



Confidential and Privileged

Golf Australia (clubs and facilities): Victoria mandatory COVID-19 vaccinations

Background

Golf Australia is the governing body for golf in Australia. It is responsible for the delivery of major golfing tournaments in Australia (such as the Australian Open and Women's Australian Open) as well as other national events and tournaments (such as the Australian Amateur).

You have sought our advice in relation to the application of the Victorian *COVID-19 Mandatory Vaccination (Workers) Directions* from the Acting Chief Health Officer dated 7 October 2021 (**Directions**) affecting Golf Australia's clubs and facilities based in Victoria (referred to in this advice as 'Clubs'). We have not considered any equivalent directions or public health orders that may apply in other jurisdictions around Australia.

Our advice is current as of 14 October 2021. The Directions may be amended, revoked or replaced in due course, which may impact the information contained in this advice.

Summary of advice

A high level summary of our advice is set out below:

1 Application of Directions to Clubs

A summary of the Directions, what they require, the exceptions to their application and penalties for non-compliance are set out below.

In our view, subject to what duties workers actually perform and the nature of their engagement with Clubs, clubhouse staff, pro-shop (retail) staff and greenkeeping staff are likely captured by the Directions. Employees, independent contractors and volunteers are each likely to be captured by the Directions, again subject to what duties those individuals actually perform and the nature of their engagement with Clubs.

2 Managing unvaccinated workers

If a worker, who is captured within the scope of the Directions, does not obtain a COVID-19 vaccine, a Club cannot permit that worker to work outside their ordinary place of residence on or after 15 October 2021 (subject to some qualifications).

Clubs should work with the worker to understand whether there is a valid reason why they are refusing to obtain a COVID-19 vaccine. If the worker still refuses to provide confirmation of their vaccination status, subject to consideration of any alternative options that may be available for managing that worker (such as re-deployment to other roles or allowing the worker to take leave), they may be 'stood aside' from their duties without pay. Clubs will then need to consider

what next steps they wish to take, which may include disciplinary action up to and including termination of employment. There is no need to take such disciplinary action immediately, or at all – subject to the Club’s business needs.

3 Privacy obligations

Clubs must ensure that they collect, use and disclose vaccination information consistent with their privacy obligations. In particular, such information may be collected with consent or by direction to do so, and once collected, should be kept up-to-date, held securely and in confidence, and only be used in accordance with the purpose for which it was collected and any applicable privacy policy.

What do the Directions require?

The Directions came into effect from 11:59pm on 7 October 2021 and will end at 11:59pm on 21 October 2021. This aligns with the date for the end of the current orders declaring a State of Emergency in Victoria (although we expect these orders to be extended beyond 21 October 2021, which will allow the Directions to be extended or replaced and continue, at least in some form, beyond 21 October 2021).

Who do the Directions apply to?

The Directions apply to employers who employ or engage specific types of ‘workers’, as set out in Schedule 1 and defined in clause 9 (except Commonwealth employees or a person who works in connection with court proceedings). This includes both paid and unpaid workers. We consider some common types of workers that may be engaged by Clubs in the next section of this advice.

What do employers need to do?

There are three primary obligations on employers in the Directions:

1 Collect, record and hold vaccination information

If a worker is or may be scheduled to work outside of their ordinary place of residence on or after Friday 15 October 2021, an employer must collect, record and hold vaccination information about the worker. This means that employers must obtain information about a person’s vaccination status that has been derived from the Australian Immunisation Register (provided they already do not hold such information), being that they are either:

- *Fully vaccinated*: received two doses of a COVID-19 vaccine;
- *Partially vaccinated*: received one dose of a COVID-19 vaccine (and not an ‘excepted person’);
- *Unvaccinated*: received no doses of a COVID-19 vaccine (and not an ‘excepted person’); or
- *Excepted person*: the person holds certification from a medical practitioner that they are unable to receive a dose, or a further dose, of a COVID-19 vaccine due to:
 - an acute medical illness (including where the person has been diagnosed with COVID-19); or

- a medical contraindication, which is which is exhaustively defined to mean one of the following contraindications to the administration of a COVID-19 vaccine:
 - anaphylaxis after a previous dose;
 - anaphylaxis to any component of the vaccine, including polysorbate or polyethylene glycol;
 - in relation to AstraZeneca (Vaxzevria), history of capillary leak syndrome or thrombosis with thrombocytopenia occurring after a previous dose;
 - in relation to Pfizer (Comirnaty) or Moderna (Spikevax), myocarditis or pericarditis attributed to a previous dose of either of those vaccines; or
 - the occurrence of any other serious adverse event that has been attributed to a previous dose of a COVID-19 vaccine by an experienced immunisation provider or medical specialist (and not attributed to any another identifiable cause) and been reported to State adverse event programs and/or the Therapeutic Goods Administration.

A certification from a medical practitioner identifying one of the above medical contraindication is only effective until the date specified by the medical practitioner or six months from the date of issue, whichever is earlier.

If a worker is unvaccinated or partially vaccinated, the obligation to obtain information about the worker's vaccination status extends to obtaining information that the worker is booked in to receive:

- if they are unvaccinated, the first dose of a COVID-19 vaccine by 22 October 2021; or
- if they are partially vaccinated, the second dose of a COVID-19 vaccine by 26 November 2021.

2 Prohibit unvaccinated workers from performing work

On or after 15 October 2021, Victorian employers must not permit a worker who is unvaccinated to work outside of their ordinary place of residence. If an employer does not hold any vaccine information about the worker, they are to be treated as being unvaccinated.

There are two exceptions to this rule:

- an unvaccinated worker may perform work between 15 October 2021 and 22 October 2021 if they have a booking to receive the first dose of a vaccine by 22 October 2021; and
- if an unvaccinated worker has been directed to self-quarantine and, as a consequence, was unable to obtain a COVID-19 vaccine, they may perform work after 22 October 2021 provided that they have a booking to receive a vaccine within 7 days of the end of their self-quarantine period.

3 Inform workers of the requirements

An employer must, as soon as reasonably practicable after the implementation of the Directions, inform each worker that is affected by the Directions of the above two obligations. A similar obligation exists for workers engaged by the employer on or after 15 October 2021.

What are the exceptions to the Directions?

The exceptions are limited and generally relate to responding to emergency situations or critical unforeseen circumstances, as follows:

- a worker is required to perform work or duties that is or are necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance;
- a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or to continue essential operations due to an emergency situation or a critical unforeseen circumstance;
- a worker is required to respond to an emergency; or
- a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.

A “critical unforeseen circumstance” means a circumstance that the employer could not reasonably have foreseen nor planned for which results in a critical need for staff. An “emergency situation” means a situation where it is reasonably apparent to an employer that medical treatment is necessary, as a matter of urgency to save a person’s life, prevent serious damage to a person’s health, or prevent a person from suffering or continuing to suffer significant pain or distress. If one of the circumstances above arises, the employer must take all reasonable steps to ensure that the worker does not work outside of their ordinary place of residence for any longer than the period of time necessary to respond to the exceptional circumstance.

Workers may also be exempt on medical grounds, however, these grounds are tightly confined to those set out above under the meaning of an ‘excepted person’. The Directions do not recognise any other grounds as a basis for not complying with the Directions – such as other medical reasons that do not fit the definition of a medical contraindication or an acute medical illness (e.g. stress or anxiety), or religious belief.

What if workers refuse to comply?

If a worker refuses to provide vaccination information to their employer and/or get vaccinated, the employer is required to treat them as if they are unvaccinated. Practically, this means that those workers will not be able to perform work outside of their ordinary place of residence on or from 15 October 2021 (unless they meet an exception outlined above).

What happens if an employer fails to comply with the Directions?

A failure to comply with the Directions, without reasonable excuse, may result in a penalty of 600 penalty units (\$109,044) for a body corporate and 120 penalty units (\$21,808.80) for individuals. Penalties also exist for providing false or misleading information.

Are Clubs' workers captured by the Directions?

Clause 8(8) of the Directions define an 'employer' as a person who employs or engages a 'worker', and a 'worker' means the person identified in Schedule 1 to the Directions, whether paid or unpaid, each of which are given specific meanings in clause 9 of the Directions.

The following sets out some common individuals who may be engaged to perform work at Clubs and whether they fall within the scope of the Directions. As you will see, it is quite possible that workers can fall within more than one worker definitions in the Directions. You will also note that many of the definitions are quite broad, especially because they cover workers who perform work "in connection with" certain activities or premises.

Clubhouse staff

Workers engaged to work in the clubroom at a Club are likely to fall within the scope of the following definitions in the Directions:

- "physical recreation worker", being a person who works at or in connection with a facility used or partly used for sport (**Physical Recreation Worker**);¹ and/or
- "professional sports, high-performance sports, or racing person", being a person who is employed to perform a sporting activity as their primary source of income (for example, employed by a professional club or recognised national body) and/or supports the safe conduct of another person's professional sport (**Professional Sports Worker**).²

Pro-shop (retail) staff

Workers engaged to work in the pro-shop of a Club providing retail services to guests and members are likely to fall within the scope of the following definitions in the Directions:

- Physical Recreation Worker;
- Professional Sports Worker; and/or
- "retail worker", being a person who works at or in connection with a retail facility, which means a premises at which a business operates to provide for the sale or hire of goods or provision of services by retail (**Retail Worker**).³

Greenkeeping staff

Workers engaged to work on the golf course in maintenance and upkeep of the course are likely to fall within the following definitions in the Directions:

- Physical Recreation Worker;
- "repair and maintenance worker", being a person who works in connection with outdoor maintenance, repairs, and cleaning,

¹ Directions, cl 9(20).

² Directions, cl 9(22).

³ Directions, cl 9(28).

including critical repairs to any premises where required for emergency or safety (**Repair Worker**);⁴ and/or

- “utility and urban maintenance worker”, being a person who works in connection with services to support the ongoing provision of electricity, gas, water, sewage and waste and recycling services and their maintenance (**Maintenance Worker**).⁵

Club volunteers

The definition of a ‘worker’ includes a person who is engaged by an employer on a paid or unpaid basis. This would include those Club volunteers who are directly engaged to work at the Club on a voluntary basis. Depending on what those volunteers actually do at the Club, they could fall into several of the definitions set out above, including Physical Recreation Worker, Professional Sports Worker and Retail Worker.

Contractors

The definition of a ‘worker’ includes a person who is employed or engaged by an employer. In our view, this would encompass individuals who are directly engaged by a Club on an independent contractor basis to perform work at the Club. Depending on what those contractors actually do at the Club, they could fall into several of the definitions set out above, including Physical Recreation Worker, Professional Sports Worker, Retail Worker, Repair Worker and/or Maintenance Worker.

However, not all contractors will fall within the scope of the Directions, depending on the specific contractual arrangements that are in place. This should be considered on a case-by-case basis.

We understand the above are likely to capture most (if not all) individuals working at Clubs. However, please let us know if you would like us to consider any other specific workers.

What steps should Clubs take in relation to employees who refuse to be vaccinated or want to ‘wait out’ the Directions?

If an employee who is captured within the scope of the Directions does not obtain a COVID-19 vaccine, the Directions are clear – on or after 15 October 2021, Clubs cannot permit that employee to work outside their ordinary place of residence (subject to the qualifications set out above).

In such circumstances, Clubs will need to manage the employee’s employment for the period that they remain unable to perform their duties at the worksite. This should be applied on a case-by-case basis having regard to the specific circumstances of the employee, including any specific requirements that may exist in a modern award, contract of employment or workplace policy.

Subject to the above, the below framework provides a general guide on how to manage direct employees. Much of this is also relevant to managing volunteers and contractors that are engaged by Clubs as well, subject to the specific arrangements that are in place with respect to those individuals and how they are engaged by the Club. Please let us know if you would like us to consider any specific types of arrangements that you have in place.

⁴ Directions, cl 9(27).

⁵ Directions, cl 9(32).

1 Consult with the employee

In the first instance, a Club should speak with the employee to understand why they are refusing to be vaccinated. It may be that they have a valid exemption under the Directions, such as a medical contraindication, that will allow them to continue to attend the worksite notwithstanding that they have not had a COVID-19 vaccine.

2 Issue a lawful and reasonable direction

If the employee does not provide a valid reason that falls within the exemptions to the Directions, or fails to provide any information at all, the Club should issue the employee with a lawful and reasonable direction that they must not attend work unless they provide details of their complying vaccination status in accordance with the Directions.

This direction should clearly articulate that unless the worker is able to comply with the direction, the worker will be regarded as not being *ready, willing and able* to perform their duties. It should be clear that the Club is not repudiating the employee's contract by not allowing performance of work, but rather is simply applying the terms of the Directions. Importantly, the Club is not directing employees to be vaccinated – it is only directing them to provide details of their complying vaccination status such that they can attend the workplace in accordance with the Directions.

An example letter that may be provided to employees is provided at Schedule 1 to this advice. Of course, this should be appropriately tailored to deal with the specific circumstances of the employee in question.

3 Consider alternatives

If the employee maintains their refusal without a valid exemption, you may wish to consider whether there are alternatives that may be implemented with respect to the employee. For example:

- Can reasonable adjustments be made so that the role can be performed at the employee's ordinary place of residence?
- Can the employee be re-deployed into another role or perform duties that do not require attendance on site? For example, there may be work that is not necessarily priority work, but is nonetheless work that is beneficial and useful for the employee to complete (for instance, performing stocktakes and developing inventories, conducting maintenance, engaging in business or continuity planning etc.).
- Can the employee take any accrued forms of leave for the period of time that they are unable to attend work (e.g. annual leave or long service leave), or otherwise agree to a period of unpaid leave? Clubs may be prepared to offer this or other types of leave as well, but is under no obligation to do so.

4 Stand the employee aside

Provided that the worker is not re-deployed to another role or other adjustments are not made to accommodate this, then the employee

may be 'stood aside' from performing their duties and will not be required to attend the worksite. As the employee is not performing any duties, the Club is not required to pay them for the time that they are 'stood aside'.

The example letter provided at Schedule 1 to this advice can also be re-purposed in this context.

5 Consider disciplinary action

The Club may be prepared to simply allow the employee to be 'stood aside' indefinitely or at least for some time until it is known what the likely future of the Directions will be, the employee gets vaccinated and/or one of the alternatives identified in (3) above becomes a viable option. This may be a simpler and less-confrontational approach with the employee, and might be a useful means of keeping a 'good' employee employed until there is greater clarity as to what will happen when the Directions lapse on 21 October 2021 (or if they are simply renewed, what will be the long-term plan for this mandate).

Alternatively, the Club may wish to consider taking disciplinary action against the employee for failing to be ready, willing and able to attend work, such as issuing formal written warnings advising the worker that if they fail to obtain a COVID-19 vaccine by a specific date (or provide a legitimate reason as to why they cannot), then the Club will have no other option other than to terminate their employment.

6 Consider termination of employment

The last option is to consider terminating the employee's employment, on the basis that because they have not confirmed that they are vaccinated in accordance with the Directions or remain unvaccinated, the employee has failed to comply with a condition precedent to their employment to be ready, willing and able to physically attend work. Of course, this is a serious step to take, and it will need to be ensured that there is procedural fairness involved in the process. For example, the Club will need to consider:

- the notice the employee has been given of the requirements to be vaccinated;
- the steps that the Club has taken to support the employee and advise them of the consequences of their actions (e.g. consideration of the alternatives outlined in (3) above, provision of time off to get vaccinated, provision of other support mechanisms etc.); and
- the usual steps that are required in effecting a procedurally fair termination, including compliance with any industrial instrument, contract of employment and workplace policy (including providing notice of the reason for termination, opportunity for the employee to respond to that reason, opportunity to have a support person etc.).

How should vaccination information be collected, stored and used?

Collection of vaccination information

As vaccination status will amount to sensitive information under the *Privacy Act 1992 (Cth)* (**Privacy Act**) and health information under the *Health Records Act 2001 (Vic)* (**Health Act**), Clubs will need to ensure that they meet the requirements for collection of such information.

Clubs may collect such information:

- if the individual consents to the collection of the information and the information is reasonably necessary for one or more of the organisation's functions or activities;⁶
- if the collection is required or authorised by or under an Australian law;⁷ and/or
- where the Club reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to life, health or safety of any individual, or to public health or safety.⁸

Clubs may wish to rely on seeking consent in the first instance to collect vaccination information from individuals, as most individuals would generally be forthcoming with that information, particularly given the effect of the Directions and that is relatively well-known that this is a requirement that has been imposed in Victoria. Alternatively, Clubs may simply prefer to direct the disclosure of the information in reliance of the latter two dot points above.

The worker should be notified of who is collecting the information, the basis and purpose for the collection, the consequence for not collecting the information, how the individual may access the information and relevant parts of any privacy policy.⁹

Storage of vaccination information

Clubs must take steps to ensure that vaccination information that they collect is accurate, up to date and complete.¹⁰ They must also take such steps as are reasonable in the circumstances to protect the information from misuse, interference and loss and from unauthorised access, modification or disclosure.¹¹ Clubs should also comply with any privacy policy they have in place in relation to the management of this information.

Clubs should regularly review whether they still need to retain this information as time goes on and what happens, in due course, with the Directions (and/or those that replace them). This should include

⁶ Privacy Act, Australian Privacy Principle (**APP**) 3.3(a); Health Act, Health Privacy Principle (**HPP**) 1.1(a).

⁷ Privacy Act, APP 3.4(a); Health Act, HPP 1.1(b).

⁸ Privacy Act, APP 3.4(b), plus a requirement that it is unreasonable or impracticable to obtain the individual's consent to the collection of such information; Health Act, HPP 1.1(f).

⁹ Privacy Act, APP 5; Health Act, HPP 1.4.

¹⁰ Privacy Act, HPP 10.1; Health Act, HPP 3.1.

¹¹ Privacy Act, HPP 11.1; Health Act, HPP 4.1.

monitoring the latest government and health advice about the vaccine roll-out, COVID-19 restrictions and Chief Health Officer directions.¹²

Disclosure of vaccination information

Disclosure of vaccination status information should only be made on a 'need-to-know' basis and for a purpose for which it was collected (known as the 'primary purpose'), or for a secondary purpose where:

- the secondary use or disclosure is required or authorised by or under an Australian law or a court/tribunal order;¹³ or
- the use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.¹⁴

These exceptions would allow Clubs to disclose information to work health and safety regulators or government agencies exercising proper powers.

To reduce the risk of any dispute arising in relation to the disclosure of information regarding vaccination status, it is recommended that Clubs communicate with workers that they may disclose information to a government and/or regulatory body on request.

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¹² If Clubs no longer need the information collected for any purpose for which it may be used or disclosed and is not required under an Australian law or order to retain the information, they should take such steps as are reasonable in the circumstances to destroy the information or to ensure that it is de-identified: Privacy Act, HPP 11.2; Health Act, HPP 4.5.

¹³ Privacy Act, HPP 6.2(b); Health Act, HPP 2.2(c). Note that cl 5(5) of the Directions authorises employers to use the vaccine information collected for the purpose of complying with its obligations to not permit an unvaccinated worker from attending work outside of their ordinary place of residence.

¹⁴ Privacy Act, HPP 6.2(c), plus a requirement that it is unreasonable or impracticable to obtain the individual's consent to the collection of such information; Health Act, HPP 2.2(h).

Schedule 1

Example direction to employees to not attend work

If an employee does not provide details of their vaccination status or fails to provide a valid reason that falls within the exemptions to the Directions, a direction should be issued to that employee advising them that they must not attend work unless they provide details of their complying vaccination status in accordance with the Directions.

An example direction is provided below. Of course, this should be appropriately tailored to deal with the specific circumstances of the employee in question (for example, to deal with the situation where an employee confirms that they are unvaccinated and do not propose to obtain a COVID-19 vaccine in accordance with the Directions).

Dear [insert name]

Victorian Government COVID-19 vaccination requirements

We refer to our previous correspondence to you dated [insert date] in relation to the effects of the *COVID-19 Mandatory Vaccination (Workers) Directions*, which were given by the Victorian Acting Chief Health Officer and commenced operation on 7 October 2021 (**Directions**).

As we have previously advised you, under the Directions, you are a worker who is, or may be, scheduled to work outside your ordinary place of residence on or after 15 October 2021.

As such, whilst the Directions remain in force, [Club] is required by law to:

- collect, record and hold certain vaccination information about you; and
- on and after 15 October 2021, not permit you to work for [Club] outside your ordinary place of residence, unless you:
 - have received a dose of an approved COVID-19 vaccine and have provided [Club] with vaccination information confirming this;
 - have a booking to receive, by 22 October 2021, your first dose of an approved COVID-19 vaccine;
 - were unable to receive your first dose of an approved COVID-19 vaccine by 22 October 2021 because you were required to self-quarantine under the relevant Victorian Government directions, and have a booking to receive your first dose within 7 days of the end of your self-quarantine period;
 - hold a current certification dated within the last 6 months from an approved medical practitioner that you are unable to receive a dose or further dose of an approved COVID-19 vaccine due to an approved medical contraindication, or an approved acute medical illness; or
 - fall within one or more very limited categories of exceptional circumstances (such as a critical unforeseen circumstance which results in a critical need for staff; to respond to an emergency; or to perform urgent essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure).



As at the date of this letter, you have not provided [Club] with information about your vaccination status, or any evidence that confirms that you fit into one of the categories outlined above.

Consequently, as required by the Directions, [Club] is required to treat you as if you are unvaccinated. This means that, on and from 15 October 2021, [Club] is prohibited from allowing you to perform work outside your ordinary place of residence.

As you are aware, it is necessary for you to attend the workplace in order to perform your usual duties. Until such time that you are able to provide [Club] with information about your vaccination status, or any evidence that confirms that you fit into one of the categories outlined above, you will be regarded as not ready, willing and able to perform the duties of your role. As such, as you are unable to meet the requirements of your role, and you will not be paid from that time [unless you apply to use any accrued annual or long service leave]. [Consider whether there are any alternative options which may be offered to the employee as well]

To be clear, this is not a direction for you to obtain a COVID-19 vaccination – that is a matter of your personal choice, but rather this is the consequence of the effect of the Directions, which [Club] is legally bound to follow.

Finally, we are aware that this is a difficult time and that the Government's health directions are creating challenges for many people. Government directions and public health orders in relation to vaccination requirements are changing frequently and we will keep you informed as to any updates or changes in relation to these directions. [Club] remains happy to work with you on an individual basis to discuss your situation and provide assistance where we are reasonably and lawfully able to do so. Otherwise, you are of course able to access the Employee Assistance Program on [insert contact details].

Yours sincerely

[Insert company contact]