Federal Court of Australia

Cox v DP World Brisbane Limited [2021] FCA 1335

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| File number: | QUD 365 of 2021 |
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| Judgment of: | **LOGAN J** |
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| Date of judgment: | 11 November 2021 |
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| Catchwords: | **INDUSTRIAL LAW** – interlocutory application – where respondent employer required all employees to submit proof of their vaccination against COVID-19 – where applicants unwilling to comply with vaccine mandate – where respondent’s “show cause letter” caused to be sent after applicants raised their unwillingness to comply in a letter – whether casual link between the “show cause letter” and exercise of workplace right – where all applicants bar one entitled to termination benefits –where closely proximate trial date for substantive hearing offered by the Court – where public interest in minimising risk of disruptions to supply chains – whether damages an adequate remedy  **PRACTICE AND PROCEDURE** – application for interlocutory injunction – whether *prima facie* case that respondent had contravened s 340(1) or alternatively s 50 of the *Fair Work Act 2009* (Cth), or alternatively committed breach of contract – whether balance of convenience favours the grant of injunctive relief – application for interlocutory relief dismissed |
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| Legislation: | *Evidence Act 1995* (Cth) s 144  *Fair Work Act 2009* (Cth) ss 50, 340, 341, 361, 545  *Federal Court of Australia Act 1976* (Cth) s 23  *Work Health and Safety Act* *2011* (Qld) |
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| Cases cited: | *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57  *Bouzourou v The Ottomon Bank* [1930] AC 271  *Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333  *Construction, Forestry, Maritime, Mining and Energy Union, Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWC 6309  *King v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601  *McLean v Tedman* (1984) 155 CLR 306  *Ottoman Bank v Chakarian* [1930] AC 277  *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1  *QNurses First Inc v Monash Health* [2021] FCA 1372  *Sabapathy v Jetstar Airways* [2021] FCAFC 25  *Turner v Mason* (1845) 14 M&W 112 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 101 |
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| Date of hearing: | 11 November 2021 |
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| Counsel for the Applicants: | Mr JB Sweeney |
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| Solicitor for the Applicants: | Green and Associates |
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| Counsel for the Respondent: | Mr J Darams with Mr M Watts |
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| Solicitor for the Respondent: | Seyfarth Shaw Australia |

ORDERS

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|  | | QUD 365 of 2021 |
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| BETWEEN: | SHAUN COX  First Applicant  ZOLTAN NEMETH  Second Applicant  JAMIE EDWARDS (and others named in the Schedule)  Third Applicant | |
| AND: | DP WORLD BRISBANE LIMITED ACN 130 876 701  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 11 NOVEMBER 2021 |

Upon the respondent undertaking that until close of business on 31 December 2021 or earlier

order, the respondent will not terminate any applicants’ employment on either of the following

grounds:

a. the applicant has not provided evidence of having been vaccinated against Covid 19;

b. that the applicant has not been vaccinated against Covid 19:

THE COURT ORDERS THAT:

1. The interlocutory injunction application be dismissed.
2. By 4:30 pm (AEST) on 15 November 2021, the applicants file and serve an amended Statement of Claim.
3. By 4:30 pm (AEST) on 18 November 2021, the respondent file and serve a Defence.
4. By 4:30 pm (AEST) on 19 November 2021, the applicants file and serve any Reply.
5. By 4:30 pm (AEST) on 30 November 2021, the applicants file and serve an affidavit of each witness it will call at trial.
6. By 12:00 pm (AEST) on 13 December 2021, the respondent file and serve affidavits of each witness it will call at trial.
7. By 4:30 pm (AEST) on 16 December 2021, the applicants file and serve any affidavit material in reply.
8. The matter be set down for hearing with a duration of two days, commencing at 10:15 am (AEST) on 20 and 21 December 2021.
9. Liberty to apply.
10. Costs be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. In a society such as ours, governed as it is by the rule of law, it should come as no surprise that the cases which come before the courts in a given era can offer insight into issues which are, at that time, controversial in our society. It is notorious that, at present, some in our society have reservations about taking up a pervasive offer by governments to undergo vaccination in respect of the COVID-19 viral disease which has so disrupted life in Australia and elsewhere over the past 20 months or so.
2. The applicants are each stevedores employed by the respondent DP World Brisbane Pty Ltd (DP World Brisbane). One of the applicants – the ninth applicant – is a casual employee; the other applicants are each, at present, ongoing employees of DP World Brisbane.
3. On 2 November 2021, Mr Benjamin Hanley, the General Manager - Operations of DP World Brisbane, sent to each of the applicants, by email, a letter in which he made reference to “vaccination against the Covid-19 virus is now a condition of employment at DP World”. Mr Hanley also referred to earlier communications from the Chief Executive Officer of DP World Brisbane’s holding company, commencing on 16 September 2021, advising that a vaccination deadline was in place and that termination of employment was a possibility should employees not be vaccinated in accordance with the policy by the nominated date.
4. In his letter, and after noting that DP World Brisbane had received no response from the employee concerned, Mr Hanley invited each of those employees to provide reasons why DP World Brisbane should not terminate their employment on the basis that they were unwilling to comply with the requirement to be vaccinated and could no longer meet the requirements for performing work. That letter specified a deadline of 5:00 pm on Friday 5 November 2021 for the furnishing a response to the company showing cause why the foreshadowed termination of employment should not occur. They are presently stood down without pay.
5. A sequel to that was the prompt institution of proceedings in this Court by the applicants in which it was alleged that a threat of adverse action had been made, that a contravention of a governing enterprise agreement had occurred, and that, in any event, there was a threatened breach of the applicants’ contracts of employment.
6. In conjunction with the originating application, the applicants sought interlocutory injunctive relief in these terms:

[1] An order that the respondent be restrained from terminating any applicants’ employment, on either of the following grounds:

[a] the applicant has not provided evidence of having been vaccinated against Covid 19;

[b] the applicant has not been vaccinated against Covid 19;

[2] An order requiring the respondent to continue to pay each applicant that applicants’ minimum weekly wages entitlement under his contract of employment, until such time as such contract of employment is validly terminated.

1. The proceeding came on urgently on 5 November 2021. At that time, and upon each of the applicants severally giving the usual undertaking as to damages, and upon the respondent, DP World Brisbane, undertaking that until close of business today or earlier order, it would not terminate any applicant’s employment on either of the following grounds:

(a) the applicant has not provided evidence of having been vaccinated against Covid 19;

(b) that the applicant has not been vaccinated against Covid-19.

I ordered that the interlocutory injunction hearing be adjourned until today. I also made related interlocutory orders adapted to that end.

1. The question, therefore, for resolution today is whether or not to grant the interlocutory injunctive relief which has been sought by the applicants?
2. The governing principles in relation to interlocutory injunctive relief have been settled in the High Court in cases such *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57. In the industrial context, no different position prevails, as is evident, for example, from *Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333, at [21], and *QNurses First Inc v Monash Health* [2021] FCA 1372, at [18] – [21]. In short, it is for the applicants to demonstrate a sufficient likelihood of success in the originating application at trial to justify a preservation of the status quo ending that trial. This entails an examination of whether or not there exists a prima facie case, and if so, its strength, as well as demonstration by an applicant that the balance of convenience favours the granting of interlocutory injunctive relief. As to the latter, it is for an applicant to prove that the injury the applicant would be likely to suffer were the interlocutory injunction not granted is greater than that which the respondent would suffer were the injunction granted. Part of that also entails an applicant demonstrating that damages, or a compensatory order of some kind, would not be an adequate remedy.
3. These considerations are not isolated unto themselves in the sense that sometimes, even if a prima facie case is established but not of apparent great strength, the overwhelming nature of an injury which might be suffered by an applicant were relief not granted might be such as nonetheless to warrant a granting of the interlocutory injunctive relief.
4. The applicants have invoked the Court’s jurisdiction under the *Fair Work Act 2009* (Cth) (Fair Work Act) and, with that, associated jurisdiction grounded in an alleged breach of contract. I have no doubt that s 545 of the Fair Work Act and s 23 of the *Federal Court of Australia Act 1976* (Cth) provide in themselves power to grant the relief sought. To these might be added the power which the Court possesses as a court of equity, once federal jurisdiction has been invoked.
5. There was no particular controversy as to the existence of the requisite power. Rather, the controversy was very much as to whether that power should be exercised as sought by the applicants. It should go without saying, but it is as well to say it, that it is no part of the Court’s role today to reach any concluded views at all in relation to whether the claims as made by the applicants would succeed at trial.
6. The nature of the applicants’ employment and of DP World Brisbane’s operations is revealed in each of the affidavits read today: that of Mr Anthony Kuschert on behalf of the applicants, and that of Mr Hanley on the part of DP World Brisbane. Unsurprisingly, given the position which he holds, Mr Hanley’s affidavit is the more detailed on each of these subjects. Mr Kuschert is a paralegal employed by the solicitors for the applicants who has deposed to particular matters on information and belief.
7. The following account of the circumstances of the applicant’s employment and of DP World Brisbane’s operations and its adoption of a policy in relation to vaccination of its workforce is based on Mr Hanley’s affidavit. Necessarily, the trial of the proceeding may possibly result in the different conclusions being reached as to the facts to which Mr Hanley deposes. Although, in the main, having regard to the two affidavits, there do not appear to be many factual differences.
8. Some differences are mentioned by Mr Hanley, and I shall advert to these shortly.

## DP World Brisbane

1. DP World Australia Ltd (DP World Australia) is the ultimate holding company of the national container stevedoring business operated by its subsidiaries. There are four container terminals, each of which is operated by a separate wholly owned subsidiary of DP World Australia.
2. DP World Brisbane operates the stevedoring terminal at the Port of Brisbane (Fisherman Islands), Queensland (Terminal). As General Manager - Operations, Mr Hanley is the manager responsible for all aspects of the Terminal’s operation.
3. The Terminal is a container stevedoring facility, at which container ships berth and are loaded and unloaded by DP World Brisbane employees. The Terminal includes several areas, including:
   1. the quayside, where large rail-mounted cranes called quay, ship-to-shore or portainer cranes load and unload containers onto and from ships;
   2. a storage area called the “yard” or “yard stack”, where containers are stored temporarily after discharge or before being loaded onto a ship; and
   3. receival and delivery areas called “truck pads” or “truck lanes” where trucks are loaded and unloaded with containers so that containers can enter or leave the Terminal by road.
4. “Export” containers enter the Terminal by road, are unloaded from trucks, are loaded onto ships, and leave the Terminal by sea. “Import” containers enter by sea and leave by road, in the reverse process.

## Work performed at the Terminal

1. Generally speaking, the types of work performed at the Terminal can be divided into four categories:
   1. general duties;
   2. operation of machinery and yard equipment;
   3. clerical work; and
   4. crane driving
2. General Duties typically involve tasks including lashing and unlashing, and working as the “pin man”:
   1. Lashing is the process whereby metal bars are latched onto containers stacked on the deck, or in the hold, of a vessel. The metal bars hook the containers into the vessel’s deck, which fastens the containers to the vessel to prevent them being thrown off or damaged during transport.
   2. The pin man role relates to a pin some containers have on each of its bottom four corners, which allows it to be stacked securely onto another container on board the vessel when being loaded. The pin man (or woman) removes these pins so a container can sit flat on the wharf, and replaces them, as needed.
3. In performing these duties, the employees work together in ‘gangs’ and can be required to be in close proximity with one another. They also need to go aboard the vessels on which the containers are stowed and therefore can have close contact with members of the crews on the vessels and the areas in which the crew work on the vessel.

#### Machinery operators

1. At the Terminal, shuttle carriers are used to move containers from the wharf (after the crane has unloaded them) to the Auto Stacking Crane (ASC) interchange area. An ASC will then automatically place the container on the stack. Shuttle carriers are enclosed cabins.
2. Reach stackers are also used at the Terminal. Employees driving the reach stackers are in close proximity of each other when changing shifts.
3. During training or re-certification for compliance purposes, more than one person is required to be in the ASC or reach stacker cabin. Additionally, in the event of a machine breakdown or emergency, a maintenance specialist may be required to be in the cabin with the driver.

#### Crane drivers

1. The role of crane drivers is to operate the quay cranes which move the containers from the wharf onto the vessels, and from the vessels onto the wharf.
2. At the Terminal, crane drivers generally work in one or two hour blocks, after which they rotate with the second crane driver on the shift. The rotation involves “swapping over” with a driver in the cabin.

#### Clerical work

1. Clerical work performed by stevedores is mostly indoor office-based work and typically involves data entry tasks and directing yard and vessel operations. These tasks may include monitoring equipment, volumes of cargo and quantities handled to or from a vessel, or recording the details of containers or cargo being received or delivered to trucks into and out of the terminal. This work requires basic computer skills and involves the use of a two-way radio.
2. Clerical employees come in contact with other employees at meal times, at their work stations with other clerical staff, with supervisory or management staff, and with any employees or contractors that may enter the control room.

#### Additional roles

1. In addition to the above 4 categories, there are foreman roles on each shift on the wharf. There are also a number of clerical roles as described in above, and specific cargo care duties involving refrigerated container freight.

## Environment and arrangements at the Terminal

1. Some of the work done by employees at the Terminal occurs outside. There is however a significant amount of time spent by employees indoors or in enclosed spaces. This includes:
   1. During breaks, which are taken in an indoor amenities room at the Terminal administration building. DP World Brisbane has sought to reduce COVID-19 transmission risks here by working cranes “continuously” (so that not all employees are taking breaks simultaneously, but there are still multiple employees taking breaks at the same time.
   2. On buses where employees are driven the (considerable) distances from the administration building where they start a shift and take breaks to their points of work.
   3. In office space at the administrative building and receival and delivery points where employees are performing clerical work, seeking first aid, holding discussions with managers, or otherwise needing to find others.
   4. In the hold of vessels where employees are performing lashing.
   5. During meetings held indoors - disciplinary or performance meetings, Employee Representative Committee and Health and Safety Committee meetings, and other ad hoc matters as required.
2. There are other times where employees may be working outside, but need to be in reasonably close proximity with others, including:
   1. At toolbox talks, where a supervisor will speak to all of the employees on a shift together before they begin their work.
   2. On board ships where it is necessary to interact with ship's crews. This occurs when a vessel master takes the names of stevedores boarding a ship at the top of a gangway, where there is a need to discuss safety or other issues, and where crews are required to turn refrigerated containers on or off (which stevedores cannot do) in order to facilitate container movements.
3. The way that the rostering and allocation of labour works at the Terminal means it is not feasible to separate shifts of employees and ensure that they do not mix, so as to quarantine the safety risks and operational disruption of a given COVID-19 transmission event to one shift. This is because:
   1. “Fixed salary employees” (FSEs), who are full-time rostered employees, are allocated according to rosters set out in Part B of the *DP World Brisbane Enterprise Agreement* 2020 (Brisbane Agreement). Most employees work across the full range of 24/7 continuous shiftwork, on the three shifts at the Terminal (day, evening and night).
   2. “Variable salary employees” and casuals (“supplementaries”) are allocated on a fully irregular basis.
   3. FSEs’ rosters are indicative, in the sense that employees are required to be available on the designated shifts, but may or may not actually work those days.
   4. Actual allocations of labour on a shift occur only the afternoon before a shift, based on factors including:
      1. projected vessel calls (and hence container volumes) the next day, which change frequently due to changes in vessel transit times due to a range of factors including weather and disruption in other ports;
      2. the skills required to do the next day’s work, which is driven primarily by the need for various work to be done to operate a quay crane and the number of cranes required; and
      3. which employees are available to work on roster, or have volunteered for overtime.
   5. Where there are unplanned absences of allocated employees (personal/carer’s leave or a “failure to report”), it may be necessary to backfill the role from other available labour, including on an overtime basis, to avoid an absence of employees with key skills that results in the inability to operate a crane at all.
4. As a result, while employees may see others from their own roster panel more frequently, they will also mix with the broader group of employees through VSEs and supplementaries working across shifts as needed, and from themselves or others working overtime. The unpredictability of the shipping schedule and labour needs means it is not feasible to avoid this for long, if at all.

## Operational continuity

1. The Port of Brisbane (Fisherman Islands) is the only container port in Queensland.
2. DP World Brisbane is a common entry port for vessels making a first port of call at Australia. Of the 10 services that berth at the Brisbane Terminal, 6 are making their first call in Australia.
3. DP World Brisbane operates one of three container stevedoring terminals at the Port of Brisbane. The others are operated by Patrick Terminals and Hutchison Ports.
4. Between them, these three terminals have nine container berths. Of those berths, the Brisbane Terminal includes four.
5. As such, if the Brisbane Terminal is unable to operate fully or at all, this affects nearly half of Queensland’s container stevedoring capacity.

## COVID-19 Vaccination Mandate and Risk Assessment

1. From around March 2020, DP World Australia management, of which Mr Hanley is part of, has been discussing the safe management of COVID-19 in the workplace to keep employees safe and the terminals operating. Each week, the DP World Australia Management team meets on Mondays (to discuss Work, Health and Safety) and Thursdays (to discuss terminal operations). From Mr Hanley’s experience attending these meetings, the topic of COVID-19 and safe management of COVID-19 arises frequently.
2. On or around 15 September 2021, Mr Hanley became aware of three positive cases of COVID-19 at the Port Botany terminal. Mr Hanley was informed by Scott Eadie (General Manager - Operations, DP World Sydney Ltd) and Andrew Adam (CEO, DP World Australia Ltd) that approximately 35 employees were required to self-isolate for 14 days in accordance with NSW Health directions. Mr Hanley is also aware that a further 57 employees were sent home from work because they were casual contacts. These employees were required to produce a negative COVID-19 test result before returning to work.
3. Mr Hanley is aware that in mid-September, Victoria International Container Terminal had a COVID-19 outbreak and was required to close operations for one day for cleaning. Mr Hanley is also aware that in early October, there was a COVID-19 outbreak at the Patrick Terminal in Melbourne. As a result, Patrick was required to operate with 20 per cent reduced capacity for approximately a week following the outbreak.
4. As a result of the Port Botany COVID-19 outbreak, it became clear to the DP World Australia Management team that similar outbreaks in the future at Port Botany and at other terminals would create a serious community transmission risk and disrupt DP World's continuous operations. Mr Hanley reasoned, and Mr Hanley believes other members of the team also believed, that logically if a similar outbreak were to occur at DP World Brisbane, Queensland Health would take a similar, if not more stringent approach, to the management of the outbreak as that taken by NSW Health.
5. On 16 September 2021, the DP World Australia management team made a decision to undertake a risk assessment to confirm that the controls currently in place at the terminals to reduce the risk of the spread of COVID-19 were adequate.
6. Risk assessments are a common procedure undertaken at DP World. They take a number of forms, but in short:
   1. hazards and the risks associated with them are identified;
   2. risks are assessed based on both the likelihood of occurrence and the significance of the consequences if they do occur;
   3. controls to reduce the likelihood or severity of the risk are identified; and
   4. the residual risk after implementing those controls is assessed to consider whether it can be adequately controlled.
7. From Mr Hanley’s experience, when undertaking a risk assessment at DP World in relation to a particular risk or hazard in the workplace the process is as follows:
   1. the National Health, Safety and Environment Committee develops the draft risk assessment in consultation with business leaders nationally at each site;
   2. the draft risk assessment is then tabled at a Heath, Safety and Environment meeting (HSE Meeting) at each terminal;
   3. employee Health and Safety Representatives are given the opportunity to comment on the draft risk assessment as make suggestions for changes; and
   4. following consultation between DP World and the Health and Safety Representatives, the risk assessment is finalised.
8. Mr Hanley’s evidence is that on or about 21 September 2021, DP World Australia’s National Health, Safety and Environment Committee produced a draft risk assessment relating to workplace transmission of COVID-19 during a community outbreak. A copy of that risk assessment was annexed to Mr Hanley’s affidavit:
9. The Draft Risk Assessment identifies the potential risks of injury or illness in the workplace arising from a community outbreak of COVID-19. For the majority of those risks, excluding only those hazards that have the potential to cause psychological injury, vaccination against COVID-19 for employees and contractors is identified as a control.
10. On 16 September 2021, the DP World Management team made a decision to mandate COVID-19 vaccinations in the workplace. This decision was made having regard to the following factors:
    1. the COVID-19 outbreak at Port Botany, which placed employees at risk and disrupted operations
    2. the importance of DP World, as an essential service provider and important part of the supply chain, to effectively protect its operations from disruptions caused by a COVID-19 outbreak;
    3. the precedent of NSW Health's contact tracing matrix treating vaccinated versus unvaccinated employee contacts of positive COVID-19 cases differently in the event of an exposure event;
    4. the effectiveness of the COVID-19 vaccine as a higher order control based on the Draft Risk Assessment;
    5. that since around March 2021, the Australian Government Department of Health had deemed stevedores as priority workers to receive a Pfizer COVID-19 vaccination, therefore vaccinations were readily available to our employees; and
    6. Public Health Orders in places in Victoria and Western Australia that mandated vaccinations for stevedores, notwithstanding that in Western Australia there was no COVID-19 outbreak of the kind in progress in NSW and Victoria.
11. Whilst COVID-19 vaccinations are only mandatory under Public Health Orders in Victoria and Western Australia, Mr Hanley and his team are consistently monitoring Queensland Health updates in the event the position changes in Queensland. This is particularly a concern given that the Queensland borders will be opening on 17 December 2021, heightening the risk of COVID-19 outbreaks and community transmission in Queensland.
12. On 16 September 2021, DP World Australia’s Chief Executive Officer sent to all employees the email to which Mr Hanley has previously referred, advising them that DP World intended to implement mandatory vaccinations across its workforce and would commence consultation with employees and health and safety representatives in relation to the risk assessment:
13. The general approach agreed to by the DP World Management team in relation to implementation of mandatory vaccines was to be dealt with locally at each of the terminals. Broadly however, the DP World Management team agreed to the following process:
14. employees would be sent an email reminding them to submit their COVID-19 Digital Vaccination Certificate by the relevant date;
15. employees would then be sent a further reminder to submit their COVID-19 Digital Vaccination Certificate by the relevant date;
16. employees would be able to ask their managers questions and would be reminded by their managers to submit their COVID-19 Digital Vaccination Certificate;
17. bulletins would be posted around the terminals to encourage employees to make vaccination bookings and to comply with COVID-19 safety requirements. An example of one of these bulletins appears at page 7 of Exhibit BCH-1; and
18. disciplinary matters relating to employees who refused to provide evidence of having received a COVID-19 first or second dose vaccination would be dealt with by terminal managers at the respective terminals.
19. On 21 September 2021, the draft risk assessment was circulated to the health and safety representatives across DP World Australia’s Australian terminals ahead of an HSE meeting. On 22 September 2021, Mr Hanley sent an email to all employees at the Brisbane terminal requesting them to confirm their vaccination status by 15 October 2021.
20. On 23 September 2021, Mr Hanley attended a meeting with union officials from The Maritime Union of Australia Division of the Construction, Forestry, Maritime, Mining and Energy Union (MUA) to discuss the Draft Risk Assessment. The MUA presented DP World Australia with approximately 24 questions in relation to the Draft Risk Assessment and the Mandate. Some of those questions were answered during the meeting and DP World advised it would respond to the remainder of the questions in writing.
21. On 24 September 2021, Mr Hanley attended a Heath, Safety and Environment meeting (HSE Meeting) at the Brisbane Terminal. The Draft Risk Assessment was tabled at this meeting. At that meeting, Mr Hanley recalls that, in relation to the Draft Risk Assessment, Kieren Carty, Health and Safety Representative, said words to the effect of:

“*We have nothing to say at this stage on the Risk Assessment*”

1. On 29 September 2021 in response to questions asked by the MUA on 23 September 2021, a frequently asked questions document was circulated by DP World Australia to all employees at DP World via email.
2. On 5 October 2021, Mr Adam sent an email to all employees advising them of revised deadlines to provide their COVID-19 digital certificate. Relevantly, employees in Brisbane were required to provide confirmation that they had received the first dose of a COVID-19 vaccine by 29 October 2021 and confirmation that they had received a second dose by 26 November 2021.
3. On or around 12 October 2021, Mr Hanley caused a letter to be sent to employees of DP World Brisbane regarding their vaccination status and its implications under the mandate. A copy of that letter is in evidence. That letter is, in essence, in like form to that sent to each of the other applicants also on or around 12 October 2021. Mr Hanley has stated in his affidavit that it was his decision to send the letters on 12 October 2021, as he supported the approach to vaccination that had been discussed by DP World Management. On 15 October 2021, Mr Hanley received a letter from the acting branch secretary of the MUA Queensland Branch, Mr Jason Miners, in relation to concerns with respect to DP World Brisbane’s vaccination direction. Mr Hanley replied to this letter on 20 October 2021. There has been no further response to Mr Hanley by the MUA after 20 October 2021.
4. On or around 26 October 2021, Mr Hanley caused a further email to be sent to employees of DP World Brisbane regarding their vaccination status and its implications under the mandate. An example of such a letter is in evidence. Mr Hanley has deposed that was his decision to send this letter.
5. On 28 October 2021, Mr Hanley received a copy of a letter which the applicants’ solicitors had sent that day to a Mr Greg Muscat, who is the manager of human resources of DP World Brisbane. In that letter those solicitors advised that they acted for the applicants. Reference was made in the letter to, notably, a media release of DP World, inferentially released in conjunction with the Chief Executive Officer’s letter to employees of that date earlier referred to.
6. Reference was also made to the mandate and to correspondence sent to employees concerning that mandate. In particular, the solicitors referred to an effective show cause deadline and they advised that DP World Brisbane should treat the letter as a submission showing cause on behalf of the applicants. The solicitors stated:

We preface this submission by making it clear at the outset that our clients' intention is not to be adversarial or confrontational, but rather, to express their well-founded and deep, genuine concerns about the vaccine mandate (only) proposed. A number of them have their own health issues, and have experience first-hand the damage of adverse reactions, yet still wish to navigate what is arguably a grey area through to a practical and fair solution. Existing medical conditions of group members range from blood clotting, hypertension and blood pressure, right through to helicobactor pylori and other bowel and liver complications, respiratory complications and even joint problems, even before having taken a vaccine, and some have immediate family members who have suffered terribly as a direct result, to the point of hospitalisation.

In addition to this, the following are noteworthy factors regarding the particular circumstances of the employment of the Group members:

1. They have all continued to work on site through both the 2020 and 2021 lockdowns, with little to no change to their roles.
2. …
3. DP World Brisbane via its solicitors made a response to this letter. The effect of that letter of 29 October 2021 was an adherence by DP World Brisbane to the mandate and the notification of a potential for termination of employment.
4. On 2 November 2021, Mr Hanley caused the show cause letter earlier referred to be sent to each of the applicants. Mr Hanley has expressly denied in his affidavit that he caused any of the show cause letters to be sent because he received the 28 October letter from the applicants’ solicitors or because the applicants have asserted that the requirements to be vaccinated were void, unreasonable, or contrary to the governing enterprise agreement.
5. Also in his affidavit, Mr Hanley has stated that he is aware that the entities that operate the other three container stevedoring terminals in Australia have each also asked employees to comply with a mandatory vaccination program. His understanding is that the show cause process has been implemented or adopted across all of DP World Australia terminals in Australia. He is further aware that terminations have occurred across Australia because of noncompliance with the policy, details of which terminations are as follows:

(a) 21 employees have been terminated from their employment at Port Botany;

(b) 10 employees have been terminated from their employment in Melbourne; and

(c) 2 employees have been terminated from their employment in Fremantle.

1. Further, one employee in Brisbane, not an applicant in the present proceedings, has been terminated from his employment in Brisbane.
2. Mr Hanley also deposes (on advice from HR staff) as to the termination benefits which would be applicable to the respective applicants as at 9 November 2021. These are:
   1. Shaun Cox is entitled to a gross termination benefit of $35,607.46.
   2. Zoltan Nemeth is entitled to a gross termination benefit of $9,988.50.
   3. Jamie Edwards is entitled to a gross termination benefit of $30,063.45.
   4. Carlo Fearn is entitled to a gross termination benefit of $34,506.60.
   5. Sheldon Wright is entitled to a gross termination benefit of $79,873.17.
   6. Nicholas Wallace is entitled to a gross termination benefit of $44,805.84.
   7. Mickey Harris is entitled to a gross termination benefit of $33,615.26.
   8. Kevin MacDonald is entitled to a gross termination benefit of $39,927.87.
   9. Grant Tuhakaraina is entitled to a gross termination benefit of $37,226.56.
   10. Richard Taylor is entitled to a gross termination benefit of $17,907.32.
3. Mr Clarke is, as noted, a casual and therefore not entitled to any termination benefit.
4. The contracts of employment respectively governing the employment of the applicants have been annexed to Mr Hanley’s affidavit. It is a feature of these that the terms of the enterprise agreement applicable to their employment are not incorporated by reference.
5. There is some dispute on the facts as to the extent to which it could be said that the applicants work, generally, in an outside environment. It is also presently factually controversial as to whether it is only of the beginning and end of a shift that the applicants are indoors.
6. There is also some difference in detail as to the types of vehicle used at the Brisbane terminal, or at least a correct description thereof, and in relation to what is entailed in the loading and unloading of ships. There is agreement on the evidence before me that interactions between DP World Brisbane staff with foreign ship crew can occur during the course of unloading and loading of arrangements.
7. There is a difference on the evidence as to whether truck drivers are the only members of the public with whom DP World Brisbane’s employees have contact. Mr Hanley’s evidence is that the range of contact is wider, including maintenance contractors, contractors conducting random for for-cause drug testing pursuant to the company’s alcohol and other drugs policy, medical personnel in the event of an onsite illness or injury, external inspectors or regulators as well as others who may need to enter the Brisbane terminal from time to time. Mr Hanley has also assumed unremarkably, one might think, that employers will also interact with members of the public when not on shift.
8. It is, in relation to the threat of adverse action, not presently controversial that the giving of the show cause letters and the placing of the applicants in jeopardy of termination could amount to a threat of adverse action.
9. What is controversial, in relation to s 340 and s 341 of the Fair Work Act, is whether the giving of those show cause letters had any causal relationship with an assertion of a workplace right not to comply with directions of an employer which were not reasonable.
10. There are, in evidence, contemporaneous documents which show that DP World Brisbane’s decision making process in relation to the adoption of the policy and the mandate were not related to the show cause letters.
11. On behalf of DP World Brisbane, it was submitted that in respect of a proceeding, a sequel to which could be the imposition of a pecuniary penalty, a respondent is entitled to expect precision of pleading.
12. There can be no gain saying that such a submission. It is well grounded in authority, see for example, *Sabapathy v Jetstar Airways* [2021] FCAFC 25, at [39] – [40].
13. In terms of causation, and especially if Mr Hanley’s evidence is accepted at trial, it seems to me that the applicants’ case is not a particularly compelling one, I would emphasise, however, as indeed I did in the outset, that it is no part of my role today to reach any concluded view on that subject. Even if, as was foreshadowed in the course of submissions, the statement of claim were to be amended so as to allege that there had been, after the letter of 28 October 2021, an adherence manifested by DP World Brisbane’s correspondence of 2 November 2021 to a position that it was allowed to engage in adverse action, there would still be, for resolution, a question as to whether there existed any causal relationship.
14. In relation to interlocutory and injunctive relief, the effect of s 361(2) of the Fair Work Act is that the provisions of s 361(1) are inapplicable. Those provisions would only become applicable at trial. As it happens, DP World Brisbane has placed in evidence, even at this stage, direct evidence from its decision maker, Mr Hanley. Once again, if that evidence is accepted, the show cause letter of 2 November 2021 had no causal relationship with the applicants’ solicitor’s letter of 28 October 2021. In turn, that persuades me that there’s not a particularly compelling case even if the pleading were to be reformulated.
15. Another basis of the claim, as presently pleaded, is an alleged breach of s 50 of the Fair Work Act, grounded in an alleged contravention of the enterprise agreement, the Brisbane Agreement. Having regard to that agreement it does not contain any express prohibition on the employer in relation to the introduction of an unreasonable policy in relation to workplace health and safety. At trial, it will be necessary to construe that enterprise agreement and, in particular, clause 21 thereof. That clause which materially provides:

**21.0 SAFETY**

21.1 Objectives

21.1.1 The parties are committed to a workplace that provides “zero harm” to people and the environment.

21.1.2 It is the intention of all parties to this Agreement to implement the best achievable level of health and safety within the Company's operations.

21.1.3 Consistent with the general intention of this Agreement to facilitate and encourage the development of world's best practice in all facets of the Company's operations, all parties are committed to continuous improvement in occupational health, safety and environment standards in the workplace.

21.2 Responsibilities

21.2.1 The Company has the primary responsibility to protect the health and safety of its employees, customers, contractors and visitors at all times.

21.2.2 Employees must take reasonable care for themselves and others, they must comply with reasonable instructions and cooperate with relevant Company Policies and procedures.

21.3 Regulatory Framework

21.3.1 The Parties will ensure compliance with the Work Health and Safety Act (including Regulations, the Safe Work Stevedoring Code of Practice 2016, Marine Orders 32, agreed Guidelines and Codes of Practice made under the legislation) and the Company's Safety Policy and Procedures.

1. A responsibility falls on employees under clause 21.2.2 to take reasonable care for themselves and others and to comply with reasonable instructions and cooperate with relevant company policies and procedures.
2. That clause, at least impressionistically, assumes that the company may implement, subject to compliance with particular procedures, policies in relation to workplace health and safety in making provision for compliance with reasonable instructions. The enterprise agreement, at the very least, takes up a position which prevails at common law in terms of relations between employer and employee. I shall refer to that shortly. For the present, it is enough to observe that, again impressionistically, the case pleaded in respect of an alleged contravention of s 50 of the Fair Work Act does not strike me as particularly compelling.
3. As to the contract of employment, I have already noted that it does not incorporate, by reference, the terms of the Brisbane Agreement. That enterprise agreement applies, in any event, to the employment of each employee per force of the Fair Work Act and the terms of coverage of that enterprise agreement.
4. At common law, the root Australian authority in relation to the ability of an employer to give directions and the extent of the obligation of an employee is the *King v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601 (*Darling Stevedores case*), in particular, the judgment of Sir Owen Dixon where, at 621 – 622, his Honour stated:

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. Accordingly, when the award was framed, the expression “reasonable instructions” was adopted in describing the employees’ duty to obey. But what is reasonable is not to be determined, so to speak, *invacuo*. 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 (*Bouzourou v. Ottoman Bank*; *Ottoman Bank v. Chakarian*).

[footnote references omitted]

1. The two cases cited by Sir Owen Dixon in the passage quoted are instructive. Each is an advice of the Judicial Committee of the Privy Council. In *Bouzourou v The Ottomon Bank* [1930] AC 271 (*Bouzourou*), the Judicial Committee referred, with approval, to observations made in the 19th century in *Turner v Mason* (1845) 14 M&W 112, where a domestic servant had sued in respect of alleged wrongful dismissal. That case failed but, in the course of it, the court made, in passages cited with approval by the Judicial Committee, at 276, particular observations as to circumstances in which disobedience by an employee of a direction might be justified. In one of these, Baron Anderson stated:

There may undoubtedly be cases justifying a wilful disobedience of such an order as where the servant apprehends danger to her life or violence to her person from the master, or where from an infectious disorder raging in the house, she must go out for the preservation of her life.

Baron Rolfe expressed similar sentiments in that case.

1. Having cited these passages, the Judicial Committee stated, at [276]:

Their Lordships agree with the view that there must be an immediately threatening danger by violence or disease to the person of the servant before an order to remain in the zone of danger can be held to be unlawful.

1. In *Bouzourou*, the case failed because the basis of the refusal had not been shown by the employee to entail any such danger. That might be contrasted with the outcome in *Ottoman Bank v Chakarian* [1930] AC 277 in which the evidence established that the employee’s personal safety was in real danger if transferred to the location required by the employer was accepted.
2. Here, there is a question for trial as to whether or not there is any particular basis for refusal established. At the moment, there are but assertions in a solicitor’s letter. The extent to which those assertions in individual cases are established on the evidence is as yet not clear. However, their asserted bases do not presently engage with any particular risk presented by the particular vaccines on offer in Australia.
3. Apart from the common law duty on the part of employers to prevent accident in the workplace and otherwise provide for safe systems of work, as to which see *McLean v Tedman* (1984) 155 CLR 306, DP World Brisbane is subject to responsibilities both in terms of clause 21.2.1 of the enterprise agreement and also under State law under the *Work Health and Safety Act* *2011* (Qld). To my understanding, those responsibilities are discharged or may be discharged by the adoption of reasonable workplace health and safety policies, reasonable in all of the circumstances relating to employment as described by Sir Owen Dixon in the *Darling Stevedores case*. Impressionistically, the prospect of the applicants demonstrating that the policy and its related mandate are unreasonable seems to me not to be a particularly compelling one.
4. DP World Brisbane, as part of DP World Australia’s group of companies, was entitled, it seems to me, to adopt and implement a policy based on experience elsewhere in Australia. As was put on behalf of DP World Brisbane, there is no different virus abroad in New South Wales, a notable place of experience for the group in relation to the virus, than in Brisbane. However, the subject is certainly one for trial.
5. Overall then, the applicants’ establishment of a prima facie case is either very moot indeed, in my view, as to its statutory foundation, and not particularly compelling as to a common law foundation.
6. In terms of the balance of convenience, the applicants’ loss of wages between now and trial if terminated, or even if stood down without pay for that matter, is obviously a relevant consideration. As against that, were they terminated then, in respect of each of those who are not casuals, some entitlements would flow in the event of termination.
7. I have been able, during the luncheon adjournment, to ascertain with precision when a trial of the proceeding would be able to occur. A trial of the proceeding can occur on 20 and 21 December. That being so, it seems to me that, in the event of termination, entitlements which would flow would provide some financial support to each of the applicants, save the ninth, between now and trial.
8. Of course, it is not merely the financial aspect which is pertinent. It is, in my view, often underestimated the value which flows to any worker, be that worker a blue collar or white collar worker, from the possession of employment. That intrudes on a worker’s self-respect and self-esteem. It also provides a society for that worker. These benefits would at least temporarily be lost. As against that, the social aspect of employment would be lost, it seems, in any event, in that DP World Brisbane is just not disposed to have the unvaccinated onsite. So even were the interlocutory injunctive relief sought granted, in all likelihood what would occur is that the applicants would be stood down with pay, rather than required to undertake duties onsite.
9. Also in terms of the balance of convenience, it was accepted, at least for the purposes of the present proceeding, that I might take judicial notice, pursuant to s 144 of the *Evidence Act 1995* (Cth), of the following facts, as stated in *Construction, Forestry, Maritime, Mining and Energy Union, Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWC 6309, at [41]:

(a) All COVID-19 vaccines currently available in Australia substantially reduce the risk that the vaccinated person will be infected with COVID-19.

(b) All COVID-19 vaccines currently available in Australia substantially reduce the risk that, if the vaccinated person is infected with COVID-19, they will become seriously ill or die.

(c) All COVID-19 vaccines currently available in Australia substantially reduce the risk that, if the vaccinated person is infected with COVID-19, they will infect someone else.

(d) A single dose (i.e. the first dose) of any of the COVID-19 vaccines currently available in Australia significantly reduces the risk that, if the vaccinated person is infected with COVID-19, they will become seriously ill or die.

(e) COVID-19 poses substantial risks to health and safety, and will continue to do so even after it becomes endemic and vaccination rates are high.

[footnote references omitted]

1. The nature and extent to which vaccination might be a practicable health and safety measure is a subject for trial. But that it has some utility is, in my view, apparent from the points of which I consider judicial notice may be taken.
2. Also relevant in relation to an assessment of balance of convenience is the imminent, as, presently, from 17 December 2021, reopening for interstate intercourse, and more pervasive trade and commerce of the Queensland border. It is inherently likely that, one might apprehend, with that a greater incidence generally, and also thus in the workplace of DP World Brisbane, of COVID-19 infection or greater potential for that. Also relevant in that regard is the fact that DP World Brisbane’s terminal is an important conduit for supply chains, both by way of export and import. The experience in New South Wales of the company in relation to interruption of that supply chain is instructive, both in terms of a legitimate private commercial interest as well as, in my view, a public interest in relation to minimisation of supply chain interruption.
3. Having regard to notably *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, it could no longer be said, in my view, that there was an extreme unlikelihood, if not impossibility, of an ordering of specific performance of contracts of employment as a form of relief.
4. That is quite apart from the Court’s ability under section 545 of the Fair Work Act, as part of relief, to order reinstatement. Even so, the ordering of specific performance of these particular contracts of employment would be an unusual course to take. Damages look to be more likely an adequate remedy.
5. It was put on behalf of the applicants that there was no breakdown in trust. I am not persuaded that that is incontrovertibly so. There has been, for reasons which prima facie appear reasonable, an adoption of the policy and related mandate by DP World Brisbane and others within the group, and a concerted refusal on the part of each of the applicants to comply with that policy.
6. Of course it may be, at trial and on evidence, that a perfectly reasonable basis in individual cases emerges for such refusal. In turn, that may mean that the employer, whose policy embraces particular medical exception, may come to accept that there is a basis for noncompliance. I do not assume any unreasonableness on the part of DP World Brisbane in any assessment of particular medical evidence in particular cases. But at the moment, there does appear to be a breakdown as between the applicants and DP World Brisbane in relation to the particular vaccination policy.
7. As I mentioned at the outset, the factors relevant to the granting of an interlocutory injunction are not islands unto themselves. Taking into account the ability on the part of the Court to offer a reasonably proximate trial date, the existence in all save the case of the ninth applicant of compensation by way of termination payment that would flow from termination, an assessment on my part that it is more likely than not that damages will be an adequate remedy in relation to common law proceeding and a compensatory order adequate in relation to proceedings based on the Fair Work Act, as well as the private and public interest considerations which attend minimising a risk of supply chain interruption, as well as, I should record, an undertaking given on behalf of DP World Brisbane to extend that already given on 5 November to the end of December this year, my view is that a case for the interlocutory injunctive relief sought is not made out. I therefore dismiss the interlocutory application.

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| I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 19 November 2021

SCHEDULE OF PARTIES

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|  |  |
| Applicants |  |
| Fourth Applicant: | CARLO FEARN |
| Fifth Applicant: | SHELDON WRIGHT |
| Sixth Applicant: | NICHOLAS WALLACE |
| Seventh Applicant: | MICKEY HARRIS |
| Eighth Applicant: | KEVIN MACDONALD |
| Ninth Applicant: | JOHNATHAN CLARKE |
| Tenth Applicant: | GRANT TUHAKARAINA |
| Eleventh Applicant: | RICHARD TAYLOR |