

# Application of Building and Construction Industry Worker (Restrictions on Access) Directions to local government civil works

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## Introduction

Various well-intended publications which circulated within the local government sector in recent weeks indicated that it has been the State government's consistent intention not to require mandatory vaccinations for local government outdoor workers undertaking civil works. However, this intention was not reflected in the drafting of *Building and Construction Industry Worker (Restrictions on Access) Directions (No 2)*, which applied generally to building and construction work and did not specifically exempt local government civil works.<sup>[1]</sup>

## Amendment to legal position

Despite those publications, the legal position was only actually changed to reflect the State Government's stated intention as at 13:00 on 31 December 2021 when the State's Acting Chief Health Officer signed the *Building and Construction Industry Worker (Restriction on Access) Directions (No. 3)*.

That Direction introduced, for the first time, an exclusion from the concept of a 'building and construction worker' (Schedule 1 Row 1) in the following terms:

'... but does not include a person employed by a local government undertaking minor construction work (including but not limited to minor road works, work on pavements/footpaths, irrigation work, parks and gardens work, landscaping work) where the construction work is being conducted by only people employed by a local government.'

Directions No. 1 and No. 2 in relation to Building and Construction Workers did not include such an exclusion. Some advice that had been given within the sector was that local government outdoor workers were not covered by Directions 1 or 2 because civil works undertaken by local government workers did not normally require a building permit.

However, the Directions do not establish, and had never established, a proposition that any work that did not require a building permit did not attract the need for mandatory vaccination of workers. The exemption applying to work not needing a building permit was and is a very narrow exemption applicable to non-structural building work, and to certain types of

building work in particular regional local government districts only, pursuant to paragraph 41 of the *Building Regulations 2012* (WA).

Fortunately, the legal position has been clarified as of 13:00 on 31 December 2021, and the basis of the clarification is the exclusion quoted above in relation to 'minor construction work'.

### **'Minor construction work'**

The term 'minor construction work' is not defined, and as such, it clearly involves assessments of fact and degree. The examples probably assist to provide the 'flavour' for its scope. Thus, minor road works, work on pavement/footpaths, irrigation work, parks and gardens work and landscaping work, would qualify as 'minor construction work'. Work of an analogous kind and scale would also qualify as 'construction work'.

By contrast, it is tentatively suggested that, where a local government is rolling out a major road upgrade project, then that would probably not qualify as 'minor construction work', and accordingly, local government workers working on such projects would need to be vaccinated as the exclusion would not apply.

The other important proviso is that, if there is a combination of local government employees and externally-engaged employees involved in constructing the relevant 'work', then the exemption does not apply.

### **Conclusion**

Direction No. 3 signed on 31 December 2021, provides a welcome clarification as to the scope of the exclusion of local government outdoor workers undertaking civil works from a requirement of mandatory vaccination. Despite advice within the sector to the contrary, in McLeods' view, the legal position only reflected the State Government's apparent intention upon the signing of Direction No. 3.

It is, however, an oversimplification to say that all local government outdoor workers involved in civil works, are necessarily exempt from the need for mandatory vaccination.

If local government outdoor workers are engaged in construction work which is not 'minor construction work', then they still fall within the mandatory vaccination requirement under the Direction.

Moreover, if workers other than local government employees are also engaged in the construction work project alongside local government employees, then those local government outdoor workers are likewise subject to the requirement of mandatory vaccinations, irrespective of whether the construction work is 'minor construction work'.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. Local governments requiring further assistance in relation to these issues are welcome to contact McLeods on 9383 3133.

**[1]** The definition of 'construction work' in the Direction includes any work defined as construction work within the *Construction Contracts Act 2002* (WA), which definition specifically includes civil works.



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