

## Unwinding the Pandemic

*Australia's two largest states and the ACT are in lockdown as the Delta strain of COVID-19 takes its toll while others are standing firm on a policy of eradication. The result is a country at a policy impasse and divided by border restrictions.*

And, it is not just businesses in lockdown that are in crisis. Tourism and hospitality businesses that rely on interstate trade are equally impacted but financial assistance is often limited or non-existent if they are not in a hotspot.

At the time of writing, Australia is on track to fully vaccinate the eligible population of 20.62 million adults in December 2021. Based on National Cabinet's four stage roadmap to normal, Australia should move to phase B of the plan when 70% of the eligible population have received their second dose of the vaccine. At Phase B, it is expected that lockdowns will be "less likely" and special rules will apply to the fully vaccinated. At Phase C, when 80% of the eligible population is vaccinated, the plan is for Australia to return to "baseline restrictions" with no caps on returning visitors, and a gradual opening of inward and outward international travel with safe countries (quarantine requirements will still apply but will be reduced).

The problem for "Team Australia" is that not all players are the same. While some regions remain in an eradication phase, the strategy for opening and returning to normal is necessarily different (assuming these regions remain Delta free).

In NSW and Victoria, hope of defeating Delta has been abandoned with the focus now on bringing the population up to the maximum vaccination level to prevent hospitalisations and death.

In QLD and WA however, the strategy for opening is more complex with the bar being raised well beyond the national plan (Queensland Premier Annastacia Palaszczuk has demand that children under 12 be included in vaccination targets).

## **Freedoms for the fully vaccinated and what it means to business**

A major concern for many business operators is the expectation of policing vaccination status for both staff and customers.

### **Identifying vaccinated customers**

Both the New South Wales and Victorian Premiers have stated that there will be greater freedoms for those who are double jabbed with new QR code check-in technology expected at the end of September. Instead of having to show a vaccination certificate or medical record, Victorian Premier Dan Andrews said that the QR codes, “don't store that information, but you either get a tick or a cross, and on that basis you are allowed in or not.” This system might also assist those who are medically exempt from vaccination as they would not need to explain their medical history behind their exemption.

But is it discriminatory? The Australian Human Rights Commission (ARC) says, “Vaccine passports are more likely to be consistent with human rights when they are used as a tool to ease existing restrictions and improve public health outcomes. Rather than becoming a further requirement on top of existing restrictions, vaccine passports should generally operate in place of them.”

“...the guiding human rights principles for considering measures taken to advance public health are:

- They must be reasonable, necessary, and proportionate.
- They must take into account the potential for discrimination.”

While public health orders are likely to protect business operators from discrimination claims, not all are waiting. Qantas was the first major airline to state that it would require passengers to be vaccinated on international flights when borders open. Several sporting venues have also stated that the price of the return to live events is double vaccination for both staff and patrons.

A business operator has the ability now to refuse entry or service to a customer as long as anti-discrimination rules are not breached. Excluding an individual by vaccination status without a public health order however will be a question of whether the rule is reasonable, necessary, and proportionate.

## **Staff members and vaccinations**

In general, vaccination will remain voluntary and free in Australia but there are some sectors where vaccinations are mandatory. Common sectors include aged care and hotel quarantine. In these sectors, the employer is generally responsible for enforcing the Health Orders.

Outside of a public health order an employer can mandate that employees are vaccinated but only if the direction to be vaccinated is “lawful and reasonable”. In addition to being able to mandate vaccinations under the relevant Award or agreement, employers need to ensure that mandating vaccinations is reasonable for example, because the staff member’s duties put them at increased risk of being infected or they have close contact with vulnerable people.

Qantas for example will require all frontline employees to be fully vaccinated by 15 November 2021 and all other employees to be vaccinated by 31 March 2022. The announcement followed a company-wide survey of staff that revealed 89% planned to be fully vaccinated and only 4% were unwilling or unable to be vaccinated. Qantas is yet to release details of how medical exemptions will be applied.

In workplaces where vaccinations are not mandated, an employer can only collect information on an employee’s vaccination status where it is reasonably necessary for the organisation’s functions or activities or where it is required by law. In these cases, it may be possible for the employer to ask to see evidence of an employee’s vaccination status without breaching privacy laws.

Another question is whether an employee can refuse to come to work because their co-workers are not vaccinated. On this, FairWork says “If an employee refuses to attend the workplace because a co-worker isn’t vaccinated, their employer can direct them to attend the workplace if the direction is lawful and reasonable.” But, the Australian Human Rights Commission states that where someone is particularly vulnerable to COVID-19, a “blanket rule requiring all employees to attend a particular workplace may constitute indirect discrimination.” Whether it’s reasonable for an

employee to attend their workplace is highly dependent on the facts and you should seek legal advice.

### **Did your super fund receive a compensation payment?**

Is a financial services compensation payment to your superannuation fund a contribution?

Of late, there have been several compensation payments made by financial services providers to customers that were inappropriately charged or overcharged for insurance premiums or services they did not receive, etc.

New guidance from the ATO helps decipher whether these compensation payments are treated as contributions to your fund. The problem for some people is that where these compensation payments are treated as a contribution to their superannuation fund, they may exceed their contribution cap or attract Division 293 tax (a 15% tax on super contributions imposed on those with combined income and super contributions of \$250,000 or more).

In general, the treatment of the compensation depends on who engaged the financial services provider. In general:

- **Super fund engaged the financial services provider and compensation paid to the fund** – compensation not treated as a contribution.
- **Individual engaged the financial services provider and compensation paid to the fund but not at member's discretion** – compensation is a concessional contribution in the financial year it is received.
- **Individual engaged the financial services provider and compensation paid to the fund at member's discretion** - compensation is a non-concessional contribution in the financial year it is received

Where neither the member of the fund or the financial services provider had a right to seek compensation, the amount will be a concessional contribution in the financial year it is received by the fund.

If you have received a compensation payment from a financial services provider and the payment means you have exceeded your contribution cap, or are liable for Division 293 tax, there is a potential solution to avoid an adverse impact where you did not have control over the payment. In these cases, you can apply to the Tax Commissioner to exercise his discretion to disregard excess contributions or reallocate them to another year.