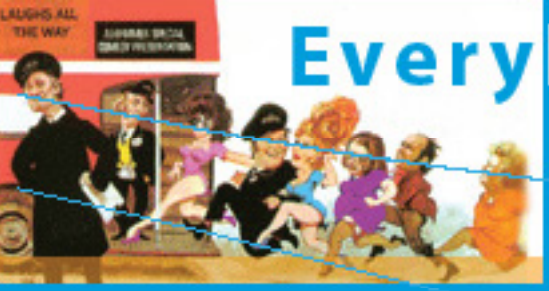


Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association
Industrial arm of the Bus Industry Confederation

Welcome to the October 2017 edition of Everybody Out

- Members News
- Industry News: What you need to know
- Stakeholder News
- Recent Decisions
- Important Dates

APTIA
Industrial Arm of the Bus Industry Confederation
moving people

Wayne Patch
Chairperson, APTIA

Members News

- APTIA Annual General Meeting
- Surfside Buslines and the Gold Coast Central Chamber of Commerce

APTIA Annual General Meeting

Notices have gone out to APTIA members advising that the 2017 APTIA Annual General Meeting will be held at 14.00 at the Grand Chancellor Hotel Hobart on Sunday 12 November 2017.

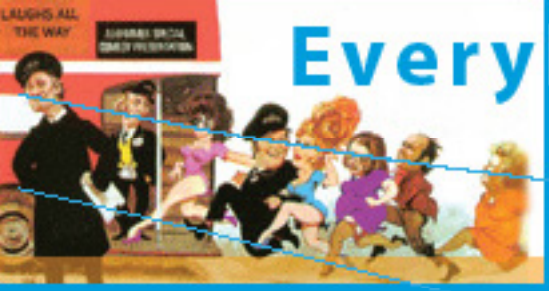
Members are invited to register for the BIC National Conference on http://ozebus.com.au

Members should also note that Grace Collier, will be the keynote speaker in the industrial relations session on Tuesday 14 November 2017 at 14.45 sponsored by the Interact Group.

Grace's topic of 'Inspiring Future Workplaces' is just the right theme for Grace, who has earned her high public profile in this space by providing solutions where others only provide suggestions. f you want to know more; go to www.collierindex.com.au

Grace Collier is a regular columnist with the Australian. Grace's early years were spent in the Labour movement, before she started her own industrial relations consulting business. Grace has written for other publications including the AFR, and contributed with specialist chapters in several books.

The Guest Speaker will be introduced by Nikki Brouwers, the Managing Director of the Interact Group, who are sponsoring the session.



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Surfside Buslines and the Gold Coast Central Chamber of Commerce

Martin Hall, President of the Gold Coast Central Chamber of Commerce and General Manager of Surfside Bus lines recently hosted keynote speaker and former Prime Minister the Hon Tony Abbott to the Chamber's annual business showcase lunch as part of the Chamber's annual business exhibition on the Gold Coast.

Martin Hall is General Manager at Surfside Bus lines on the Gold Coast, where he is responsible for more than 800 staff. He started in the bus industry as a supervisor at Hornibrook Bus Lines in 2009 and quickly ascended to the role of General Manager.

He is a keen advocate of public transport, particularly buses. Martin is a chartered member of the Institute of Transport and Logistics and a Justice of the Peace. With an undergraduate degree in agriculture and a post-grad in housing and community, buses seemed Martin's next obvious career path.

Industry News: What you need to know

- 4 Yearly Review
- Penalty Rates
- Pay rises remain low for enterprise bargaining
- Reinstatement on the rise?
- Loaded Rates
- The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017
- Work Health and Safety and Other Legislation Act 2017 (Queensland)

4 Yearly Review

One of the remaining applications to be determined by the Fair Work Commission in the 4 yearly review of the modern award which commenced in 2014 is the return to work provisions sought by the ACTU, which would:

a) Create an 'entitlement' to Family Friendly Working Hours, defined as an employee's existing position on a part-time basis (if the employee is fulltime) or on a reduced hours basis if the employee's existing position is part-time or casual, to accommodate the employee's parenting (sole or joint responsibility for a child of school age or younger) and/or caring responsibilities (Flexibility Entitlement).

b) The 'content' of the Flexibility Entitlement has two principal characteristics, including an entitlement to reduced hours and an entitlement to hours which 'accommodate' individual parental and caring responsibilities.

c) The claim includes no right of refusal for an employer on any grounds.

d) The claim also provides an employee with a reversion right to return to their original hours up until their child is school aged (or at a later time by agreement) and in the case of carers, within a two year period from the commencement of the family friendly arrangements (or at a later time by agreement).

The Australian Chamber of Commerce and Industry is representing its members, including BIC and APTIA, and has opposed the making of the orders sought by the ACTU, on the following grounds:

a) The Commission, as well as all of its predecessors, has never allowed an employee to stand in the shoes of their employer and to dictate when and how they are going to work.

b) The Claim would compel an employer to accept any request from an eligible employee for 'family friendly hours' to accommodate parental or caring responsibilities. Critically, no right of refusal would be provided to an employer, no matter how justified or warranted.

c) No coherent understanding of a fair and relevant minimum safety net could confer on an employee a unilateral right to determine their hours, regardless of the operational considerations of the employer.

It is highly unlikely that the Full Bench would make such a wide ranging set of orders which substantially cut into the relationship of employer and employee. APTIA will watch the progress of the application closely and report to its Industrial Working Group once the hearings are finalized. The matter is to be heard in Sydney and via video in other States between 12-14 December 2017 and 18-21 December 2017.

Penalty Rates

A full Federal Court judgment has now rejected the union challenge to reduced penalty rates in retail and hospitality has upheld the Fair Work Commission's power to change awards during reviews, even when there has been no "material change" in circumstances. United Voice and the SDA argued the Commission had no power to make a determination to vary the awards without having satisfied itself there had been a material change in circumstances that meant they no longer met the "modern awards objective". However, the full court – Justices Tony North, Richard Tracey, Geoffrey Flick, Jayne Jagot, and Mordy Bromberg – found the Commission correct in rejecting that argument. "A modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account," the judges said.

They said the modern award objectives required the FWC to perform two different kinds of functions when conducting reviews. This involved ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions and in so doing, take into account the award objectives at s134(a)-(h) of the Fair Work Act.

The full court said the duty to provide a fair and relevant safety net "itself involves an evaluative exercise" and consideration of the modern award objectives did not exhaust the matters the FWC might consider relevant. "It is apparent that 'a fair and relevant minimum safety net of terms and conditions' is itself a composite phrase within which 'fair and relevant' are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC's duty relates," the full court said.

"Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. "As such, the FWC is to perform the required evaluative function taking into account the s134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.
"It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act," the five judges said.
The full court also rejected union arguments that the Commission made an error by deciding that Sunday penalty rates were not suited to "contemporary circumstances".

Outside the Commission, United Voice national secretary Jo Schofield said the Federal Court judgment had sanctioned the "undermining of existing entitlements" and that business groups would attempt similar measures in other industries.
"We'll keep challenging the system if it fails to restore the central principles of our wage setting system."

"In the meantime, we continue to call on all employers to do the right thing by their hard-working employees and to not to pass on these unjust cuts. Businesses can make the choice to support their staff." ACTU secretary Sally McManus said the Turnbull Government could act to reverse the cuts to penalty rates. Opposition leader Bill Shorten said there was "one reason why Malcolm Turnbull and his government refuse to vote for Labor's Fair Work Amendment (Protecting Take-Home Pay) Bill 2017 – they support cutting penalty rates and reducing the wages of up to 700,000 low income workers".The problem with the ALP amendment Bill is that whilst it is designed to remove a reduction to weekend penalty rate in a small number of industries it prevents any diminution in take home pay in any enterprise agreement or Award negotiation for all industries and therefore would limit productivity savings negotiations into the future. If elected in 2018/19 no doubt a Shorten lead Government would re- introduce the Bill.

Pay rises remainlow for enterprise bargaining

Wage rises in private sector agreements have sunk to a new 26-year low, while the number of agreements approved has collapsed to a 22-year low, according to Department of Employment data. The department's Trends in Federal Enterprise Bargaining report shows that private sector approved in this year's June quarter paid average annualised wage increases (AAWIs) of 2.6% a year, down from a record low of 2.7% annually in the previous three-month period.

For agreements across private and public sectors, the AAWI dropped to 2.7% in June, down from 2.6% in March. But public sector agreements bucked the trend, with increases rising from a record low of 2.4% in the March quarter to 2.5% in the June quarter. The 846 agreements approved by the FWC in the June quarter is the lowest since the 686 endorsed in the June quarter of 1995, and the 114,100 employees covered has been lower in only five quarters since that time (see the department's historical trends data).

The next data release to provide an indication of whether pay remains in the doldrums is due on November 15, with the publication by the ABS of the September quarter wage price index.

Reinstatement on the rise?

Fair Work Commission members in NSW have suggested that a pilot program in the State that accelerates unfair dismissal claims has generated a rise in reinstatements, a senior tribunal member told a conference on the weekend. Vice President Joe Catanzariti, speaking at the Queensland IR Society convention at Surfers Paradise recently, said that one of the criticisms levelled at the tribunal "has been, how do you get a reinstatement, when there are delays in the system?"

He said the pilot, being conducted in NSW, maintains the practice of applications first going to telephone conciliation. But if conciliation fails on a Monday, it is referred to a Sydney-based member within a couple of days, said Vice President Catanzariti, who is based in the NSW capital. The member will then "invariably" list it for a first directions hearing that week, he said. The vice president said that at that point "around 60% to 70% of matters don't go any further, they actually settle".

He said that under the system used across the rest of the tribunal's operations, conciliators issue all the directions and set a timetable "and the member only gets the matter two to three weeks out, before the hearing". The pilot program's key performance indicator is for a final hearing in 70 days. Vice President Catanzariti said there is "a nice discussion to occur about which system works better", adding that users would soon be evaluating the pilot. "I can say that from some of the comments of my New South Wales colleagues, there's probably been a spike" in reinstatements, he told delegates.

"It seems to me the faster a matter gets on", the greater the chance of reinstatement, he said. "It's interesting that some of those cases are in the NSW system where they've been fast-tracked," he said. However, he cautioned that "it's still too early" to draw firm conclusions. Vice President Catanzariti's presentation indicated that of 307 dismissal cases arbitrated in 2016-17, 25 had resulted in reinstatement. He said the unfair dismissal load had increased by about 5% over 12 months.

Loaded Rates

Loaded rate are used as part of negotiations for enterprise agreements. Loaded rates occur when the base is higher than the Award rate which is the subject of the BOOT and the higher rate is used to cover. A Fair Work Commission full bench has decided to consider how the BOOT should be applied to enterprise agreements that roll up penalty rates and other benefits into loaded rates of pay. The Commission has sent a letter to peak union and employer groups to explain the move and call for submissions ahead of hearings in November.

The letter drew attention to six applications for approval of single-enterprise agreements, although two of the agreements relate to Aldi stores and other two relate to Gloria Jeans coffee shops. It says the applications have been referred by FWC President Justice, Iain Ross, to a full bench for hearing. The letter originated from the associate of Vice President Adam Hatcher, who will lead the Full Bench.

The Commission's letter said the applications "all raise issues of general importance concerning how the Better Off Overall Test (BOOT) should be applied to an agreement which rolls up penalty rate payments and other benefits into loaded rates of pay."

The Commission's decision in February to cut penalty rate in the retail and hospitality sectors discussed loaded rates. The decision said that, subject to appropriate safeguards, schedules of "loaded rates" might make awards simpler and easier to understand, consistent with the considerations in s.134 (1) (g)". "Schedules of 'loaded rates' would also allow small businesses to access additional flexibility without the need to enter into an enterprise agreement."

"It appears from the various FWO reports we mention in Chapter 12 that some businesses in the hospitality and retail sectors already provide 'flat' (or loaded) rates of pay, in order to simplify their payroll process, but they underestimate the additional premium (or loading) required in order to compensate employees for the loss of penalty rates, resulting in non-compliance." "The insertion of 'loaded rates' schedules in these modern awards may have a positive effect on award compliance." "In raising this matter, we are alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates. It has to be borne in mind that any loaded rate will remain part of the safety net and will have to be fair and relevant." "Determining an appropriate loaded rate would not be straightforward."

"For example, an employee who worked the vast majority of their hours on a weekend or late at night, when a penalty rate would apply, would require a higher loaded rate than, say, an employee who worked the vast majority of their hours during the ordinary spread of hours, Monday to Friday." "Any loaded rate and the associated roster configuration, would, of course, need to be relevant to the needs of industry and employees. Accordingly, there would be benefit in further engagement with interested parties as to the dominant roster patterns in the relevant industries so that appropriate rates can be developed." "We envisage that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates."

The full bench on loaded rates follows controversy over the quashing of a proposed enterprise agreement covering Coles supermarket workers because it failed the BOOT Test.

The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

This Bill, which is another in the long line of responses by the Government to the Heydon Royal Commission into the trade union movement places much greater scrutiny upon trade union finances and their spending processes.The explanatory memorandum says the Bill will amend the Fair Work Act to prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund. "The Bill provides that enterprise agreements and employment contracts cannot include terms that require people to contribute to 'election funds' that are set up to fund the campaigns of people running for office in a union or employer group."

But enterprise agreements will only be allowed to include terms that allow payment for training or welfare if the fund is a superannuation fund, registered worker entitlement fund registered charity, or a deductible gift recipient within the meaning of the Income Tax Assessment Act 1997. The Bill has been heavily criticised by the Labour Opposition and a number of Trade Unions. An industry entitlements fund says the Turnbull Government's "proper use of benefits" bill could threaten its ability to provide free ambulance and funeral cover to worker members, while an industry skills body is calling for a regulatory impact statement to identify whether the costs to be imposed would exceed benefits.

Victorian entitlements fund Incolink says that the strictures that would flow from the enacting the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill might prevent it continuing to fund 21 OHS officer positions in Victoria and continuing to provide free accidental dental, ambulance and funeral cover. It says in its submission to a Senate inquiry into the Bill that it began funding the OHS officer roles when the State's WorkSafe stopped paying for them in 2002. "The Bill, as currently drafted, prevents Incolink investing in this critical work and puts worker safety at significant risk on Victorian construction sites," the submission says. Incolink funds the dental, ambulance and funeral cover from its investment returns and says that if the Bill passes, employers might have to pay more to maintain the benefits, or enterprise agreements might need to be re-negotiated.

Entitlements fund Protect says in its submission that "a large part of the intent of the legislation is premised not for good governance nor to protect members' benefits but to stop funds flowing to our sponsors. "In doing so, it restricts legitimate uses of income and imposes additional costs that far exceed what is expected in other regulatory or corporate environments," it says. Plumbing Joint Training Fund Limited, the skills training body for the plumbing and fire protection sector, says the legislation would be "very disruptive and destabilising". It is calling in its submission for a regulatory impact statement, saying that its absence, in tandem with the "compressed consultation timeline", isn't appropriate for legislation that contains substantial new obligations and penalties for non-compliance.

In its submission, the Department of Employment says it made some changes to the legislation after consulting with the Committee on Industrial Legislation and employee entitlement funds. For example, it changed the Bill to allow such funds to spend their income on training and welfare services, "provided such arrangements are transparent and made at arm's length".

The Government also changed the legislation to "more lightly-regulate" single-employer funds. The inquiry into the legislation is conducting a hearing in Melbourne today.

Stakeholder News

- OFWO
- ACTU
- The Reserve Bank

OFWO

The Fair Work Ombudsman says it will use new coercive investigation powers provided by the passing of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 as a "last resort" against employers that systematically fail to meet their obligations. Ombudsman Natalie James welcomed the Senate passing the new laws to strengthen to investigatory powers, and to introduce a ten-fold hike in maximum penalties for serious breaches. The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 has passed the Parliament, after the House of Representatives yesterday accepted amendments made in the Senate.

Under the changes, the Ombudsman can require the production of information and documents, or the answering of questions under oath about underpayments. James says the new powers come with "strong protections", including supervision by the AAT and Commonwealth Ombudsman; rules preventing the evidence a person gives from being used against them personally; the right to have a lawyer present if they attend to answer questions; and the right to claim reimbursement of reasonable expenses.

She says most employers work with the FWO, but "employers who know their obligations and systematically fail to meet their workplace obligations should be on notice that we will use all the powers at our disposal." Use of the new powers will be governed by the FWO's compliance and enforcement policy. James says the new laws will apply from the day after the Bill received royal assent, except for the new franchisor and holding company liability rules, which will start six weeks later.

The changes will hold franchisors and holding companies responsible for underpayments by their franchisees where they knew, or reasonably ought to have known, about the contraventions and failed to take reasonable steps to prevent them. They will apply to franchisors that have a significant degree of influence or control over the franchisee's affairs. "Now is the time for franchise systems that care about their reputation to take steps to ensure their employees receive their lawful entitlements," James says. The new laws will double the maximum penalties for record-keeping and pay slip breaches, to $12,600 per contravention for individuals and $63,000 for companies, and triple existing penalties in cases where employers give false or misleading pay slips to workers, or provide false information to the FWO.

Under amendments moved in the Senate, employers who don't have a "reasonable excuse" for failing to keep records or fail to provide pay slips will face a reverse onus of proof when they have to answer wage claims in court. Last financial year, about two-thirds of the FWO's court cases involved alleged record-keeping or pay slip contraventions, with almost one-third involving allegations of provision of false or misleading records to inspectors. The new laws take aim at "cashback" arrangements by specifically prohibiting unreasonable requirements for an employee to pay money to their employer or another person. The law will also extend to prospective employees unreasonably required to pay their own money to get a job.

ACTU

ACTU secretary Sally McManus told a hearing in Melbourne recently that the Federal Government's "ensuring integrity" legislation would impose harsher standards and punishments on unions and their officials than the Corporations Act does to employers. Appearing before a Senate committee that is scrutinising the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill, McManus said the "extreme and dangerous" legislation would undermine union democracy and expand the grounds for putting unions into administration and disqualifying leaders from holding office.

The ACTU said in its submission to the inquiry that the Bill widens the basis in the current regulatory regime for a court to make a declaration for "dysfunctional organisations" to be placed under administration. The peak body said in its submission that under the Corporations Act, the grounds for a court to appoint an administrator is "generally" limited to insolvency and enforceable security interests and does not go to the conduct of company directors. But it said that under the Bill an industrial organisation "could face" the consequence of a court-appointed administrator because its directors failed to fulfil financial reporting duties.

McManus told the inquiry that the Registered Organisations Act already required unions to have rules for the removal of office holders that are member-controlled under organisations' rules. But the Bill expands the regime for the disqualification of officeholders regardless of the views of members, which is contrary to the principle of free elections, she said. The ACTU submission said the Federal Court can make a disqualification order under the proposed laws by using a "fit and proper person" test that allows it to take into account the refusal, revocation or suspension of a right of entry permit, civil or criminal findings, and any other event that it thinks relevant.

The peak body said no equivalent test is imposed on company directors under state regimes so is a "significant overreach" that invites political and regulatory interference in the democratic control of registered organisations. McManus told the hearing in the Victorian Parliament that the new Bill allowed a disqualification order to be made against an office holder by the Commissioner, Minister or a person with a "sufficient interest". The ACTU submission said a person with "sufficient interest" could be an employer, employer organisation, disgruntled former member, or a business within the supply chain that is not in the relevant industry. The proposed laws have no conditions that operate against frivolous or vexatious claims and it creates an opportunity for undue corporate interference in the control of unions, the peak body argued.

The Reserve Bank

The wages share of the economy has dropped to a 53-year low, according to according to ABS data released, while the Reserve Bank's governor has suggested that the laws of supply and demand will eventually push up pay. The ABS national accounts statistics show that the wages share of total factor income dropped to 51.3% in trend terms in the June quarter of this year, the lowest level since the 50.9% recorded in the corresponding quarter in 1964.

The wages share's lowest point in recent years was 51.7% in December 2008. Meanwhile the profits share grew to a five-year high of 27.3%. It reached 27.4% in the June quarter of 2012.

Real labour costs down substantially

The data shows that real non-farm unit labour costs fell by 0.5% in trend terms in the June quarter and 5.4% over 12 months. Private sector productivity grew strongly, with gross value added per hour worked in the market sector increasing by 0.4% in the quarter and 1.7% over 12 months.

Recent Decisions

- Non regular casuals vote on EA
- Failure to genuinely try to reach an agreement stops protected action ballot
- A company manager is not a good support person

Non regular casuals vote on EA

Construction, Forestry, Mining and Energy Union [2017] FWC 5043 (27 September 2017)
The Fair Work Commission has rejected an argument that non-regular casuals should not be counted in a majority support determination. There is nothing in the Fair Work Act that suggests only regular and systematic casuals can participate in bargaining, vote on an enterprise agreement and be counted in the number of employees when determining if there is a majority of employees in favor of bargaining, Deputy President Anne Gooley found.

Company hired casual to "stymie" our application: CFMEU
The CFMEU had filed a petition with the FWC that had been signed by 10 Mitchell Laminates Pty Ltd employees in support of its majority support determination application to start bargaining for an enterprise agreement. However, the union accepted at the September 25 hearing in Melbourne that one of the signatories had resigned, so it had nine current employees on its petition out of 18 workers at the company. The CFMEU argued the company had "stymie[d]" its MSD application when it hired a casual who had worked up to three shifts.

The union argued the employee should not be included in FWC's decision as to whether a majority of workers supported it bargaining on their behalf because he was not a regular and systematic casual. But Deputy President Gooley rejected the CFMEU's argument because it could not point to any authority to support it. She said that if the CFMEU wants the tribunal to conduct a ballot of employees to determine whether a majority want to bargain, it must by October 5 file "any submissions and evidence it seeks to rely upon which defines with precision the categories of employees who it says should be entitled to vote".

Failure to genuinely try to reach an agreement stops protected action ballot

United Voice v Castlemaine Perkins Pty Limited T/A Lion [2017] FWC 4951 (27 September 2017)
The FWC has refused to grant a protected action ballot for Lion's Castlemaine Perkins brewery workers after finding that United Voice stopped negotiating in good faith when it this month started pressing a non-permitted clause aimed at restricting the use of supplementary labour. In a decision that also noted the FWC would have rejected the union's inclusion of a ballot question proposing that workers be allowed to perform social media tasks, Commissioner Jennifer Hunt yesterday said United Voice took a "calculated risk" in pursuing a non-permitted clause, on the chance the tribunal would find in its favour.

The proposed clause permitted Castlemaine Perkins Pty Limited (trading as Lion) to making short-term use of contract or labour hire workers at its XXXX brewery in Milton, Queensland, but only short term (and excluding short term sick leave) in four classifications, and only if it could establish its permanent, full-time workforce could not cover the work.

It also required supplementary workers to perform work in accordance with the agreement's classifications; at rates no less than permanent employees; on roster patterns consistent with the agreement and provided that all labour hire workers would be employed on a casual basis.

Union claimed clause designed to be "restrictive": Lion

Lion workplace relations specialist Michelle Wicks gave evidence that at a meeting on September 13, in which United Voice tabled the clause on behalf of itself and the CEPU, organiser Greg Davey said it was "meant to be restrictive", it was "the position" of members and the union would "see it through to the end".

Davey also said words to the effect that the clause was "one of the most significant and important outstanding claims that needs to be addressed, and it's a more significant claim than even wages". According to Wicks, after informing the union the clause would not work operationally as it was too restrictive and was a non-permitted matter, she declared Lion would go ahead with plans to directly put its proposed deal to a ballot of members.

UV said Lion's decision to take its proposal to a vote when its "bargaining position had not changed and [the union and the employer were] still a fair way apart" prompted members to request a protected action ballot. The union also maintained it had been prepared to enter into discussions "to adapt its proposal to ensure that it would address any concerns that may exist with the Fair Work Act" and "soften it" and said the agreement provided a "work-around" if Lion obtained the agreement of it and the CEPU.

Meanwhile, Davey asked the FWC, if it considered the clause contained a non-permitted matter, to look only at the claim it stemmed from, namely "confirmation that direct employment of workers in core production roles is the primary option". If the proposed clause contained sentences that might be non-permitted matters, Davey submitted it was the claim that was more important, while the proposed clause could be negotiated.

Commissioner Hunt disagreed, observing that if this was the only commitment United Voice sought, Lion could have provided the sentiment in a similar clause "but without restrictions". Finding that "almost the entire clause contains non-permitted matters", the commissioner also rejected as "disingenuous", given Davey's experience, his evidence that because the clause largely reflected a position reached after consultation last year, he did not believe it included non-permitted matters. Of UV's submission that it could have "smoothed the [clause's] edges" if Lion provided more time before declaring its intention to conduct a vote, Commissioner Hunt said that while the union might consider the vote a "handbrake on meaningful negotiations", it should "not be the default position". Rather, that "action was available to United Voice from 13 September 2017, right up until 21 September 2017 at the hearing, and even thereafter", she said, adding that the union's suggestion during the hearing that "these things could possibly happen" was not a "positive attestation" that it was interested in doing them.

When Commissioner Hunt invited United Voice and the employer during the hearing to consider further negotiation of the clause, she noted the union "did not wish to" unless Lion committed to withdrawing its intention to put its proposal to a vote. "There was no declared willingness on behalf of United Voice," she said. "It is clear from the submissions of United Voice that it took a calculated risk in pressing its claim in the form of the proposed clause, with all of the non-permitted matters and all of the other relevant circumstances, on the chance that the Commission would find it has been, and is genuinely trying to reach agreement with Lion." Dismissing the PABO application, Commissioner Hunt said that "by words stated, conduct and submissions made at the hearing, United Voice is not prepared to genuinely reach agreement with Lion on this issue". If she had found an order could be made, Commissioner Hunt also noted that she would not have included one of the proposed questions proposed, which sought to provide some immunity to employees to engage in social media campaigns without threat of disciplinary action. Because employees do not perform social media tasks in the performance of their work, she said the question "would not constitute protected industrial action".

A company manager is not a good support person

Leanne Trembath v RACV Cape Schanck Resort [2017] FWC 4727 (13 September 2017)
A HR manager should not have allowed a company manager to be put forward as a support person for a worker who was under threat of dismissal, the FWC has found. Commissioner Nick Wilson said the manager of the RACV's Cape Schanck Resort "should not have allowed his name to be put forward as a potential support person for [the retail supervisor] and neither should. . . the organisation's People & Culture Business Partner [have] allowed it to occur", he said.

He said that "disquiet must be expressed about the proposition apparently put forward that [the resort manager] could be her support person. "If there was to be a conflict of interest with [another employee] attending as the support person for [the retail supervisor] than that conflict of interest would pale into insignificance with the attendance of [the resort manager] in that capacity.

"He was in attendance at the [disciplinary] meeting on Friday, 24 March 2017 as the management representative. "He was the one who signed the letter of dismissal to [the retail supervisor]. "By no means could he be regarded as someone who would give [the retail supervisor] 'support' in any of the capacities implied by that word; whether as an advisor, counsellor or representative."

Commissioner Wilson nevertheless found the company had not unreasonably refused to allow the retail supervisor to have a support person present at the meeting. The retail supervisor after the company took issue with her compliance with cash-handling and stock control procedures sought to have the employee present as her support person at the meeting. However, the company objected because the chosen support person worked directly with the resort manager.

Commissioner Wilson upheld the employee's dismissal.

Important Dates

12 November 2017	BIC & APTIA AGM	Hobart, TAS
13-15 November 2017	BIC Annual Conference	Hobart, TAS

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