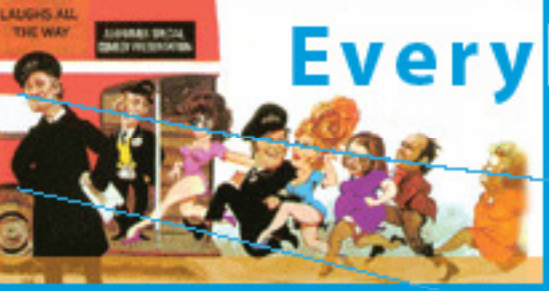


Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

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

Welcome to the April 2018 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

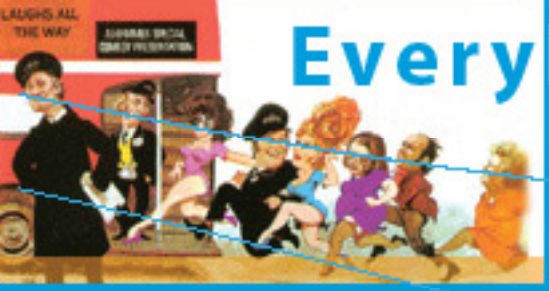
- TASBUS Annual Conference (1 & 2 June 2018)
- School Bus & Coach Connections Summit (27 June 2018)
- 2018 BAV Maintenance Conference and Trade Show (July 2nd & 3rd)
- BUSNSW Business Improvement Boot Camp for Members

TASBUS ANNUAL CONFERENCE (1 & 2 June 2018)

The Tasmanian Bus Association annual conference and dinner will be held on Friday 1st and Saturday 2nd June 2018 at Hotel Grand Chancellor Hobart.

The Association is currently in negotiations with the Government to conclude contracts for school bus and route bus services across Tasmania.

The conference affords the recently re-elected Tasmanian Liberal Government to address the members on the next three years of Government and how that relates to public transport in their State.



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School Bus & Coach Connections Summit (27 June 2018)

The first Australian School Bus Summit will be held at the National Convention Centre in Canberra on June 27 and will conclude with an Industry Dinner at which Federal Members and Senators will be invited. This will run in parallel with the 2nd Coach Connections Summit at the same venue.

Registrations for both Summits our now open. The day programs for both summits will commence at 9am and conclude at 4pm.

Go to the School Bus Summit page for more information and to register (http://ozebus.com.au)

Go to the Coach Connections Summit page for more information and to register

Cost to Attend

To qualify for the Member discount on your registration, your organisation must meet at least one (1) of the following eligibility criteria:

1. A Bus and/or Coach Operator Member of the BIC, APTIA or a State Association in Australia
2. A Bus and/or Coach Operator Member of an International/non-Australian Passenger Transport Association
3. A Manufacturer or Supplier Member of the BIC
4. A Representative from Australia or other country in Government, Tourism, Educational or not-for-profit organisation.

2018 BAV Maintenance Conference and Trade Show (July 2nd & 3rd)

BusVic are extremely pleased to open registration for the 2018 BusVic Maintenance Conference and Trade Show to be held at the Pullman Albert Park Melbourne on Monday 2 and Tuesday 3 July 2018. Join us for BusVic's 64th Maintenance Conference and Trade Show; recognised as the industry's leading exhibition, conference and networking event.

KEY EVENT FEATURES:

- Maintenance, technical & management conference sessions and workshops delivered within, and adjacent to the exhibit, all on the one level.
- Ample amount of time for delegates to interact with exhibitors.
- Catering and networking events held within the exhibit.
- Premium keynote speakers and entertainers as part of the 2-day conference programme.
- Industry gala dinner held at Pullman Ballroom on July 2 and networking drinks and canapés among the exhibit on July 3.

BUSNSW Business Improvement Bootcamp For Members

APTIA along with Tim Capelin, senior industrial relations partner at Piper Alderman conducted a session at the recent BusNSW Annual Conference in the Hunter Valley.

The session comprised the following characteristics:

- Managing Performance
- Culture Through Strong Leadership
- Mentally Healthy Workforce
- Managing Drug and Alcohol Risks

Some of the lessons from the session included:

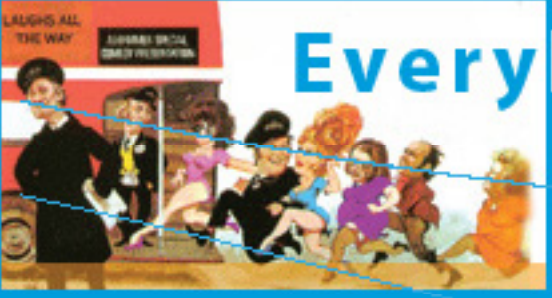
i) Employees must comply with any 'lawful and reasonable direction' issued by their employer. This means the employee can be required to follow directions given in respect of matters which are lawful, and which fall within the scope of the employment contract. For example, employees can be directed to:

ii) Take reasonable care for their own health and safety and that of others and comply with reasonable instructions and policies of an employer e.g. wearing seatbelts, not using mobile phones whilst driving, not breaching driver fatigue laws, complying with passenger relations guidelines, drug and alcohol policies and incident management guidelines.

iii) In addition, employees can be directed to refrain from conduct which undermines the reputation of the employer.

Other sessions included:

- Pricing, Profitability and Performance – How to ensure you have a firm grasp of your Business Financials; Finding opportunities for cost competitiveness and revenue growth; Tips for pricing charters and tendering for contract services; How to use data and business intelligence to monitor performance
- Public Relations and Marketing – Using PR to build your organisation's reputation in a competitive environment; Opportunities to improve your organisations image through marketing & promotions; Developing a social media strategy for passenger and community engagement
- Property and Plant - Managing property, plant and equipment to optimise safety and profitability; Developing an effective vehicle maintenance management system; Communicating with vehicles and drivers; Using an effective financing strategy that considers cashflow and security risk



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Industry News: What you need to know

- Laundy positions Government in the middle ground on IR
- ALP National Platform
- ACTU Calls for broad powers to be reinstated for the FWC
- Domestic/ Family Violence leave and Family Friendly Arrangements

Laundy positions Government in the middle ground on IR

Workplace Minister Craig Laundy has today urged employers to rally to defend the Coalition's "sensible middle-ground" on IR against the "extreme left" agenda of a potential Shorten Labor Government and its de facto IR minister, ACTU leader Sally McManus. Addressing the AIG's PIR conference in Canberra this morning, some 12 years after the Coalition won passage of its radical Work Choices legislation that is widely credited with the Howard Government losing the 2007 election, Laundy told his audience that it had "long occupied the sensible middle-ground on workplace relations and will continue to do so".

In contrast, as unions become more irrelevant, they become more desperate, shifting to policy positions "further and further to the extreme left".Laundy said he was seeking to "address some of the very real concerns we should all be worried about should Bill Shorten win government, with Sally McManus as minister for workplace relations". He claimed that Labor support for the ACTU's proposal to facilitate industry-wide bargaining would "turn the clock back to the 1970s when industrial action was more than 40 times higher than today". "That means industrial disputation could potentially rise to 4000 per cent of today's level if the ACTU and Labor's plan becomes a reality," he said.

Applying the minister's estimation to the ABS data for days lost to industrial disputes last year, there would be 6360 disputes annually, up from just 159 last year. Laundy also accused McManus of "trashing" the Constitution with her proposal to make the FWC a "one-stop shop" with greater powers to resolve a wider range of workplace disputes. Such a change, to make the tribunal "the umpire and enforcer", would "breach Constitutional safeguards governing separation of powers", he said.

Laundy also said the Coalition remained "100% committed" to passing its "ensuring integrity" legislation and said he was meeting with "key industry stakeholders, including the ACTU about what reform is achievable in the current political landscape". Labor and unions allowed to claim IR turf While he attacked Labor for being "desperate to start a class war", Laundy conceded that the Coalition and its supporters had allowed the ALP and union "smart operators" to "take over the industrial relations field unchallenged".

Laundy said the Coalition's opponents had a background in union organising and "are very good at it"."They have perfected the art of organising as a political tool." But Laundy indicated it was time to draw a line in the sand and called for employers to act and "organise the way the unions do".

ALP National Platform

The ALP's draft national platform pledges to restore the Fair Work Commission's power to arbitrate a broad range of disputes. The draft, which has been released for consultation ahead of the triennial ALP national conference in July, says that Labor is committed to providing parties with access to arbitration for "intractable disputes."

"Labor will ensure all workers, employers and unions have equal access to assistance from the independent umpires to resolve award, NES and agreement disputes by arbitration where disputes cannot be resolved through discussion, conciliation or mediation," the draft's IR chapter says.

The platform says that a Shorten Labor Government will retain the Fair Work Commission and the Fair Work Ombudsman, while abolishing the Coalition's construction watchdog, the ABCC.It says the FWC is the appropriate body to regulate registered organisations, rather than the Coalition's ROC, while serious contraventions will be referred to ASIC for investigation and prosecution. Labor has also committed to extending responsibility for compliance to corporate "economic decision-makers", including franchisors and along the supply chain.The 209-page draft platform picks up the campaign themes pushed by Labor and the ACTU, such as Australia's record low wage growth, growing inequality and insecure work.

"Labor recognises that wage stagnation and falling levels of collective bargaining contribute to inequality," the platform says. "Modern awards need to provide an effective and up-to-date safety net and must allow for improved test case standards, both within and across awards.""Where economic pressures create unsafe or unfair outcomes Labor will seek tripartite solutions to address the concerns across industries and across supply chains."Elsewhere, the platform says Labor is committed to a minimum wage that will "maintain or improve the relative living standards of low-paid workers."

It supports giving early access to preserved superannuation accounts for workers in "physically rigorous occupations" that lead to earlier than average retirement ages.It retains a "truth in bargaining policy" and a commitment to paid parental leave of 26 weeks, which were endorsed at the 2015 national conference.Also retained is a pledge that Labor will end the Coalition's freeze on the superannuation guarantee at 9.5% "when prudent" to do so, before "fast-tracking" the SG increase to 12%.

The platform reflects recent policy pledges by Labor to reverse the cuts to penalty rates in retail and hospitality, to increase penalties for systematic underpayment and exploitation and to include 10 days family violence leave in the National Employment Standards. The platform says Labor will toughen regulation of sham contracting and labour hire, while setting an "objective test" for determining when a worker is a casual.

Labor has also committed to ensuring agreements are made with a "representative cohort" and that it will stop unilateral terminations. It argues the Fair Work Act has not adequately facilitated multi-employer bargaining, particularly for industries with low-paid workers who lack bargaining power.Labor will enact an "equal pay for equal or comparable work" strategy underpinned by legal and reporting obligations, while ensuring that "gig economy platforms" do not undermine the safety net pay and conditions or undermine workers' rights to organise collectively.

The FWC will be required to take account of the principle of pay equity when reviewing modern awards, and by ensure that equal remuneration provisions in the Fair Work Act "deliver for low-paid women".

Superannuation: The draft says the Fair Work Commission should oversee a "practical industry-based system" for selecting default funds in modern awards, with input from employees, employers and experts.

Finance sector: Labor would recognise structural changes driven by digitisation, artificial intelligence and automation. It would establish a tripartite finance skills taskforce to oversee training "for the finance jobs of the future".

Skills: Labor would establish a tripartite Australian Skills Authority that reports to government on skilled migration issues. It would strongly encourage employers to sponsor temporary visa holders for permanent residency where the visa holders are working under successful arrangements and have priority skills that are in short supply in Australia.

Apprentices and trainees: Labor would ensure that one in 10 jobs on all Commonwealth priority projects are for apprentices or trainees. It would crack down on employer exploitation of apprentices and trainees.

Supply chains: Labor would legislate to ensure Australian enterprises' domestic and global supply chains are transparent and do not breach state and ILO labour standards, international human rights, anti-slavery, child labour and human trafficking laws.
Services: Labor would disclose to Australian consumers where services are provided from off-shore locations, through "country of origin disclosure legislation".

Road transport IR: Labor would work with unions, employers and experts to "eliminate incentives for truck drivers to work long hours and adopt unsafe driving practices in order to make a living". It argues that fatal accidents involving trucks have increased since the Turnbull Government abolished the Road Safety Remuneration Tribunal, highlighting the urgent need for a new body.

Aviation: Labor opposes allowing foreign airlines to fly domestic routes in Australia, creating an "uneven playing field" for Australian aviation employees and operators. It says that any carrying of passengers within Australia – from an Australian airport to another Australian airport – should occur under Australian employment laws. It has committed to pursuing equal remuneration of aviation workers within the Australian and New Zealand Closer Economic Relations Trade Agreement region.

Shipping: Labor will improve corporate and seafarer tax incentives to encourage investment in Australian-owned shipping, while removing "loopholes" that favour use of foreign temporary licensed ships in coastal trade. It says it would give Australian ships preferential access to domestic cargo through a ship licensing system overseen by an independent industry body.

Procurement: Labor would require prospective tenderers to demonstrate compliance with labour laws as a pre-condition for tendering. It would give preference to companies employing local workers and giving "equal and fair" treatment to LGBTIQ employees. It would also consider extending procurement policies on good workplace outcomes and Australian industry participation to other areas of expenditure, including grants and other funding. It would investigate ratifying ILO Convention 94, on the payment of market wages in government procurement, as an additional measure.

Public sector: Labor would replace the government-wide efficiency dividend with "targeted efficiencies". It would encourage direct employment with less reliance on contractors, consultants and labour hire firms. It would impose a limit on senior public service remuneration. It would ensure that core APS-wide terms and conditions are negotiated at a service-wide level, with remaining conditions negotiated at agency level. It would maintain at least 15.4% employer super contribution to federal government employees, regardless of choice of fund.

ACTU Calls for broad powers to be reinstated for the FWC

ACTU secretary Sally McManus is calling for the reinstatement of the Fair Work Commission's broad power to arbitrate disputes, providing a powerful incentive for parties to reach agreement or have the tribunal "knock heads together". In an advance copy of a speech to be delivered in Melbourne today, McManus argues the Commission should be a "one-stop shop" for resolution of workplace grievances. She will tell the Per Capita think-tank that the Commission should have the power to make repayment orders for faster resolution of underpayment claims that now go to the Fair Work Ombudsman and the courts.

"Disputes about pay, disputes about conditions of employment, disputes about unfair treatment can no longer be resolved quickly and easily by the independent industrial umpire," she says. "We still have an industrial commission, but it can't do much," she says. "The industrial commission used to be a strong umpire. "Work Choices relegated it to being an occasional linesman. "It now makes a few calls here and there, but it's a long way from the main game."

Domestic violence ruling underlines need for "fair and reasonable" test

McManus says the Commission's lack of power is illustrated by its ruling on the ACTU's application to insert paid family and domestic violence into modern awards.The tribunal found merit in the union peak body's case but was constrained by the "limited test" imposed by the modern award objectives. "The Commission doesn't apply a merit test anymore. "It applies lists such as the 'modern awards objective'. "The test of fair and reasonable has gone. "The Commission should be able to determine cases on their merits, not be constrained by the current rules."

McManus laments that Australia once had the world's best conciliation and arbitration system. "You could run test cases for an 8-hour day, for paid annual leave, paid sick leave, for superannuation, retrenchment pay. "All of those things that unions have campaigned for and won over the years. "We could run those cases because there was access to an independent umpire which could grant claims on merit and improve conditions as circumstances allowed," she says. Use streamlined award system as foundation for "strong and relevant" rights McManus concedes that the system of awards before their modernisation and rationalisation over recent decades was "complicated". But "the Commission was told to tidy up awards". "And it did so. We now have 122 awards instead of over 3000 and thousands of state awards are now effectively defunct."

Rather than pay heed to "extremist" calls by employer groups to abolish awards, it is time to acknowledge that the award system is needed. "It should form the basis of improving the rights of workers. Reducing the number of awards "might have made sense", but "stripping back award rights did not". "We need to use the new streamlined award system to ensure a strong and relevant foundation for everyone," McManus says. But McManus says the problems with the system didn't lie just in making and varying awards.

"We need a tough cop back to deal with wage theft. "Disputes about pay have to be taken to courts. "The Commission can't help. "But court processes take a long time; they are technical; they are costly." McManus says the Ombudsman is "under-resourced and conflicted" with 200 inspectors to deal with a workforce of about 12 million and a recent record of "meddling in industrial disputes and competing with other institutions" such as the Commission.

She cites the Oaky North coal dispute in Queensland where the parties reached agreement after a 237-day lockout of workers. "That dispute should have been resolved by the industrial commission much sooner. "The Ombudsman seems to think it now has a role to reignite the dispute in the courts. "Instead of quick, informal dispute resolution our rules have created a complex, legalistic system that results in disputes going on and on. "We need a one-stop shop for the resolution of workplace disputes. "Our institutions shouldn't be competing with one another to deal with disputes.

"Disputes should not be taken to the courts. They should be resolved by the industrial commission with a strong arbitration power." Time to remove minimum wage panel's handcuffs McManus says the Commission should be able to arbitrate annual minimum wage increases based on what is "fair and reasonable' rather than being constrained by the minimum wage objective. In enterprise bargaining, McManus argues the Commission just applied "checklists formulated by parliament in a one-size fits all manner". "When the tribunal had authority to move quickly to arbitration if conciliation failed, parties had every incentive to agree to a reasonable compromise. "That incentive has gone. "And the Commission should have broad powers to arbitrate. "It should have strong powers to compel parties to attend conferences and hearings. "Arbitration is the key as it focuses the mind. "The law needs to have broad coverage so that the Commission can deal with all aspects of a dispute."

Domestic/ Family Violence leave and Family Friendly Arrangements

Nigel Ward from ABL has provided this concise report of the most recent decisions regarding domestic/ family violence leave and Family Friendly Arrangements. The final model clauses are to be provided by the FWC shortly.
Domestic and Family Violence Leave

The Fair Work Commission has decided to include a model clause in all 122 modern awards that entitles all employees (including casuals) to 5 days of unpaid family and domestic violence leave.

The Decision states that family and domestic violence is a community issue and requires a community response."

What is family or domestic violence leave?

Family or domestic violence leave will be available in the event that the employee needs leave to do something to deal with the impact of the family and domestic violence and it is impractical for them to do it outside their ordinary hours of work.

This could include by way of example, making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

How does the leave accrue?

Five days of unpaid leave will be available at the commencement of each 12 month period rather than accruing progressively during a year of service. The leave will not accumulate from year to year.
Most significantly, the full five days of unpaid leave will be available to part-time and casual employees. This is different to some other forms of leave (e.g.; annual leave) which are pro-rated for part-time employees or not provided at all to casuals employees.

What is a model clause?

A model clause means the terms of the clause will be identical in all 122 modern awards and will be finalised in the coming weeks.

ABLA will be participating in the drafting of the model clause on behalf of the Australian Chamber of Commerce and Industry, Australian Business Industrial, NSW Business Chamber and all of the business' that are members of these organisations.

The future

The extent to which the new entitlement to unpaid leave will be utilised is unknown, as is the impact of the new entitlement on business.

As a result the Commission proposes to revisit the issue in 2021, after the model term has been in operation for three years.

At that time the Commission will consider:

- whether any changes are needed to the unpaid leave model clause;
- whether to allow access to personal/carer's leave (for the purposes of family or domestic violence leave); and
- whether the Commission should re-visit the possibility of paid family and domestic violence leave in modern awards.

ABLA are the leading law firm involved in the proceedings and represent the Australian Chamber of Commerce and Industry, the New South Wales Business Chamber and Australian Business Industrial.

Family Friendly Arrangements

The Fair Work Commission also has recently handed down its decision in the family friendly test case proceedings as part of the Four Yearly Review of Modern Awards.

Background

The family friendly work arrangements (AM2015/2) common issue proceedings centred around a claim by the Australian Council of Trade Unions (ACTU) which sought to impose a model term in all modern awards that would allow employees with parenting or caring responsibilities to unilaterally:

- select their hours of work to accommodate their parenting/caring responsibilities;
- for employees with parenting responsibilities, revert to their original hours of work at any time prior to their child attending school; and
- for employees with caring responsibilities, revert to their original hours of work within two years of commencing flexible hours.

Importantly, an employer would not be able to refuse an employee's proposal on reasonable business grounds (or indeed any grounds at all). The claim would mark a significant departure from the current operation of the law under section 65 of the Fair Work Act 2009 (Cth) where employees have a right to make a request for flexible working arrangements which employers can refuse on reasonable business grounds. ABLA played a leading role in the proceedings, representing the Australian Chamber of Commerce and Industry.

The decision

While the desirability of increased labour force participation by parents and carers was acknowledged by the Full Bench of the Fair Work Commission, the Full Bench rejected the claim on the basis that it would fundamentally alter the employment relationship and has the potential to have a substantial adverse impact on business. However, the Full Bench did determine (on a provisional basis subject to further submissions by the parties), that all modern awards should be varied to incorporate a model term related to facilitating flexible working arrangements.

FWC model clause facilitating flexible working arrangements

The model clause proposed by the Full Bench proposes to supplement s65 of the National Employment Standards by:

- expanding the group of employees eligible to request a change in work arrangements to include ongoing and casual employees with at least six months' service with the employer (compared to the current threshold of twelve months for a more limited group of employees);
- requiring an employer to seek to confer with the employee before refusing an employee's request to genuinely try to reach an agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances; and
- requiring an employer to provide a comprehensive explanation of the reasons for the refusal in writing including the details of any change in working arrangements that was agreed or if no change is agreed, the details of any changes in working arrangements that the employer can offer to the employee.
- The parties have now been invited to provide submissions on the Full Bench's model term and ABLA will be providing its comments on the model term.

The effect on businesses

The proposed new clause will mean some more "red tape" around consultation like obligations with parents or employees with caring responsibilities however is unlikely to fundamentally alter business practice.

ABLA CEO Nigel Ward lead the employer case on behalf of the Australian Chamber of Commerce and Industry, the New South Wales Business Chamber and Australian Business Industrial.

Important Decisions

- Mobile Phones and Zero Tolerance
- Adverse action after dismissed whilst on sick leave
- Large Payout for Adverse Action
- The importance of record keeping

Mobile Phones and Zero Tolerance

Rosario (Ross) Condello v Fresh Cheese Co (Aust) Pty Ltd [2018] FWC 2025 (9 April 2018)
The FWC has poked holes in the record-keeping and training practices of an employer and its HR manager that summarily dismissed a long-serving employee for breaching its "zero tolerance" mobile phone policy without making sure he was aware of it.

Fresh Cheese Co (Aust) Pty Ltd summarily dismissed the employee from its Broadmeadows cheese factory for gross misconduct and a serious breach of company policy and guidelines in August last year, the day after it observed him using his mobile phone in what it considered to be a food production area. The factory worker alleged that the HR manager had already decided to dismiss him, after 16 years' tenure, by the time he was called into his office and that he said he wanted to make an example of him.

Admitting he knew it was against the rules to use his phone at work but not that he could be dismissed without notice for it, the factory worker said that because he thought his wife might be trying to urgently contact him about his dementia-affected mother-in-law's health, he went into a storage room to take her call. The HR manager, who also serves as the company's OHS representative, said Dairy Food Safety Victoria (DFSV) had deemed the room part of the factory's-controlled area, with Fresh Cheese affixing door signs to advise employees that it was part of the production facility.

The company said the factory worker had attended a "toolbox meeting" that reminded all employees of the DFSV prohibition on using phones in production areas just a week before he breached the policy. However, under cross-examination the HR manager conceded that he did not know if the factory worker had attended the meeting, nor whether he was given a copy of the company's policies and DFVS regulations for phone use. Claiming the company had provided the factory worker with several verbal warnings about poor performance previously, the HR manager also revealed that there were no records of these and that the company lacked a formal disciplinary procedure. Company took inconsistent approach to phone use: FWC

An operations manager, who admitted that the HR manager had typed out his witness statement for him after providing his own as "guidance", initially said he knew the factory worker had attended the meeting but later conceded that he did not see him and that meetings were undocumented. Under cross-examination the operations manager also conceded when he and other supervisors had previously found employees using phones in production areas they simply told them that they had to be placed in lockers.
He said supervisors routinely used their own phones in the loading bay and storage areas.

Commissioner Katrina Harper-Greenwell this week observed that Fresh Cheese had taken a "lenient approach" to taking phone calls in areas not specifically used for food production and had "not consistently applied" its rules as defined in its employee handbook.
She also found that because there was no evidence that the company had ever provided the factory worker with or trained him in the contents of its employee handbook, it could not establish that he was aware of the rooms it had designated as "production areas".

Fresh Cheese breached obligation to inform employees

Even if the factory worker had attended the toolbox meeting, Commissioner Harper-Greenwell said she would not have been satisfied that his phone use constituted a valid reason for dismissal as the event was "poorly organised and there was insufficient detail provided to employees". The commissioner noted that meeting attendees received no "written materials outlining the proposed changes to mobile phone usage". It was "simply not sufficient" for Fresh Cheese Co to rely on the training provider's confirmation that the training had gone ahead or the "the employee handbook which [the factory worker] had not had in his possession nor received any training on, or the tardily organised toolbox meeting to justify the termination", the commissioner said.

She said it was the HR manager's "very own evidence" that it was Fresh Cheese Co's responsibility to ensure all employees were aware of DFSV guidelines and prevent the use of mobile phones in restricted areas, and that it had not reinforced its position to the factory worker other than by providing its handbook. "Therefore, Fresh Cheese Co was not fully compliant with their obligation and [the factory worker] cannot be held accountable for that," Commissioner Harper-Greenwell said, finding the dismissal harsh.

"A company cannot simply produce policies and procedures and expect to rely on them to defend a claim if there is no evidence to support that its employees have been made aware of those documents, trained in the content of the documents, and provided with access to those documents," she continued. "The onus is on the employer to adequately operationalise their policies and procedures if they seek to rely on them to defend an unfair dismissal application."

As Fresh Cheese had not established it had a zero-tolerance policy in place, Commissioner Harper-Greenwell said the factory worker "could not have been in breach". Given the "extensive [practical and academic] experience" of the HR manager, the commissioner said the "denial of procedural fairness in this matter was significant, accordingly I find the dismissal of [the factory worker] to be unfair". Commissioner Harper-Greenwell said she would invite submissions on an appropriate remedy.

Adverse action after dismissed whilst on sick leave

McCulloch v Transport Workers Union of Australia Western Australian Branch [2018] FCCA 676 (22 March 2018)

The WA branch of the TWU has failed to strike out a former organiser's adverse action claim in which she alleges the union sacked her six months into her employment for taking sick leave and personal carer's leave to look after her elderly father.

Shortly after engaging the organiser in May 2014, the WA branch described her on its website as an "excellent industrial officer/organiser with more than three decades of experience as a union official" who is "very strong, down-to-earth". However, the union has told the Federal Circuit Court that it dismissed her 23 weeks later because she had "an excessive amount of time off work … was rude and disruptive in the office, and … regularly disagreed with instructions given by the Branch Secretary about her work".

With TWU leave records marking her absent on about 15 days in a three-month period, the organiser says she suffered serious health problems from July 2014 and exercised her right under reg.3.01(4) of the Fair Work Regulations and s352 of the Fair Work Act to be temporarily absent due to illness.

As the primary family carer for her elderly father, the organiser says she also had to take leave when he suffered major health setbacks. She maintains that her doctor provided her with a letter and advice that she should reduce her workload to four days a week until their health issues settled.

But the organiser alleges that four days after telling TWU branch secretary Tim Dawson about the letter, the union sacked her.

No more right to paid leave: TWU

The TWU called on the Federal Circuit Court to summarily dismiss her application, arguing she had no reasonable prospect of success because her leave failed to meet the statutory criteria for a temporary absence due to illness. The union claimed that at various times during her employment, the organiser said she needed to take the leave to visit her father in a nursing home, to care for her own health and because the roof had collapsed at her home.

It also argued that by July 2014, the organiser no longer had any right to paid leave for personal illness or to care for her father because she had already exceeded her leave entitlement and was in deficit. However, Judge Toni Lucev refused to throw out her application, noting her submissions that she provided evidence of her illness to the TWU and a medical certificate within a reasonable time, and that she also exercised a right to use her entitlement to two days' unpaid carer's leave.

"In the court's view any one of the above arguments, properly pleaded and supported ultimately by evidence, might succeed, and each is a possibly plausible reason, or part of a plausible reason … for her termination of employment, and therefore a foundation for an arguable case of termination of employment for a prohibited reason," Judge Lucev said. The judge also noted that several the TWU's arguments "do not stand the scrutiny necessary to meet the high standard required to warrant summary dismissal of an application".

For example, he said it was "notable" that the leave record characterised her leave as sick leave, and that the union in its response to her application said that part of the reason for her dismissal was that she had "an excessive amount of time off work", which presumably included the "sick leave". Even if the absences were due to her father's health issues and not her own illness, she might "still have been exercising a workplace right" under s102 of the FW Act, which "may have been the reason, or part of the reason" for adverse action. Regarding the union's argument that she was not entitled to take paid personal/carer's leave under s96 because she had exceeded her accrued entitlement, he said the organiser might be able to argue that she was "granted an entitlement to paid personal/carer's leave in excess of that prescribed by the NES in s96 of the FW Act, and therefore still falls within the ambit of s352 of the FW Act".

Judge Lucev pointed out that the NES only prescribed a minimum entitlement and did not cap the amount of leave that could be provided. Alternatively, unpaid periods of carer's leave "may be caught by ss102 and 103(1) and (2)(b) of the FW Act", he said. He adjourned the matter to April 27 for a directions hearing, granting the organiser leave to amend her statement of claim in the meantime.

Large Payout for Adverse Action

Fatouros v Broadreach Services Pty Ltd [2018] FCCA 769 (29 March 2018)

The Federal Circuit Court has taken a broad view of what amounts to an employment-related complaint in ordering an employer to pay more than $150,000 in compensation and penalties for its adverse action when it sacked a senior employee who upbraided his chief executive for failing to pay outstanding invoices to a key subcontractor that had downed tools in protest. Judge Alister McNab accepted that the Electroboard Proprietary Ltd (ELB) project manager had been given responsibility for an audio-visual and digital media equipment installation project at Melbourne University that had fallen behind schedule and had brought it back into line.

However, he became aware that an electrical subcontractor, Eclipse, had not been paid for some time, despite promises from the chief executive, and had stopped work, which threatened to expose ELB to liquidated damages.Eclipse had $30,000 outstanding for the University of Melbourne project and a further $120,000 for other ELB jobs. The project manager, who had been on a salary of $155,000 a year, plus super, told the court he didn't want the job to fail after bringing it back under control, to "suffer the same fate" as the previous managers on whose watch the project fell behind, or be exposed to the risk of being sued by clients.

The project manager concluded that "if disciplinary action is the follow-on effect of my actions here then so be it." "However, please be assured, my intent is purely driven by the interests of the business, its employees, our customers and suppliers, all of whom we have obligations to that are presently not being met."

Judge rejects employer's view that complaint not employment-related

ELB told the court that the worker's complaint didn't relate sufficiently to his employment. He was entitled to make complaints that might "extend to matters such as salary entitlements, leave entitlements and so on". "They do not however extend to entitling commentary or criticism of the direction of which the owners of the business choose to take the business," the company said.

But Judge McNab found "no basis in the legislation or in the decision of Shea (see Related Article) to circumscribe the operation" of the s341(1)(c)(ii) workplace right to make a complaint or enquiry.

"Consider for example, a person, who in the course of their employment had as part of their duties a responsibility to ensure that the business of the employer honour its covenants to it bankers. "If that employee raised a complaint with a superior within the workplace (whether that person be a director or otherwise) that the company, by entering into a transaction was risking trading whilst insolvent or placing itself in breach of covenants with the bank that would be. . . [a] complaint in relation to his employment as the subject matter of the complaint arises directly from the work that person performs in his or her employment.

"In this case the management of the projects at Melbourne University were part of the [project manager's] duties arising from his employment and his raising of issues regarding the timely payment of subcontractors in each of the relevant emails was something that arose directly out of the performance of his work and impacted on him as an employee," Judge McNab said. He accepted that the project manager's sending of the emails constituted a "substantial or operative and immediate reason" for his dismissal.

He also found that the emails constituted complaints and enquiries under s341(1)(c)(ii) and that as a result ELB had breached the s340 prohibition on taking unlawful adverse action. He ordered the employer to pay the project manager $131,723.22 for loss of wage, superannuation and leave entitlements, $1266.12 for expenses incurred during his employment, and $11,581.14 in interest.

Ian Jordan of HR Legal, which ran the case for the employee, said the ruling "is noteworthy for showing that, despite the arguments made by the employer, a complaint or enquiry does not need to be limited to one that relates to or is derived from the contractual rights of the employee, amongst other matters".

"Instead, the court accepted that a complaint or enquiry can be one that 'raises an issue' that has 'potential implications for the employee's employment'."If an employee makes a complaint or enquiry of that kind, the employer cannot take prejudicial action against him or her for having made the complaint." Jordan said the ruling "applies and endorses the wider view of 'complaint or enquiry' expressed in the earlier Federal Court case of Walsh v The Greater Metropolitan Cemeteries Trust (No 2)". It also, he said, "demonstrates the willingness of the court to order compensation and civil penalties, if an employee is dismissed for reasons that included having made complaint or enquiry". Jordan said the case underlined that compensation might be ordered for the period during which the employee was out of work.

Large Payout for Adverse Action

Mr Vijayan Kothandan v Transdev Melbourne Pty Ltd T/A Transdev [2018] FWC 2119

Vijayan Kothandan (Mr Kothandan) was employed as a Bus Driver by Transdev Melbourne Pty Ltd (Transdev) from 12 January 2015 until 13 November 2017. He suffered a work injury on 8 July 2016 and worked on and off on modified duties until an incident on 28 March 2017, after which he did not work again. On 13 November 2017, his employment was terminated claiming his restricted medical capacity prevented him from safely performing his role.

On 4 December 2017, Mr Kothandan applied to the Commission for an order granting a remedy for unfair dismissal under section 394 of the Fair Work Act 2009 (the Act) because Transdev did not provide him with appropriate treatment to recover or support his rehabilitation and failed to provide a safe working environment. He said there was no valid reason for dismissal and that the dismissal was harsh. In J Boag and Son Brewing Pty Ltd v Button (Boag), a Full Bench of the Commission held that when an employer relies upon incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position.

In this case, Mr Kothandan's substantive role was Bus Driver. The parties agreed it was a "safety sensitive position". Mr Kothandan was required to drive a bus on public roads, transporting passengers safely across pre-determined bus routes. The primary purpose of the role was to handle "all facets of bus driving, ticket sales and customer relations for general service, including school, route service, charter, special event driving e.g. Grand Prix, train/tram replacement". A Transdev document titled "Inherent Requirements – Bus Driver" describes the role as a "predominately sedentary task, which require a number of repetitive and sustained upper limb postures and gross motor movements as well as a high level of fine more[sic] control. In addition, a number of higher order cognitive functions and a sustained level of attention and concentration are essential."

Excellent reasoning and judgement skills are also essential so that drivers can "respond to the environment and traffic conditions and ensure overall safe operation of the bus."At the time of the dismissal, Transdev employed approximately 1000 employees. It had established systems, policies and processes, as well as relationships with various providers to assist in managing workers' compensation claims. It employed experienced staff including Ms Code who, as Health Services Manager, was responsible for the management of all aspects of WorkCover, rehabilitation and return to work.

Each of these factors together ensured a comprehensive approach to the management of Mr Kothandan's claim over a period of almost 18 months. The decision highlighted the need for employers to keep detailed records about return to work plans, and the FWC has upheld the dismissal of a bus driver kept off the road for 16 months by a combination of nerve pain and anxiety.

By the time major public transport provider elected to dismiss the driver in November last year, his file contained a dizzying number of capacity-to-work assessments, abandoned return to work plans, inconclusive specialist diagnoses and supervisory meetings.
In considering what she called the case's "long history", Commissioner Sarah McKinnon observed that the driver's capacity for work was "limited". "He had a left shoulder injury, anxiety and panic attacks," continued the commissioner. "He was authorised to perform light duties with no lifting for three days a week, could use his injured arm/hand with modification and was authorised to drive for 30 minutes at a time after his first week at work.

"He had ongoing anxiety and his judgement was affected.
"In my view, the medical evidence establishes that at the time of dismissal, [the driver's] medical condition prevented him from regularly driving buses for periods of at least one hour at a time, while applying a sustained level of attention, concentration and judgement."
Accordingly, said Commissioner McKinnon, the driver "did not have the capacity to perform the inherent requirements of his role as bus driver on 13 November 2017".It followed that Transdev had a valid reason for the dismissal, said the commissioner. "Transdev was not obliged to maintain his employment indefinitely in circumstances where he could no longer do the job he was employed to do."
Commissioner McKinnon noted that Transdev's access to dedicated HR management expertise "had a positive impact on the procedures followed in effecting the dismissal".

Important Dates

5-7 May 2018	QBIC Conference, Sunshine Coast QLD
1-2 June 2018	TasBus Conference, Hobart TAS
27 June 2018	Coach Summit, School Bus Summit, National Stakeholders Dinner (Canberra Convention Centre)
2-3 July 2018	BAV Maintenance Conference, Melbourne VIC
7-10 October 2018	2018 Australasian Bus Conference

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