



Everybody Out

Australian Public Transport Industrial Association

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Welcome to the October 2020 Edition of Everybody Out

PUBLIC TRANSPORT INDUSTRIAL RELATIONS NEWS

The information contained within this Edition is developed within the Bus and Coach Industry. It is not intended that the information should be relied upon without the reader first seeking their own expert advice.



Wayne Patch, Chairperson

In this issue:

MEMBERS NEWS

- **National Industrial Relations (Mini) Seminar**

APTIA will hold an Online Zoom Seminar on Wednesday 4 November 2020 between 10.00am and 12 noon (AEDST) titled:

“Working our way through the Pandemic.”

Speakers and Topics:



Nikki Britt (formerly Brouwers) is a well-respected and passionate health professional who is the managing director of Navigate Health. Nikki is well known to the industry,



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having formerly operated as the Interact Group. Nikki's presentation, titled, "Addressing the Psychological Impacts of Covid-19 in our Bus Companies" will address psychological hazards in our workplaces and consider risk management to mitigate infection and anxiety of infection for your staff.



Tim Capelin is a senior partner in the legal firm Piper Alderman, solicitors, who have represented bus operators from across the country, for many years. Tim's expertise is industrial relations, and he has regularly presented to the industry. Tim will deal with those IR issues, which are prevalent during the pandemic, including, how job keeper works and the flexibilities that come with it. Tim will also reflect upon changes to leave entitlements and Award provisions.



"The Seminar will provide an opportunity for members to hear, firsthand, from experts, how best to deal with employees during these difficult times and to understand what changes may need to be made to adjust to the new working environment." Ian MacDonald, National IR Manager, BIC.

- **Professor Ron McCallum debate**

On Thursday 22 October 2020, the 10th Annual Prof. Emeritus Ron McCallum Debate was held.

The topic "**Labour Relations and Pandemics: Past, Present, Future**" posed the following question:

"What is the impact of the Covid-19 pandemic on work, employment, and labour relations globally and locally, and what impetus and opportunity does it present for reform?"



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At the outset of the debate, Prof. Emeritus Ron McCallum provided the historic perspective that during times of great stress, whether a substantial economic downturn, war or a world-wide pandemic, there had been significant changes to the way in which people were employed and which resulted in substantial industrial relations reform. He espoused the historical view that labour laws had been enacted in times of crisis and alluded to the fact that this pandemic crisis had already seen a change in attitude to online work, to working from home, to the plight of aged care and health workers and had focussed upon casual workers and at what point should a casual worker be entitled to sick leave and a vacation. He even suggested that the Government might have to intervene as with long service leave to ensure some form of paid leave to casual employees.

Prof. Emeritus Ron McCallum saw the current pandemic presenting the same opportunities for change, which occurred in the way many persons were now working from home and other flexibilities in the workforce intended to keep people in work.

The participants in debate included:

- Hon Justice Iain Ross AO – President of the Fair Work Commission (Chair)
- Sally McManus – Secretary, Australian Council of Trade Unions
- Annie Butler – Federal Secretary, Australian Nursing and Midwifery Federation
- Jennifer Westacott AO – Chief Executive, Business Council of Australia
- Joellen Riley Munton – Professor, Faculty of Law, University of Technology Sydney
- David Peetz FASSA – Professor of Employment Relations, Griffiths University
- Innes Willox – Chief Executive, Australian Industry Group

The Secretary of the ACTU made the point that our unique IR system with the Fair Work Commission had served us well during the pandemic, given that Unions and Employers had negotiated changes to the industrial laws.

The Chief Executive of AiG also agreed that the system had stood up well and that we are coming to end of this wave of IR changes, with more to come.

The Chief Executive of BCA could see the national imperative for change in IR laws but warned of the need to find a shared purpose. Improvements to bargaining was seen as a significant factor in getting people to work again.

The Federal Secretary of ANMF however saw the successful containing of the virus only opened the inequities in some industries which Industrial Relations would need to address.



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- **APTIA Online**



APTIA participated, during October, in a video conference, as part of its membership with ACCI, with Dr Andrew Leigh MP, Shadow Assistant Minister for Treasury. APTIA posed the following question:

“Given the apparent failure of the National Cabinet to reach any real consensus between the various State Governments, especially on border closures and the concept of what constitutes a hot spot, what do you think Anthony Albanese might have done better if he was Prime Minister?”

Dr Leigh made the point that, if “Albo” was PM, he probably would have invited the leader of the Opposition to the National Cabinet to make sure that the Opposition had input into the decisions of National cabinet and therefore could not criticise them and at best the Leader of the Opposition might have been able to negotiate better with those State Premiers of the same political persuasion to reach that consensus.

INDUSTRY NEWS – What you need to know

- **Overtime for Casuals**

The FWC has recently varied 97 awards to address casuals' overtime payments and had rejected employer arguments that its application of a compounding formula in many sectors contradicts the "widely accepted" proposition that penalties should not be applied to loadings.

The Full Bench in a landmark decision on 30 October 2020 ruled the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise.



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With respect to the Passenger Vehicle Transportation Award, following representations from APTIA and significant contributions from APTIA members, who provided evidence by way of affidavit and going into the witness box, the APTIA position was upheld to ensure that the casual loading is only paid on ordinary hours not on overtime hours.

The Full Bench Decision reaffirmed APTIA's position:

" Passenger Vehicle Transportation Award 2020

[102] In paragraphs [322] and [333] of the August decision, we expressed concern as to whether the agreed position conveyed to us about this award by the Australian Public Transport Industrial Association (APTIA) had in fact been agreed to by the Transport Workers' Union (TWU). We invited the TWU to provide advice within 21 days as to whether it confirmed or contested the advice given by the APTIA. No advice has been forthcoming from the TWU pursuant to this invitation. In the circumstances, we do not propose to pursue this matter any further. The award has already been varied in terms consistent with the position conveyed by the APTIA, so no further action is required in relation to this award."

- **Industrial Reform – Will it happen?**

ACTU secretary Sally McManus is hopeful that agreement can be reached on a legal definition of casual employees, despite the Morrison Government's IR working groups ending with recriminations between union and employer groups.

McManus broke her silence on the discussions, saying they ended a month ago and that unions had respected their confidentiality while they were underway over four months.

She told Radio National Breakfast's Fran Kelly in an interview recently there was now a "holding pattern" in place while the government worked on legislation to change the workplace laws.

"Some of the employer groups are actively lobbying the government to try and achieve cuts to workers' rights," McManus said, in explaining her decision to speak out.

"The employers have told us they will be directly talking to the government about what they want, so we know it's happening."

McManus said unions were concerned about an employer push to undermine minimum pay and conditions set in awards and the Better Off Overall Test, which is applied by the Fair Commission in deciding whether to approve new agreements.

She said some employers wanted to undercut minimum conditions, giving them a competitive advantage because they would be able to pay workers less.

During the negotiations, the ACTU struck an agreement with the Business Council for fast-tracking agreement approvals where unions are involved, while relaxing the application of the BOOT test.



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However, this was rejected by other employer groups – the ACCI, Ai Group, the MBA and AMMA.

McManus argued today that union involvement in negotiating agreements would allow a simplified form of vetting them, but the BOOT was especially needed where there was little or no union involvement.

"There is one area that we found to fast-track agreements that will make sure that people aren't worse off and make it simpler," McManus said.

"So, for example, at the moment the Fair Work Commission has got to think about hypothetical rosters . . . even if people aren't working them.

"We found a way of making that faster by saying that if an employee in the future found that they were worse off, they would be able to get that resolved by the Fair Work Commission."

McManus said some employer groups do not support the changes on rostering because they wanted to use bargaining to cut wages, which unions would not support.

Sources close to the talks say there was some common ground on a definition of casual employment and allowing casuals to convert to permanent employees after working for an employer for nine months.

McManus said the small business lobby group, COSBOA, supported giving casuals more rights and ensuring they were not treated as casuals when they were actually permanent employees.

"So, I am still hopeful that there could be a group outcome there," she said.

"Having said that, in a way it's a big missed opportunity because the issue of casualisation and labour hire ... and the gig economy, are much, much bigger issues that what we've been able to discuss in this working group, and something I think we've got to consider as a country going forward."

Unions are also understood to have agreed on having a proposal for government subsidies for payroll software to help small businesses avoid accidentally underpaying their employees, and to not apply criminal and civil sanctions for inadvertent underpayments that are quickly rectified.

McManus argued that consumer confidence and job security were needed to get out of a recession, rather than pay cuts.

"We approached it from that perspective."

"But unfortunately, some employers are using the pandemic . . . to bring about permanent changes, like permanent cuts that pass on to the next generation.

"It's not really about the pandemic, it's about using it as an opportunity to achieve things that they couldn't achieve beforehand.

"Those employers have spent four months listening to us.

"We've listened to them; they've listened to the experts.



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"They haven't got their own way, they're not happy about that.

"So, they're thinking, well, what can we do to put on political pressure and I just think that's bad faith and I think it's not 'Team Australia' to be behaving like that."

McManus said the IR working groups had still been useful in terms of employer groups and unions understanding different positions and looking for common ground.

"The Prime Minister said everyone should put down their weapons and approach this without ideology."

"We've tried to take up that spirit in the way that we've approached it.

"We believe that some employer groups are just incapable of that type of thinking."

IR Minister Christian Porter said in a statement that the working groups had been "incredibly beneficial in helping to inform the government's efforts to find practical and common-sense solutions to well-known problems within our industrial relations system".

"While we have listened closely to all views, our job now as a Government is to take what we have learnt and deliver reforms that will help to regrow the jobs that have been lost to the pandemic," Porter said.

"That is what this process has always been about and I am now considering outcomes from the working groups and working towards a package of reforms to put to the Parliament in an omnibus bill towards the end of this year.

"Until the Bill is released all matters considered by the working groups remain under active consideration."

- **Fair Work (Paid Parental Leave) Bill 2020**

The Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Bill 2020, was on the Parliamentary schedule for debate at the last sitting. While it did not get debated, it may again make the schedule when Parliament next resumes.

The Bill follows policy announcements by the Government as previously advised to members. In summary this Bill responds to the report of the Senate Select Committee on Stillbirth Research and Education to:

- (i) Increase the entitlement for unpaid parental leave for those who have experienced a stillbirth or infant death to a maximum of 12 months (up from 6 weeks).
- (ii) Provide greater flexibility around returning to work for parents of premature babies, or babies that experience birth-related complications that result in immediate hospitalisation.
- (iii) The Bill also seeks to provide the ability to take up to 30 days of their existing 12-month entitlement to unpaid parental leave flexibly (including on a single day basis), within 24 months of the birth or adoption of a child. This would complement the new flexible



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government-funded Paid Parental Leave scheme as amended by the Paid Parental Leave Amendment (Flexibility Measures) Act 2020 earlier this year.

- **Job Keeper decision**

A recent case - **Qantas v. Flight Attendants Association of Australia (The Job keeper case) [2020] FCA 1365**, which is the decision of a single Judge in the Federal Court and, which is subject to Appeal by Qantas, has made a number of disturbing judgments with respect to the way in which Job Keeper operates in the workforce.

I will report further, but for now, be mindful of the following:

1. Pursuant to section 789GDA of the Fair Work Act 2009, a job keeper payment in respect of an employee's fortnightly pay must be the greater of the amount payable to that employee in relation to work performed in that fortnight, including overtime and/or the job keeper payment.
2. If payments for any fortnightly pay period are deferred, i.e. overtime (TOIL), to a further fortnightly pay period then this does not obviate the obligation to make the payments, set out in paragraph 1 above.
3. Because annual leave is not work performed, then it is payable under the NES, whilst Job Keeper is also payable for the same period as a duplication.

- **Industrial Manslaughter**

Western Australia's upper house has passed new OHS legislation that introduces an offence of industrial manslaughter. The Work Health and Safety Bill 2019 has passed the Legislative Council with amendments, which now have to be approved by the Legislative Assembly.

The passage of the legislation will mean that WA will join Queensland, Victoria, and the ACT in having an industrial manslaughter offence on the books.

The WA Government said in a statement that the legislation will now be sent to the Legislative Assembly for the final vote, which is expected on November 3, and will become law once the supporting regulations are finalised next year.

Under the legislation, industrial manslaughter offences can attract a maximum penalty of between five- and 20-years' jail for an individual and a maximum \$10 million fine for a body corporate.

The Government argues the new laws will offer greater protection to workers, capturing "modern employment relationships, such as subcontractors or casual workers, not just the classic employer/employee relationship".



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"In particular, they will introduce the term 'person conducting a business or undertaking'."

The legislation increases penalties, prohibits insurance coverage for OHS penalties and introduces enforceable undertakings as an alternative to a penalty.

IMPORTANT DECISIONS

- **Aggravated damages for sexual harassment**

Lucy Orchard v Frayne Higgins [2020] TASADT 11 (1 September 2020)

A third-party courier driver who sexually harassed a Sanity manager when he slapped her on the bottom, repeatedly called her the "lewd" name "Juicy Lucy" and asked many times about her relationship status has been ordered to pay aggravated damages, largely for retaliating by serving her with a defamation letter in response to her internal complaint.

The Tasmanian Anti-Discrimination Tribunal ordered the Toll Transport courier to pay \$20,000 in aggravated damages to the assistant store manager and \$25,000 in compensation for "the injury incurred as a consequence" of his conduct.

Tribunal Member Kate Cuthbertson said the "principal aggravating feature" justifying the damages "is the defamation letter" he had his lawyers send in the wake of Sanity asking Toll, without the assistant manager's knowledge or consent, to investigate matters that surfaced in 2017.

Member Cuthbertson said the courier's sexual harassment "caused distress and humiliation" to the assistant manager, "but did not result in a serious psychiatric illness or ongoing psychological distress".

The assistant manager, who started work full-time at Sanity's Eastlands store in Hobart in January 2013, told the tribunal that in about July 2014 the courier entered the space behind the counter and slapped her on the bottom "quite hard", without her consent, when she bent over to check some stock that he had delivered.

She told the tribunal she jumped up and told him: "You can't do that".

He responded, she said, by saying "whoops", laughing and saying "don't tell your boss I did that" in a joking manner.

Just before the slap he said "ooh, nice pants", which she perceived as "seedy, like it had overtones about the fit and shape", which left her "taken aback".

She informed a co-worker about the bottom-slapping incident when he started his shift alongside her that day and also told her boyfriend and best friend.

She claimed that when the courier arrived the following day, he was laughing and asked her: "Have you told your boss yet [about the bottom slap]?"



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When the store manager, who overheard, asked her to explain, she said he had slapped her "on the arse".

The assistant manager said the store manager became angry with the courier, "had words with him and told him he could not do that".

She claimed the courier laughed while the store manager spoke to him but did not deny his conduct.

The assistant manager also told the tribunal that the courier "generally engaged in sleazy, intimidating and favouring behaviour towards her" and called her "Juicy Lucy" (a play on her first name).

She "assumed that there were sexual connotations and overtones attached" to the name and she "found it an uncomfortable thing to be called".

Some three years later an area manager visited the store and raised with the store manager the issue of whether couriers entered the area behind the counter.

When the area manager asked the assistant manager if she knew the particular courier, she said: "Yeah, he's a bit of a creep because he slapped me on the bum".

This led to Sanity, without the assistant manager's knowledge, asking Toll to investigate his conduct, triggering a phone call to the store from the courier's wife, with an employee reporting that "the tone of the call was not pleasant".

Sanity then complied with the assistant manager's request to drop the complaint, "not because it was not true, but because she did not feel safe, was not a troublemaker, and did not want to cause trouble".

"Sometime later" the courier arranged for the defamation "concerns letter", which made her "very upset" and "very angry", as she felt the demand had been made to intimidate her.

She sought medical advice and a doctor prescribed her antidepressants and soon after she left Sanity and lodged her claim with the tribunal.

The member accepted the manager's "convincing evidence" of the courier's conduct, including the bottom-slapping, which she found "largely corroborated" by accounts from others, the "Juicy Lucy" name-calling and repeatedly asking about her relationship status.

However, she found nothing "overtly sexual" in saying "Juicy Lucy", but the context in which he used them meant they amounted to unwelcome remarks with sexual connotations.

Member Cuthbertson further found that sending the defamation letter did not constitute victimisation but did amount to "an aggravating feature that is directly related to the [courier's] behaviour and aggravates his misconduct".



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"As the [courier] himself conceded in cross-examination, it is disgraceful to send a letter to a young woman demanding she retract her complaint, apologise and pay \$30,000 in circumstances where the allegation was true."

- **When can Job Keeper be used to cover leave entitlements?**

Qantas Airways Limited v Flight Attendants' Association of Australia (The JobKeeper Case) [2020] FCA 1365.

On 24 September 2020, Flick J of the Federal Court of Australia handed down the decision in the Qantas case. The JobKeeper Case, as it is now known, concerns the interpretation of the "minimum payment guarantee" contained in s 789GDA of the *Fair Work Act 2009* (Cth), which relevantly provides:

If a jobkeeper payment is payable to an employer for an employee of the employer for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:

- (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight.*
- (b) the amounts payable to the employee in relation to the performance of work during the fortnight.*

This decision arises as a result of declaratory relief being sought. For context, with respect to a number of its employees, Qantas' payroll system was set up so that a worker's pay across one fortnight could be split across two pay cycles, where overtime and penalty rates are paid in the following fortnight. For the portion to be paid in the subsequent fortnight, Qantas deducted the JobKeeper amount of \$1,500 from pay that was owed to workers.

Justice Flick determined that, for the purpose of the minimum payment guarantee, the "amounts payable to the employee in relation to the performance of work during the fortnight" are only those amounts which:

- (a) an employee is contractually (or otherwise) entitled to be paid in the JobKeeper fortnight; and
- (b) relate to work performed by the employee in the same JobKeeper fortnight.

The amounts described above cannot include payments made for work performed by the employee in a different JobKeeper fortnight, with Flick J finding:

"monies that may nevertheless be contractually required to be paid during a given fortnight but for work performed in a previous fortnight are not monies payable "in relation to the performance of work during the fortnight".

Justice Flick determined that the provision is divorced from the manner in which an employer may be required to account to an employee for work that may have been performed for a period of time outside "the fortnight", and that inquiries as to the pay cycle of employers or the terms upon which



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an employer may be entitled to pay an employee (e.g. the terms of employment or an industrial agreement), assume no relevance for the terms of the provision in question.

Accordingly, if in a JobKeeper fortnight an employer pays an employee for work the employee performed in a different JobKeeper fortnight, the employer must pay that money in addition to the JobKeeper payment.

Justice Flick also found that the above amounts cannot include payments for annual leave, as those are not amounts for "the performance of work". This is despite Note 2 to s 789GDA specifically referring to leave payments.

Flick J found:

"There is no ambiguity in the phrase employed in s 789GDA(2)(b) such that the Note should be used to give that phrase a meaning different to its normal and ordinary meaning."

Justice Flick's decision did not grapple with how an employer is to deal with payments that are not easily associated with the performance of work in a particular period, such as bonuses or other incentive payments. It appears likely that those amounts could also not be included and would need to be paid in addition to the value of the JobKeeper payment.

It appears that the Federal Court decision in the JobKeeper Case requires an employer, in determining whether it has met the minimum payment guarantee, to:

- (a) determine how much of the amount required to be paid to an employee in a JobKeeper fortnight (as part of the employee's usual pay cycle) relates to work performed by the employee in that JobKeeper fortnight (noting that the employer's pay cycle may not align with the JobKeeper fortnight);
- (b) compare that amount against the JobKeeper payment for the fortnight; and
- (c) to the extent that amount is less than the JobKeeper payment, make an additional Payment to the employee up to the job keeper payment.

Justice Flick noted that this decision affects not only the parties to this matter but "has potential application for all employers and employees participating in the *JobKeeper Scheme*." This interpretation of the minimum payment guarantee can lead to differing outcomes depending on an employer's pay cycle, even where two employees work the same hours in the same business. This interpretation also effectively denies an employer any benefit from the JobKeeper scheme where the employer pays its employees entirely in arrears for work performed by the employees outside the relevant JobKeeper fortnight.

There are also potential issues where an employee is on annual leave for the duration of a JobKeeper fortnight, as it appears the employee will be entitled to receive his or her annual leave pay in addition to the full amount of the JobKeeper payment. Flick J recognised that idiosyncrasies may arise with



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respect to amounts owed to employees, as well as “windfalls”, however said it is a matter for Parliament to “tweak” the JobKeeper scheme if it sees fit:

“If the consequence of the interpretation now given to s 789GDA(2)(b) is that idiosyncrasies arise in respect to the quantification of amounts that an employee is to receive – including the prospect that employees may benefit from a “windfall” – so be it. It remains a matter for the Legislature to “tweak” or adjust the Scheme if it sees fit.”

IMPORTANT DATES

BIC and APTIA ANNUAL GENERAL MEETINGS – Thursday 26 November 2020

(11.00am APTIA; 11.30am BIC)

NATIONAL IR (MINI) SEMINAR – 4 Nov (10.00am-12.00am AEDST)



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