

19 August 2021

Request for Clarification – FWO Advice

Restaurant & Catering Australia



Background:

Following the Workplace Vaccinations Roundtable convened by the Attorney General on 18 August, R&CA wishes to raise ongoing issues relating to hospitality businesses who could reasonably be classed as Tier 3 businesses as per Fair Work Ombudsman guidance.

FWO Guidance:

The FWO Advice states, for tier three businesses, that:

Tier 3 work, where there is interaction or likely interaction between employees and other people such as customers, other employees or the public in the normal course of employment (for example, stores providing essential goods and services).

For employees performing Tier 3 work:

where no community transmission of coronavirus has occurred for some time in the area where the employer is located, a direction to employees to be vaccinated is in most cases less likely to be reasonable

where community transmission of coronavirus is occurring in an area, and an employer is operating a workplace in that area that needs to remain open despite a lockdown, a direction to employees to receive a vaccination is more likely to be reasonable.

State Public Health Orders:

This advice puts FWO in conflict with rules governing restaurants, cafes and catering businesses under various state Public Health Orders. In each state and territory, hospitality businesses are subject to a range of Public Health Orders which primarily

seek to limit the spread of covid-19 within hospitality business, with particular rules governing staff, patrons and certain activities allowed within these premises. These orders are subject to rapid change based off of local health advice.

For example, such orders may include limits on capacity, bans on singing, bans on dancing, no standing, seated consumption of alcohol only, mask wearing and restrictions of certain food styles such as buffets.

Further questions to be clarified:

Given the above, R&CA requests that the FWO should update their advice to provide businesses certainty relating to the below questions:

Where a premises is bound by Public Health Order limiting the interaction or likely interaction between employees and other people such as customers, would such Public Health Order:

- 1. Satisfy the test of that premises being deemed a category 3 premises?*
- 2. Satisfy the test of community transmission occurring in an area?*

Conclusion:

While R&CA appreciates that each business would still have to independently satisfy itself of all the other tests that you raised today, it is clear that certain circumstances where public health orders are implemented with the express intention of reducing community transmission in certain public settings deemed as presenting a high risk of such transmission, then businesses and workers that are the subject of those orders would categorically satisfy the tier three threshold requirements.

As such, R&CA, on behalf of its members, would appreciate further guidance on the above questions, predominantly to reduce the need for individual businesses to seek costly legal advice.

I appreciate the difficulty of the FWO providing specific advice but was hoping that the above issue can be given more clarity.