966) 84 WN (Pt 1) (NSW) 557 at 582.

[179] Respondent Submissions, 16 November 2021 at [104(d)].

[180] Transcript, 24 November 2021 at PN1225.

[181] Transcript, 24 November 2021 at PN438-439.

[182] Transcript, 25 November 2021 at PN1650.

Site Access Requirement would be imposed. The 7 October 2021 announcement stated that BHP 'will introduce' the Site Access Requirement and the consultation that would take place after the announcement was limited to the 'implementation of this decision'.[183] The terms of this announcement, coupled with Witness R4's evidence that after the 7 October 2021 announcement he did not have a choice other than to introduce the Site Access Requirement at the Mine, satisfy us that the decision communicated to employees on 7 October 2021 was not open for reconsideration. We do not accept evidence to the contrary given by managers less senior than Mr Basto, such as Witness R2.[184]

[173] We have earlier set out what is required by ss.47-49 of the WHS Act. We have also reached the conclusion that the Code is relevant to our consideration of whether the Respondent met its obligations under the WHS Act.

[174] The process undertaken by the Respondent and BHP in relation to the decision to implement of the Site Access Requirement has been set out above. In our view, the Employees were not given a reasonable opportunity to express their views and to raise work health or safety issues, or to contribute to the decision-making process relating to the decision to introduce the Site Access Requirement. They were not provided with information relating to the reasons, rationale and data supporting the proposal, nor were they given a copy of the risk assessment or informed of the analysis that informed that assessment. In effect the Employees were only asked to comment on the ultimate question: should the Site Access Requirement be imposed? The contrast in the consultation or engagement with Employees in the implementation phase compared to the assessment phase is stark and suggests that during the assessment phase the Respondent was not consulting *as far as is reasonably practicable* as required by s.47 of the WHS Act. There was no real explanation provided by the Respondent as to why there was a markedly lower level of engagement during the assessment phase.

[175] We do not consider that HSRs were involved in any consultation in any meaningful way as required by s.48(2) and we note that established mechanisms such as health and safety committee meetings were not used for this purpose. We agree with the Applicants that the language used in the 31 August 2021 communication demonstrates that the Employees would not be consulted in a meaningful way prior to a decision being made by BHP about the Site Access Requirement. Accordingly, we are not satisfied that there was consultation in accordance with ss.47 and 48 of the WHS Act. In reaching this conclusion, we have taken the guidance provided by the Code into account.

[176] Even if we are wrong in our conclusion that there has been a failure to meaningfully consult as required by s.48, we consider that the inadequacy of the consultations undertaken with the Employees prior to the announcement of the Site Access Requirement on 7 October 2021 is relevant to the reasonableness of the Site Access Requirement.

[177] For completeness, we note that the Applicants submit that the Respondent did not consult with the Employees at all, rather, to the extent that there was consultation, it was BHP who carried this out. The Respondent has indicated that consultation steps undertaken by BHP in relation to the Mine were as the Respondent's agent.[185] Ai Group also notes that it is common for WHS and other communications and services to be led by head office or a particular entity

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[183] Exhibit R6 at pp 103-4.

[184] Exhibit R3 at [16].

[185] Respondent Submissions, 16 November 2021 at [104(d)].

in major corporate groups, and that if 'larger corporate groupings were unable to satisfy a consultation requirement by deploying common resources toward that end, this would significantly curtail the capacity of such entities to implement consistent policies aimed at protecting the work health and safety of all employees of entities in the corporate group.'[186]

[178] We have considered the substance of the communications between BHP and Mt Arthur and the Employees in assessing the adequacy of the consultation process undertaken. Given the conclusion reached above, we have not felt it necessary to express a concluded view on this point.

[179] As noted at [85] above, we consider that 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.[187]

[180] However, the ACTU contends that '[t]he lawfulness of a direction is not exhausted by considering whether the subject matter of the direction falls within the scope or subject matter of the employment, but extends further to a consideration of the employment (and other) laws that bear upon that subject.'[188] A similar point is made by the Applicants and the Union Interveners. This is said to extend to breaches of statutory obligations such as the duties in ss.47 and 70 of the WHS Act.

[181] We note that there appears to be no judicial authority directly on the point. For reasons which will become apparent, we do not feel it necessary to express a concluded view on this point. However, we make the following observations.

[182] The Respondent submits:

> 'It is an offence not to comply with section 47 of the WHS Act. Section 47 prescribes that the consequence of a failure to discharge the duty that it prescribes is liability for a civil penalty to the stipulated maximum amount. In this respect, section 47 should be taken to be a code, and the fact that it does not say anything about the invalidation of a decision taken in the absence of compliance with the duty it creates should be taken to be deliberate. This is particularly so given that any failure to meet the requirements of section 47 would result in the unwinding of the implementation of a safety control, exposing both the employer and employees to the very risk that the employer seeks to manage in compliance with its lawful obligations. That would be contrary to the purposes of the WHS Act.'[189]

[183] No other party endorses the proposition that (in the respect outlined by the Respondent) s.47 should be taken to be a code, and the Applicants, ACTU and the Union Interveners expressly reject this.[190] In the absence of judicial authority on this point, we do not consider it

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[186] Ai Group Submission in response to the background paper, 23 November 2021 at [21]-[22].

[187] ACCI Submissions, 16 November 2021 at [3.12].

[188] ACTU Outline of Submissions, 11 November 2021 at [8].

[189] Respondent Submissions, 16 November 2021 at [107].

[190] Applicants' Outline of Submissions in Response to Background Paper, 23 November 2021 at [31]; Reply Submissions of the AMWU and CEPU, 23 November 2021 at [39]; ACTU Submissions in response to the Full Bench's questions and in reply, 23 November 2021 at [42].

appropriate, or necessary, to express a concluded view as to whether or not s.47 of the WHS Act constitutes a code.

[184] Instead, we focus our attention on whether, as submitted by the Respondent, Ai Group and ACCI, the WHS Act does not prohibit, and does not render unlawful or otherwise invalidate, an employer direction issued without compliance with the consultation obligations in the WHS Act.[191] For example, Ai Group submits in support that 'neither the text of ss.47 to 49 or consideration of the broader scheme of the legislation supports a view that non-compliance with the duty to consult under the [WHS] Act invalidates or otherwise renders unlawful a direction of an employer flowing from a decision by the employer as to how it will meet its health and safety duties under the WHS Act.'[192] In addition to the Respondent, Ai Group and ACCI also draw attention to the 'potentially dire' or 'significant unintended and adverse' consequences that could arise if non-compliance with consultation obligations rendered a direction unlawful, and that Parliament has included specific penalties in the WHS Act for breaches of the consultation provisions to avoid this.[193] Such an outcome would be contrary to the purpose of the WHS Act and also, the Respondent submits, to the 'hierarchy' of duties in the WHS Act.[194]

[185] We are aware that the Parties hold a number of divergent views about the consequences of non-compliance with the statutory duty to consult (and other statutory requirements), and the propositions to be drawn from the cases referred to in the Background Paper at questions 11 and 12. We have considered all of those submissions in making the following preliminary observations.

[186] We agree that *Project Blue Sky Inc v Australian Broadcasting Authority*[195] is authority for the proposition that government action taken in breach of a statute is not necessarily invalid and that the consequences of non-compliance is a matter of statutory interpretation.

[187] For the reasons outlined in the submissions of the AMWU and CEPU,[196] the cases referred to in the Background Paper[197] can be distinguished on the grounds that they concerned the exercise of a statutory power which is subject to preconditions which may, or may not, result in the exercise being invalid. [198] In this case, we agree with ACCI's position that the Respondent's authority to issue the direction was not derived from the WHS Act nor any industrial instrument, but from the exercise of an implied contractual power to direct.[199]

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[191] See, for example, Respondent Submissions, 16 November 2021 at [106]; ACCI Submissions, 16 November 2021 at [3.6]; Ai Group Submission in response to the background paper, 23 November 2021 at [34].

[192] Ai Group Submission in response to the background paper, 23 November 2021 at [36].

[193] Ai Group Submissions, 16 November 2021 at [91]-[93] and Further supplementary submissions of ACCI , 23 November 2021 at [12.9].

[194] Respondent Answers to the Full Bench's Questions, 23 November 2021 at pp.14-15.

[195] (1998) 194 CLR 355.

[196] Reply submissions of the AMWU and CEPU at [41].

[197] Under questions 11 and 12 of the Background Paper, in addition to Saunders DP's decision on the application for interim relief, to the extent considered relevant, the parties were requested to consider the decisions of *TVW Enterprises Ltd v Duffy* [1985] FCA 525, (1985) 8 FCR 93, *Kutlu v Director of Professional Services Review* [2011] FCAFC 94 and *Project Blue Sky v Australian Broadcasting Authority (S41-1997)* [1998] HCA 28 (and any other authorities).

[198] Such as the exercises of power addressed, with differing outcomes, in *TVW Enterprises Ltd v Duffy* (1985) 8 FCR 93 and *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177.

[199] ACCI submission, 16 November 2021 at 3.16-3.21.

[188] Accordingly, it seems to us that a failure to consult in accordance with the WHS Act does not have the effect of *invalidating* a direction issued pursuant to an implied contractual power.

[189] The AMWU and CEPU further submit that the Respondent wrongly conflates the concepts of 'invalidity' and 'unlawfulness', and even making an assumption in the Respondent's favour that the Site Access Requirement is not invalid, a breach of a statutory provision still makes them unlawful. The submission references the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* in support of this point:[200]

> 'In a case like the present, however, the difference between holding an act done in breach of s 160 is invalid and holding it is valid is likely to be of significance only in respect of actions already carried out by, or done in reliance on, the conduct of, the ABA. Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision "may in particular cases be punishable". That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.'

[190] The Applicants and ACTU make the same argument that a direction that fails to comply with a statutory provision applicable to its making (or put slightly differently, that is contrary to statutory norms of conduct, punishable by the imposition of penalties) renders the direction unlawful.

[191] In the circumstances, we do not need to express a concluded view on whether a failure to comply with the statutory duties in the WHS Act goes to the lawfulness of a direction – we consider that it is plainly relevant to reasonableness having regard to the approach in *Darling*.

[192] There is one final matter relevant to the consultation issue. In the event that we concluded that there had been a failure to consult in accordance with s.47 of the WHS Act, the Respondent advanced the following, alternative, submission:

> '… if there was <u>not compliance with section 47 of the WHS Act</u>, that is a relevant consideration in the assessment of the reasonableness of the direction, but it is not governing, and <u>in this case is not determinative of the objective reasonableness of the direction</u>. That is because there is no basis in the evidence to conclude that any further consultation might have resulted in a decision not to direct compliance with the Site Access Requirement. Neither the CFMMEU nor any of the intervenors point to any thought, idea or suggestion pertaining to the Site Access Requirement that has a factual basis and was not in fact taken into account during the decision-making process.'[201] (Emphasis added)

[193] The gravamen of the submission put is that any failure by Mt Arthur to comply with its consultation obligations is *not* determinative of the objective reasonableness of the direction given *because* there is no basis to conclude that any further consultation might have resulted in a decision not to direct compliance with the Site Access Requirement.

[194] The submission put is misconceived for 2 reasons.

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[200] (1998) 194 CLR 355 at [100] (McHugh, Gummow, Kirby and Hayne JJ).

[201] Respondent Submissions, 16 November 2021 at [122].

[195] First, the outcome of any further consultation is not to be simply viewed through a binary prism; that is, whether or not Mt Arthur would direct compliance with the Site Access Requirement. The terms of the Site Access Requirement itself and the consequences of any failure to comply with it are also matters which may be the subject of amendment, following further consultation. As mentioned earlier, the responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they can be taken into account; it is not a mere perfunctory exercise.

[196] Second, the relevance of a failure to consult to the assessment of the reasonableness of a direction is not determined by the *likelihood* of the success of further consultation, it is sufficient if the failure to consult denied the Employees the *possibility of a different outcome*. As the High Court held in *Stead v State Government Insurance Commission*[202], in the context of a denial of natural justice:

> '… if the Full Court is properly to be understood as saying no more than that a new trial would probably make no difference to the result, their Honours failed to apply the correct criterion. All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.'[203]

[197] In *QR Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia*[204] (*QR Ltd*) the Full Federal Court considered the consequences of a failure by QR Ltd to consult with employees as required by clause 36 of the *QR Limited Traincrew Union Collective Workplace Agreement 2009* (the QR Agreement). The requirement to consult arose from an announcement by the Queensland Premier that the group of government-owned rail corporations would be partially privatised. Clause 36.2 of the QR Agreement provided, relevantly, that 'The Company will consult with affected employees and, at the employees' election, their nominated representatives, over any proposed changes that will have an impact on employees' terms and conditions of employment'. The proceedings in the Federal Court sought the imposition of pecuniary penalties under s.546 of the FW Act for contravention of the obligation to consult. The primary judge upheld the claim. On appeal Keane CJ and Marshall J held:

> '… the exigencies of implementing that [privatisation] decision necessarily gave rise to matters for decision by the appellants which fell within the scope of the consultation obligation …
>
> the employees were entitled to an opportunity to urge a different approach to the implementation of the privatisation decision. There may have been little likelihood that the QR employers would be persuaded to take a different position, given the attitude of their shareholders, but cl 36.2 is not concerned with the likelihood of success of the consultative process. It is concerned simply to ensure that consultation occurs, before a decision is made to implement a proposal.'[205]

[198] Their Honours went on to observe that a requirement to consult employees 'constitutes an intrusion upon the managerial prerogative of employers; but the legitimacy of such intrusion

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[202] (1986) 161 CLR 141.

[203] Ibid at p 147. Also see *Re Refugee Review Tribunal and Another Ex parte AALA* (2000-2001) 204 CLR 82 at 116 per Gaudron and Gummow JJ.

[204] [2010] FCAFC 150; (2010) 204 IR 142.

[205] Ibid at [31]–[32]; Gray J, at [67], generally agreed with their Honours' reasons.

and the importance attached to such provisions has long been recognised',[206] citing Murphy J in *Federated Clerks' Union (Aust) v Victorian Employers' Federation,*[207] where his Honour said:

> 'During this generation, there has been an accelerating trend towards concentration of economic power in fewer and fewer persons. The growth of the great national corporations, their mergers and expansion into transnationals have transformed the methods of production, distribution and exchange. The power of the greatest corporations transcends that of most governments. A reaction to the submergence of the individual worker is the demand by organized workers for some share in deciding what work is to be done, by whom and when, where, and how it is to be done. The thrust of the demand is not merely the improvement in existing pay and conditions. It extends to the protection of jobs, for themselves treated as more than wage-hands — to be treated as men and women who should be informed about decisions which might materially affect their future, and to be consulted on them. It is a demand to be emancipated from the industrial serfdom which will otherwise be produced by the domination of the corporations; a demand to be treated with respect and dignity.'[208]

[199] Mt Arthur's failure to meaningfully consult with the Employees denied the Employees the opportunity to influence the Respondent in its decision-making process and the possibility of a different outcome. We are *not* persuaded that further consultation could not possibly have produced a different result.

[200] Further, unlike the situation in *QR Ltd*, the decision to introduce the Site Access Requirement was not imposed on the Respondent by an external decision-maker through a public health order but was made by the Respondent (in association with BHP) as part of BHP's organisation-wide response to the COVID-19 pandemic.

[201] The deficiencies in the consultation process tell against a conclusion that the Site Access Requirement was a reasonable direction.

5.3 The Privacy Act

[202] The Applicants submit that the Site Access Requirement is unlawful or involves unlawfulness, or in the alternative that it is not a reasonable direction, because the Respondent has not complied with its obligations under the Privacy Act.

[203] The Applicants submit that collecting information from the Employees about their vaccination status is integral to the mandatory nature of the Site Access Requirement, and say:

> '… any suggestion that the Site Access Requirement involves giving consent voluntarily is belied by the consequence of an employee not providing the respondent with his or her vaccination status, namely exclusion from the Mine and disciplinary proceedings with the consequence of possible dismissal from employment'.[209]

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[206] Ibid at [14].

[207] (1984) 154 CLR 472.

[208] Ibid at 493-494, cited in *QR Ltd* at [14].

[209] Applicants Outline of Submissions in reply, 23 November 2021 at [30].

[204] The Respondent submits that the direction does not contravene the Privacy Act but that even if it did, that would not invalidate the direction.[210] It accepts that it is bound by the Privacy Act not to collect health information about its employees unless they consent to the collection of the information. The Respondent, Ai Group and ACCI submit that the Site Access Requirement does not require the Respondent to collect,[211] or the Employees to provide, [212] information about their vaccination status.

[205] ACCI submits that the Commission needs to be careful that it does not exceed its jurisdiction in considering the Applicants' submission in relation to the Privacy Act, because it needs to be conscious that the dispute to be resolved is whether the Site Access Requirement, as outlined in Attachments 1 and 2 to the Applicants' application, is lawful and reasonable. It submits that the subject of the dispute is a direction to be vaccinated in order to enter the site, not a direction to provide vaccination information.[213]

[206] While Attachment 1 to the Applicants' application does not deal with providing vaccination information, Attachment 2 states that to retain access to NSW Energy Coal workplaces, 'evidence of a second vaccination dose will need to be provided by 31 January 2022'. In our view, the requirement to provide vaccination information is part of the direction and so falls within the scope of the dispute before us.

[207] It is uncontentious that the Respondent and BHP have responsibilities under the Privacy Act. The Respondent is an organisation as defined in s.6C of the Privacy Act and therefore an 'APP entity',[214] and it is required to comply with the Australian Privacy Principles (APPs) in relation to collection of personal information from the Employees.[215] An APP entity 'collects' personal information 'only if the entity collects the personal information for inclusion in a record or generally available publication'.[216] A 'record' includes a document or an electronic or other device.[217] An APP entity must collect personal information only by fair and lawful means.[218]

[208] APP 3.3 provides that an APP entity that is an organisation must not collect 'sensitive information' about an individual unless the individual consents and the information is reasonably necessary for one or more of the organisation's functions or activities. 'Sensitive information' includes health information about an individual,[219] which would include information about a person's vaccination status. The requirement to have consent to the collection of sensitive information in APP 3.3. is subject to the exceptions in APP 3.4, which include:

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[210] Respondent Submissions, 16 November 2021 at [113].

[211] Ai Group Reply Submission, 16 November 2021 at [110]-[111].

[212] ACCI Submission, 16 November 2021 at [4.1]-[4.7]; Respondent Submissions, 16 November 2021 at [113].

[213] Transcript of 25 November 2021 at PN 1984.

[214] Privacy Act, s.6.

[215] Privacy Act, s.15.

[216] Privacy Act, s.6.

[217] Ibid.

[218] Privacy Act, APP 3.5.

[219] Privacy Act, s.6.

- where the collection of the information is required or authorised by an Australian law.[220] This could include where required under public health orders or directions,[221] and
- where the APP entity is an organisation, and a permitted general situation exists in relation to the collection of information by the APP entity.[222] This includes where the APP entity reasonably believes that the collection is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.[223]

[209] 'Consent' in APP 3.3. means 'express or implied consent'.[224] The Australian Privacy Principles Guidelines issued by the Australian Information Commissioner under s.28(1) of the Privacy Act explain:

> '… The four key elements of consent are:
>
> - the individual is adequately informed before giving consent
> - the individual gives consent voluntarily
> - the consent is current and specific, and
> - the individual has the capacity to understand and communicate their consent.'[225]

[210] Guidance issued by the Office of the Australian Information Commissioner on COVID-19 vaccinations and privacy obligations explains:

> 'Consent to collecting vaccination status information must be freely given and constitute valid consent. You must make sure that your employees understand why you need to collect this information, what you will use it for, and give them a genuine opportunity to provide or withhold consent. You should exercise caution in seeking consent in these circumstances given the imbalance of power in the employment relationship that may cause employees to feel pressured or obligated to provide their consent.
>
> Public health advice will be useful to inform what information, including vaccination status information, is reasonably necessary to prevent or manage COVID-19. Applicable workplace laws and contractual obligations will also influence whether the collection of vaccination status information would be considered reasonably necessary for your activities or functions.

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[220] Privacy Act, APP 3.4(a)

[221] See Coronavirus (COVID-19) Vaccinations: Understanding your privacy obligations to your staff, available at https://www.oaic.gov.au/privacy/guidance-and-advice/coronavirus-covid-19-vaccinations-understanding-your-privacy-obligations-to-your-staff.

[222] Privacy Act, APP 3.4(b)

[223] Privacy Act, s.16A.

[224] Privacy Act, s.6.

[225] Australian Information Commissioner, *Australian Privacy Principles Guidelines*, available at https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines, at B.35.

> Where you have provided a lawful and reasonable direction to your employee to be vaccinated, you can also ask your employee to provide evidence of their vaccination if you are satisfied that this is reasonably necessary and you have obtained the employee's consent.'[226]

[211] In *Lee v Superior Wood Pty Ltd* (*Lee*),[227] the Full Bench considered whether the Applicant provided genuine consent to the collection of his sensitive information, being fingerprint data. The Full Bench observed that 'any "consent" that he might have given once told that he faced discipline or dismissal would likely have been vitiated by the threat. It would not have been genuine consent.'[228]

[212] We note here that *Lee* was not relied on by any of the parties and nor was the correctness or otherwise of the decision subject to any comment by any party.

[213] APP 5 requires that at or before the time that personal information is collected, or if that is not practicable, as soon as practicable afterwards, an APP entity must take reasonable steps to notify or ensure the individual is aware of matters referred to in APP 5.2.[229] Those matters include the purpose for which the information is collected and the ways in which the information may be used or disclosed.

[214] On the limited information before us, we are unable to reach a concluded view about whether the Respondent has breached its privacy obligations, including whether an APP 3.4 exception to the requirement for consent to the collection of sensitive information applies. In any event, it is unnecessary for us to do so given the conclusion we reach in relation to the reasonableness of the direction.

5.4 Bodily Integrity

[215] The Union Interveners contend that the Site Access Requirement 'at least impacts upon the choice of an individual to undergo a medical procedure' and hence engages the common law right to personal and bodily autonomy and integrity. *Prima facie*, any physical contact to a person or threat of physical contact is unlawful as a corollary of the right in each person to bodily integrity, that is, the right in an individual to choose what occurs with respect to his or her own person.[230]

[216] In *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (*Marion's Case*),[231] Mason CJ, Dawson, Toohey and Gaudron JJ identified a 'right in each person to bodily integrity [t]hat is to say, the right to an individual to choose what occurs with respect to his or her own person'.[232]

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[226] Coronavirus (COVID-19) Vaccinations: Understanding your privacy obligations to your staff, available at https://www.oaic.gov.au/privacy/guidance-and-advice/coronavirus-covid-19-vaccinations-understanding-your-privacy-obligations-to-your-staff.

[227] *Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946.

[228] Ibid at [58].

[229] Privacy Act, APP 5.1.

[230] AMWU/CEPU submissions at [11].

[231] (1992) 175 CLR 218 (Marion's case).

[232] Ibid at 233.

[217] *Marion's Case* concerned the power of the Family Court to authorise the sterilisation by hysterectomy and an ovariectomy of an intellectually disabled young woman who was incapable of giving consent. The case was determined in circumstances where a medical procedure undertaken without consent is a violation of the right to bodily integrity and *prima facie* an assault.[233]

[218] The existence of such a right is uncontroversial but the right is not violated by the terms of the Site Access Requirement. Unlike the circumstances in *Marion's Case*, the Site Access Requirement does not purport to confer authority on anyone to perform a medical procedure on anyone else. As Beech-Jones CJ at CL said in *Kassam v Hazzard*:[234]

> 'It can be accepted that there is room for debate at the boundaries of what external factors might vitiate a consent to medical treatment so as to render the treatment a battery and a violation of a person's right to bodily integrity. [...] People may choose to be vaccinated or undertake some other form of medical procedure in response to various forms of societal pressure including a law or a rule, an employment condition or to avoid familial or social resentment, even scorn. However, if they do so, that does not mean their consent is vitiated or make the doctor who performed the vaccination liable for assault. So far as this case is concerned, a consent to a vaccination is not vitiated and a person's right to bodily integrity is not violated just because a person agrees to be vaccinated to avoid a general prohibition on movement or to obtain entry onto a construction site. Clauses 4.3 and 5.8 of [*Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No. 2) 2021* (NSW)] do not violate any person's right to bodily integrity any more than a provision requiring a person undergo a medical examination before commencing employment does.' [Emphasis added]

[219] The Union Interveners accept that the Site Access Requirement does not, itself, force any employee to undergo vaccination,[235] and that it remains open to an employee to decline to become vaccinated. They submit, however, that:

> '…it is contemplated that the failure of an employee to become vaccinated will have consequences for the employment, most likely termination. This is a relevant factor in considering the reasonableness of the vaccination direction. It imposes a practical compulsion to get vaccinated in order for an employee to retain employment. Indeed, that would seem to be the very purpose of making the direction'.[236]

[220] The effect of the Site Access Requirement is that an employee who fails to become vaccinated faces disciplinary action up to and including the termination of their employment. Employment is important to an individual's dignity and self worth.[237] The Respondent acknowledges that absent medical contraindications, it is a choice between being vaccinated and continuing to be employed by Mt Arthur.[238] As the Respondent puts it:

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[233] Ibid.

[234] [2021] NSWSC 1320.

[235] Submission of the AMWU and CEPU at [15].

[236] Ibid.

[237] *Quinn v Overland* [2010] FCA 799 at [101]; approved in Maritime Union of Australia v Fair Work Ombudsman [2016] FCAFC 102 at [22] per Tracey and Buchanan JJ. Also see ZZ v Secretary to the Department of Justice [2013] VSC 267 at [87] per Bell J.

[238] Transcript, 25 November 2021 at PN1891.

> 'we accept that those workers who don't wish to comply with that requirement must now make a choice, and we accept that it's a hard choice.'[239]

[221] In *Four Aviation Security Service Employees v Minister of COVID-19 Response,* Cooke J considered whether a public health order requiring aviation security workers to be vaccinated was a justified limit on the right to refuse to undergo medical treatment in s.11 of the *New Zealand Bill of Rights Act 1990.* While ultimately finding that in the circumstances the order was a justified limit on that right, his Honour observed:[240]

> '[29] …Whilst persons in the position of the applicants are not being forcibly treated in the sense that they can decline to be vaccinated, they are required to be vaccinated as a condition of their employment and to decline to do so can, and has, led to termination. A right does not need to be taken away in its entirety before it is regarded as having been limited…
>
> [30] It is a matter of degree whether practical pressure to undergo a medical treatment will be taken to have limited the right to refuse that treatment. Here the level of pressure is significant and amounts to coercion. The employees are forced to be vaccinated or potentially lose their jobs. This involves both economic and social pressure…'

[222] While we would demur from the proposition that the Site Access Requirement constitutes coercion in the legal sense, we accept that it is a form of economic and social pressure.

[223] The practical effect of the Site Access Requirement is to apply pressure to employees to surrender their bodily integrity (by undergoing medical treatment) in circumstances where they would prefer not to do so. In our view, this is plainly a relevant matter in assessing the reasonableness of the direction. However, we also accept that this factor is not determinative of the question of reasonableness; it is a consideration to be weighed in the balance with the other relevant considerations. As counsel for the Respondent put it in the course of oral argument:

> 'Mt Arthur Coal acknowledges, that every worker on the mine has a right to their bodily integrity, but, as we have pointed out in our written submissions, that is a right that in every case must be balanced against other rights …'[241]

[224] The practical effect of the Site Access Requirement also underscores the significance of the failure to meaningfully consult with the Employees prior to the decision to introduce the Requirement. It is common knowledge that some citizens feel very strongly about their bodily integrity and do not wish to be vaccinated. A minority of the Employees appear to hold such views. It is particularly important that these employees be heard; that they be consulted and their views be taken into account.

5.5 Other relevant circumstances?

[225] The Applicants submit that the BHP Announcement and the BHP Rationale demonstrate that there is not a reasonable basis for the Site Access Requirement in relation to the

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[239] Transcript, 25 November 2021 at PN1891.

[240] *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012

[241] Transcript, 25 November 2021 at PN1889. We note that Mt Arthur goes on to submit that a worker's right to bodily integrity does not 'trump' Mt Arthurs right to discharge its statutory and common law obligations.

Employees.[242] In relation to the question of whether the Site Access Requirement is reasonable, the Applicants submit:

> 'First, a reasonable direction for mandatory vaccination should have regard to the circumstances of the particular workplace. However, the Site Access Requirement is not directed at the circumstances of the Mine. It applies at a variety of workplaces across Australia and does not take into account the different circumstances at each of these workplaces.' [243]

[226] The Applicants submit that the BHP Rationale did not have regard to all factors that Safe Work Australia (**SWA**) identifies in its guidance on whether a requirement for workers to be vaccinated is 'reasonably practicable'. The Applicants submit that having regard to these factors and the specific circumstances at the Mine, the Site Access Requirement is not reasonable.[244]

[227] Further, the Applicants contend that there is nothing in the BHP Rationale to suggest that BHP or Mt Arthur had regard to the matters set out in s.19 of the WHS Act or conducted the balancing exercise required by the qualification of reasonable practicability in s.19. In the circumstances, the Applicants submit that s.19 of the WHS Act does not provide a proper basis for the Site Access Requirement and that the Requirement is not 'reasonably practicable' for the purposes of s.19.

[228] By s.17, the duties under ss.19 and 20 of the WHS Act require that the duty holder eliminate risks to health and safety so far as that is reasonably practicable, and if that cannot be done, to minimise those risks so far as is reasonably practicable. We accept that the duty of care in s.19 of the WHS Act is separate and additional to the common law obligation upon employers to take reasonable care for the health and safety of employees at work.

[229] 'Reasonably practicable' is defined in s.18 of the WHS Act. In *Slivak v Lurgi (Australia) Pty Ltd,*[245] the High Court considered the extent of the obligation on 'the designer of any structure to be erected in the course of any work' in s.24(2a)(a) of the *Occupational Health, Safety and Welfare Act 1986* (SA) to 'ensure so far as is reasonably practicable that the structure is designed so that the persons who are required to erect it are, in doing so, safe from injury and risks to health'.

[230] Gaudron J described the duty imposed by s.24(2a)(a) as:

> 'a duty to ensure the safety of construction workers, not simply to prevent a foreseeable risk of injury to them.
>
> 'The statutory duty is a duty to protect against all risks to construction workers, if that is reasonably practicable …
>
> … Once it is accepted that the statutory duty is to design a structure that is as safe as reasonably practicable for construction workers, it follows that the designer is required to incorporate safety features in the design to ensure the safety of those workers if those features are reasonably

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[242] Applicants Submission, 9 November 2021 at [58].

[243] Applicants Submission, 9 November 2021 at [59].

[244] Applicants Submission, 9 November 2021 at [62].

[245] *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at [52].

> practicable. That imposes a much higher standard than the exercise of reasonable care in designing a structure.
>
> The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:
>
> - the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
>
> - what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
>
> - to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.' (References omitted) [at 51-53]

[231] We agree that the element of reasonable practicability means that a duty holder does not have to take every possible step that could be taken in response to a work health and safety risk. The steps that have to be taken in order to discharge the duty in s.19 of the WHS Act are those steps that are reasonably practicable.[246] That is a 'much higher standard than the exercise of reasonable care'.[247]

[232] Mt Arthur has determined that 'it must implement the Site Access Requirement in the circumstances in order to comply with its duties under ss.19 and 20'.[248]

[233] We do not need to decide whether or not the Respondent was *required* by the WHS Act to introduce the Site Access Requirement, as that does not answer whether the Requirement constitutes a lawful and reasonable direction. To be lawful and reasonable, a direction does not need to be founded on a statutory source of power. We acknowledge that some of the parties in this matter submitted that in addition to being a direction pursuant to an implied contractual term, an alternative source of power for the Site Access Requirement was s.19(3) of the WHS Act.[249] However, that point was not strongly advanced before us and it is not necessary for us to decide it given the question we have been directed to answer.

[234] In the Application, the CFMMEU has affirmed its 'policy position of strongly supporting the vaccination of the highest possible number of Australians as the most practical measure to prevent serious illness and death from the Covid 19 virus'.[250] On the evidence before us, we agree with this proposition.

[235] In the circumstances, we are not persuaded that the Site Access Requirement is not reasonable because it is said, in essence, that its introduction was not demanded by s.19 of the

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[246] *R v Commercial Industrial Construction Group Ltd* (2006) 14 VR 321 at [30].

[247] *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at [52].

[248] Respondent's submissions, 19 October 2021 at [68] to [73].

[249] Application, 19 October 2021, Question 2.1 at [17].

[250] Application, 19 October 2021, Question 2.1 at [17].

WHS Act. Other factors relevant to the reasonableness of the Site Access Requirement are considered further below.

[236] Turning to the other submissions in relation to the reasonableness of the Site Access Requirement, the AMWU and CEPU submit that the assessment of whether a vaccination direction by a particular employer is reasonable must depend on the circumstances of, and risks associated with, the particular employment. They submit that the following matters will be relevant to the Full Bench's assessment of the vaccination mandate in issue in this case, and in any other case:

- The health objective(s) that are sought to be achieved by introducing the vaccination mandate, and the cogency of the concerns and the risks. This should include consideration of the nature of the employment, the proportion of employees in the workplace who are unvaccinated and the level of community transmission in the relevant area.[251]
- Whether the health objectives of the employer can be achieved through alternative, less invasive, means. This could include, for example, physical distancing arrangements, changes to rostering practices, improving ventilation, implementation of good hygiene practices or altering the duties of employees. These are practical control measures that could reduce any risk of contracting or transmitting the COVID-19 virus to a reasonable level. If alternative measures are considered to be less efficacious than a vaccination mandate, the Full Bench should consider the extent of the marginal difference.[252]
- The views of those with public health expertise. This should include consideration of whether there are any public health orders in place that require vaccination, as well as advice, guidance or evidence from peak medical bodies or regulators.[253]
- The actions taken by comparable employers and the advice of relevant industry associations (for example NSW Mining).[254]
- The process undertaken by the employer including: consideration of the information the employer is acting upon, the risk assessments carried out, the alternatives considered, the consultation process and the transparency of the decision-making process.[255]
- The tailoring of the mandate including whether it permits consideration of individual cases or differentiates between different groups of employees (if this is warranted).[256]
- The impact on individuals. The effect of the Site Access Requirement is that an employee who fails to become vaccinated faces disciplinary action up to and including the likely loss of employment. [257]

[237] The Respondent submits that:

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[251] Submissions of the AMWU and CEPU, 9 November 2021 at [18]-[21].

[252] Submissions of the AMWU and CEPU, 9 November 2021 at [22].

[253] Submissions of the AMWU and CEPU, 9 November 2021 at [24]-[25].

[254] Submissions of the AMWU and CEPU, 9 November 2021 at [26]-[28].

[255] Submissions of the AMWU and CEPU, 9 November 2021 at [29]-[30].

[256] Submissions of the AMWU and CEPU, 9 November 2021 at [31].

[257] Submissions of the AMWU and CEPU, 9 November 2021 at [33].

- It has the statutory responsibilities of a mine operator under the Mine Safety Act, and of a PCBU under the WHS Act.[258]
- It is a 'residential mining operation' in that its workforce primarily resides in surrounding communities. As a consequence, its workforce has regular daily contact with their families and other members of the surrounding communities, and the Respondent cannot prevent workers from contracting COVID-19 outside work and bringing it with them when they are next on site.[259]
- BHP applies a single, group-wide approach to risk management. The Site Access Requirement was promulgated in accordance with the Respondent's safety management system, which informs the Respondent's decision-making process about all WHS matters.[260]
- COVID-19 can cause serious illness and is potentially fatal, and the Delta variant is more infections and has more severe health effects than previous variants. All COVID-19 vaccines currently available in Australia are effective at preventing symptomatic infection, with vaccination the most effective and efficient control available to combat the risks posed by COVID-19, but even with higher community rates of vaccination, COVID-19 remains a significant workplace hazard.[261]

[238] ACCI submits that where an employer direction is issued for the purpose of eliminating or reducing the risk of harm from a particular hazard, in assessing the reasonableness of any such direction, an assessment must be made as to:

- whether or not the risk exists;
- the probability of the risk event occurring (but not the fact that the risk event has never occurred at the particular workplace); and
- the impact/consequences associated with the risk event occurring.[262]

[239] Ai Group submits that employers have obligations under both statute and the common law to protect the health and safety of employees at work.[263] They submit that the Site Access Requirement is reasonable because it is underpinned or justified by the obligation upon the Respondent under s.19 of the WHS Act and the common law obligation upon employers to take reasonable care for the health and safety of employees at work.

[240] Ai Group also submits that the Site Access Requirement is a proportionate response to the gravity and nature of the risk posed by the pandemic to the work health and safety of the Employees and others working on the employer's site, and is appropriate given the utility of vaccination as a measure for protecting persons from serious illness and death, as well as in limiting the transmission of the virus.

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[258] Respondent Submissions, 16 November 2021 at [15] and [69].

[259] Respondent Submissions, 16 November 2021 at [17].

[260] Respondent Submissions, 16 November 2021 at [21].

[261] Respondent Submissions, 16 November 2021 at [23].

[262] ACCI Submissions, 16 November 2021 at [10.13]-[10.14].

[263] Ai Group Reply Submissions, 16 November 2021 at [41].

[241] Ai Group further submits that the Applicants' contention that there is less need for such intervention now than when vaccination rates were lower does not negate the need to protect employees at work, through the imposition of a vaccination requirement.[264]

[242] There are a range of factors relevant to the question of whether the Site Access Requirement was reasonable in the circumstances. In Chapter 3 of this Decision, we have set out the general factual propositions relating to the seriousness of COVID-19 and the effectiveness of the available vaccinations that we accept have been established on the evidence before us. We note that these propositions are also relevant to the reasonableness of the Site Access Requirement, particularly in relation to the protections offered by the COVID-19 vaccination.

[243] At the time the Site Access Requirement was introduced, the Hunter New England Local Health District, where the Mine is located, had the highest number of COVID-19 cases by local health district within NSW. In the 4 weeks up to 11 November 2021, the Hunter New England Local Health District had 1,528 locally acquired COVID-19 cases. This was more than any other local health district in NSW for that time period. NSW Government data on the number of cases as at 19 November records 0 cases in Muswellbrook. The surrounding LGAs record the following case numbers; 2 cases in Singleton, 41 cases in Cessnock, 15 cases in Maitland, 0 cases in Upper Hunter and 55 cases in Lake Macquarie.[265]

[244] The Local Government Area (LGA) in which the Mine is located is Muswellbrook. At the time that the Site Access Requirement was introduced, NSW Government data recorded the LGA as having a first vaccination rate of 81.3% and a fully vaccinated rate of 47.7%. As at 14 November, the figures had increased to >95% and 91.7% respectively. Similar improvements are recorded in the vaccination figures in nearby LGAs.[266]

[245] The Respondent submits that the risks associated with the removal of movement restrictions and reopening were a relevant factor in the assessment of the need for the Site Access Requirement and the timing of its implementation at the Mine. We have earlier accepted that the rates of infection of COVID-19, in the Hunter Region and throughout Australia, will increase over time.[267] 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. We also noted that Witness R5 expressed his opinion that 'with reopening the virus will spread through Australia, and [although] the timing in the given locations [is] not exact, in time it will spread to all locations, and be present in all work places.[268] 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. We also note that these considerations formed part of the risk analysis provided to BHP Executive leaders during the assessment phase. [269] We note here that the likely spread of

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[264] Ai Group Reply Submissions, 16 November 2021 at [76].

[265] Supplementary Statement of Peter Colley at [7].

[266] Supplementary Statement of Peter Colley at [6].

[267] Exhibit R12 at [58]-[69]; Exhibit R10 at [11], [18], [24], [30]; Transcript, 24 November 2021 at PN1367-1389 & PN1415-1418.

[268] Exhibit R12 at [58]-[69]; Exhibit R10 at [11], [18], [24], [30]; Transcript, 24 November 2021 at PN1367-1389 & PN1415-1418.

[269] Exhibit R2 at TD-28; PN1851.

COVID-19 with the easing of travel restrictions and the associated uncertainty at the Mine is also a relevant factor in the consideration of the reasonableness of the Site Access Requirement.

[246] The control measures currently in place are also relevant to the question of reasonableness. The Respondent has a Trigger Action Response Plan (TARP) in place at the Mine which includes the following COVID-19 controls:

- physical distancing protocols
- hygiene protocols, including hand hygiene, cough etiquette, cleaning and disinfection and working in split teams
- personal protective equipment
- screening questionnaire for workplace entry including return to work criteria
- occupancy limits
- the requirement to return a negative rapid antigen test as a condition of entry to the Mine.

[247] The TARP has been revised on 4 occasions throughout the COVID-19 pandemic. This allows for the imposition and relaxation of a range of measures depending on particular trigger points. The efficacy of the range of factors and the current circumstances are relevant to the question of reasonableness. We note here that BHP is to be commended for the proactive steps taken to encourage voluntary vaccination including the on-site vaccination clinic and the hotline staffed by medical professionals to answer employee queries.

[248] We are conscious that the Applicants and the Union Interveners have raised a range of other matters that were said to tell against the reasonableness of the direction. We have taken into account all of the submissions and the relevant circumstances in reaching our decision. However, in view of our conclusion below that taking the Respondent's case at its highest, the Site Access Requirement was not a reasonable direction, it is not necessary for us to address each of these matters here.

5.6 A reasonable direction: Conclusion

[249] We have had regard to all of the matters before us, including the evidence and the uncontentious matters referred to at paragraphs [29], [68], [77], [98] and [207]. While the ultimate decision as to whether to introduce the Site Access Requirement was a decision for the Respondent, consultation is an important component in that decision-making process. It seems to us that the most telling factor against a finding that the Site Access Requirement was reasonable is the failure by the Respondent to reasonably consult with the Employees.

[250] As observed at [108] above, adequate consultation does not require that those consulted agree to the direction,[270] or give them a power of veto,[271] but in the context of this matter it

[270] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2016] FCA 1009 at [60].

[271] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [44].

should have provided the Employees with a reasonable opportunity to persuade the decision-maker in relation to the decision to introduce the Site Access Requirement.[272]

[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.

[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.

[253] Had the Respondent 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.

6 Determination of the Dispute

[254] As we have mentioned, it is common ground that the question for determination is as follows:

> '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.'

[255] For the reasons given, the answer to the posited question is 'no'.

7 Concluding Remarks

[256] We wish to emphasise the following particular features of the matter before us:

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[272] *Consultation clause in modern awards* [2013] FWCFB 10165, [35].The Work Health and Safety Bill 2011 (Cth) Explanatory Memorandum explains that clause 48(1) establishes the requirements for meaningful consultation. It requires PCBUs to: share relevant information about work health or safety matters (listed in clause 49) with their workers; give workers a reasonable opportunity to express their views; and contribute to the decision processes relating to those matters. It also requires PCBUs to take workers' views into account and advise workers of relevant outcomes in a timely manner.

1. The Employees and the Respondent are covered by an enterprise agreement approved by the Commission (the Agreement).

2. The Application is made under s.739 of the FW Act seeking that the Commission deal with a dispute under the dispute resolution procedure in the Agreement.

3. The dispute resolution procedure in the Agreement is not limited to disputes about matters arising under the Agreement and extends to 'any dispute […] arising in the course of employment'.

4. The decision to implement the Site Access Requirement was made in a dynamic environment which has evolved even since the hearing of this matter, with the World Health Organisation designating variant B.1.1.529 (the Omicron variant of COVID-19) as a variant of concern.

[257] As to the last point we acknowledge that employers face a difficult task in managing the risks for their workers in such a dynamic environment.

[258] Absent a public health order or an express term in a contract of employment or industrial instrument, the basis for an employee to be vaccinated as a condition of entry to work premises must derive from the implied contractual term that employees obey the lawful and reasonable directions of their employer.

[259] The reasonableness of a direction is a question of fact having regard to *all* the circumstances, which may include whether or not the employer has complied with any relevant consultation obligations; the nature of the particular employment; the established usages affecting the employment; the common practices that exist; and the general provisions of any instrument governing the relationship.[273]

[260] We note that, absent a consideration of all the relevant circumstances it is not appropriate to make general statements about whether a direction of a particular character is a lawful and reasonable direction. That said; we think there is some utility in making some broad observations.

[261] If the object and purpose of such a direction is to protect the health and safety at work of employees and other persons frequenting the premises then such a direction is likely to be lawful. This is so because it falls within the scope of the employment and there is nothing illegal or unlawful about becoming vaccinated. But such a direction must also be reasonable.

[262] As Flick J observed in *NSW Trains v Australian Rail, Tram and Bus Industry Union*[274] the determination of whether an employer direction is lawful and reasonable can only be made by reference to the subject matter and context; it cannot be made *'in vacuo*'.[275] The assessment of reasonableness and proportionality is essentially one of fact and balance and needs to be

[273] *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday & Sullivan* (1938) 60 CLR 601 at 622 (Dixon J).

[274] [2021] FCA 883.

[275] Ibid at [218].

assessed on a case-by-case basis.[276] The assessment will include, but not be determined by, whether there is a logical and understandable basis for the direction.[277]

[263] A direction lacking an evident or intelligible justification is not a reasonable direction but that is not the only basis upon which unreasonableness can be established. It is an objective assessment of the reasonableness of the direction, having regard to all of the circumstances.

[264] In any particular context there may be a range of directions open to an employer within the bounds of reasonableness. Further, to establish that a direction is reasonable it is *not* necessary to show that the direction in contention is the preferable or most appropriate course of action or in accordance with 'best practice' or in the best interest of the parties.

Mt Arthur: The Way Forward

[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.

[267] In this context we note that during the course of oral argument counsel for the Applicants responded to the Respondent's contention that the relaxation of movement restrictions will mean that the virus will become endemic and the level of risk for unvaccinated persons will increase as follows:

> 'The more reasonable position in relation to this matter, if opening up is a factor, is for the Commission to at least stay the site access requirement until the new year to see whether the dire forecast of BHP, the respondent or Witness R5 are in any way borne out?'[278]

[268] For completeness we note that the proposition advanced lacks merit. As we mention at [62] above, the rates of COVID infection are likely to increase over time, as movement restrictions cease, with a consequent increase in risk, particularly for the unvaccinated. The WHS Act framework is concerned with the assessment and reduction of *risk*. The approach proposed by counsel for the Applicants is to wait and see if infection rates actually increase

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[276] *McManus v Scott-Charlson* (1996) 70 FCR 16 at 30 (Finn J).

[277] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 112.

[278] Transcript, 25 November 2021 at PN1669.

and, presumably, whether significant numbers of the unvaccinated become seriously ill or die. In our view, this is not an appropriate approach to take to the issue.

[269] The Commission is available to facilitate any discussion between the Applicants and Mt Arthur regarding the consultation process to be undertaken.

PRESIDENT

Appearances:

S Crawshaw SC with P Bates for the Construction, Forestry, Maritime, Mining and Energy Union and Mr Howard.

I Neil SC with J Alderson for Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal.

M Harding SC for the Australian Council of Trade Unions.

M Gibian SC with C Tran for the Australian Manufacturing Workers' Union and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

B Ferguson for Ai Group.

L Izzo for the Australian Chamber of Commerce and Industry.

Hearing details:

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