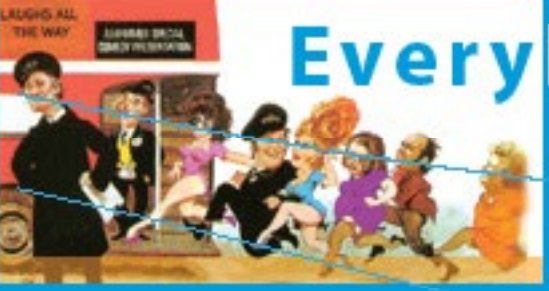


Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

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

Welcome to the December 2018 edition of Everybody Out

- Membership News
- The Important Decisions in 2018

APTIA
Australian Public Transport Industrial Association
moving people

Wayne Patch
Chairperson, APTIA

Membership News

- The Year in Review
- A Year in Photos (The people who impacted on our industry in 2018)

The Year in Review

In 2018, industrial relations in Australia was dominated by four significant changes, which included:

- The finalisation of the four-yearly review of modern awards
- Skene's case and the change in the way casual employees are employed
- Legislation and regulation that finally passed both houses of Parliament
- The ACTU's 'change the rules' campaign and the differing positions of each major political party in the lead up to next years election

Four Yearly Review

The Four-Year Review has finally concluded with legislation that will prevent a repeat of the last four-year review. Specific application will be required to be made to change the PVTA.

A comprehensive set of explanatory notes will be considered by the IWG in the new year and will be compiled from the 4-yearly process. Which has seen the following changes to the PVTA.

(i) Family and Domestic violence leave – which provided 5 days leave to all employees who are experiencing family and domestic violence was included into all Awards, including the Passenger Vehicle Transportation Award from 1 August 2018.

(ii) Casual conversion – was included into all modern awards from 1 October 2018 and provides an opportunity for casual employees to seek permanent or part time employment unless excluded on reasonable business grounds.

(iii) The PVTA was amended to settle the issue of the minimum engagements for school bus casual drivers. The changes ensured that two hours must be paid for each worked morning and afternoon engagement in any day.

(iv) Family friendly arrangements – is provided to carers and those returning from parental leave with the responsibilities for young children to approach an employer for lesser hours of work only to be rejected upon consultation and reasonable business grounds. The clause is finalised and awaiting details of commencement dates.

(v) Payment of wages – a clause will be inserted into most awards, excluding the PVTA, to require termination payment to employees no later than 7 days after termination.

(vi) Plain language re-drafting – various clauses of the modern awards have been updated supposedly to make them easier to understand. These clauses include: individual flexibility arrangements, consultation after major workplace change, consultation about changes to rosters and hours of work, dispute resolution, termination of employment and reasonable overtime. No date has been given for the commencement of these new clauses however draft clauses have been issued.

(vii) Other changes included a time off in lieu clause and annual leave clauses such as taking excessive leave, cashing out annual leave and payment in advance.

Casual Employment

In August 2018, the Full Court of the Federal Court handed down a decision, Workpac Pty Ltd v. Skene [2018] FCAFC 131, which enabled an employee considered by the employer to be a casual employee to claim paid leave entitlements retrospectively and at the same time receive a casual loading. In the same month a Full Bench of the Fair Work Commission handed down its decision, 4 Yearly review of modern awards – Part time employment and permanent employment [2018] FWCFB 4695 in which it provided the right for casual employees who worked regular hours for more than 12month to request that their employment is converted to part time or permanent employment.

APTIA sought legal advices and its Industrial Working Group met to try to understand the implications of these two decisions. Whilst the issues are ongoing and will be further refined by case law and legislation into 2019 the following comments are made by APTIA.

7 Steps to consider when employing casuals

1. An employee, who has worked for a period of time, longer than 12 months, and who is rostered regularly, in excess of 38 hours, is not a casual employee and should be made a permanent employee. Employers should not employ their staff as casuals on this basis.
2. A casual employee, who has worked regular hours, on a roster, 52 weeks a year, should be given the opportunity to convert to a permanent or part time employee.
3. A notice detailing the conversion clause in the Award should be given to all casual employees within the first 12 months of their employment as a casual. This requirement does not apply to enterprise agreements in force which do not incorporate the Award.
4. School bus drivers, who work regular hours, 40 weeks a year, may not be eligible to convert to part time employees on reasonable business grounds. To become a part time employee these employees would need to have their rosters changed to 52 weeks. It may be possible to annualise a casual's wages to allow for wages to be paid over a 52 weeks year so that conversion may be possible in these circumstances.
5. Employers should discuss with their casual employees, who work regular hours, whether they wish to convert to permanent or part time employment. Similarly, long time casual employees should be offered part time or permanent employment. It is important that an employer at least has the conversation with their employees.
6. Employers should ensure that payslips, common law letters of employment or enterprise agreements make it clear that the separation of the casual loading is an additional payment made in lieu of paid entitlements which are available under the NES to permanent or permanent part time employees. In this way double dipping may be avoided.
7. Employers should seek to add to any new enterprise agreement negotiations a clause which better defines a casual employee and seeks to protect an employer from double dipping by a casual employee who may seek to claim both the NES entitlements, such as paid leave, along with the casual loading.

There has of course been a number of developments in relation to casual employment since the decision in Skene which need to be factored in.

They include:

1. The Minister for Industrial Relations, Kelly O'Dwyer, has announced that she will bring legislation to the Parliament, in the new year, to enshrine, into the NES, a casual conversion clause, presumably along the lines of the FWC determination for the Awards. This means casual conversion will apply to every employee in the land.
2. The Minister has also introduced the Fair Work Amendment (Casual Loading Offset) Regulation 2018, which allows an employer to offset against any NES entitlements those casual loadings paid provided that the employer has made it clear to an employee that the casual loadings are payments in lieu.
3. The Shadow Workplace Relations Minister, the Hon Brendon O'Connor, made it clear in Government he will define 'casual employment' by stating: " Employers have to be disabused of the notion that they deem whether a worker is a casual or not"
4. Finally, there is now another case before the Federal Court, initiated by Workpac, against an employee (Rossato) in the similar work circumstances as Skene, in which the principles enunciated in Skene's case are being challenged. The Federal Government, the CFMMEU and a class action lawyer have intervened in this case with different perspectives.

Legislation

The **Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018** was finally passed by both houses of Parliament, being a Bill introduced in March 2017; much needed and supported by employers and employees. The Act now means that the FWC will no longer be required to conduct four-yearly reviews of modern awards. Powers are also given to the FWC to approve enterprise agreements despite minor procedural or technical errors, under long-delayed legislation passed by the Federal Parliament last night.

The **Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Act 2018** was passed and which implements various recommendations from the Royal Commission into Trade union Governance and Corruption. The Act allows the court to cancel registration of organisations and prohibit officials from holding office if they flout the law and introduce a public interest test for the amalgamation of registered organisations. This Act requires organisations such as APTIA to file with its members and the ROC a declaration of related party interests.

The **Fair Work (Family and Domestic Violence Leave) Act 2018** amended the National Employment Standards (NES) to be consistent with the Fair Work Commission's decision to award 5 days' unpaid domestic violence leave.

The **Fair Work Amendment (Casual Loading Offset) Regulation 2018** creates a new regulation to address Workpac Pty Ltd v Skene was made by the Governor General today and will take effect from tomorrow. Details are:

- The regulation is intended to apply to persons who have mistakenly been classified as a casual employee during all or some of their employment.
- The regulation applies if an employer has paid a clearly identifiable loading to compensate a person for not having one or more relevant NES entitlement; and the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements.
- In such circumstances, an employer may make a claim to have the loading amount taken into account in determining any amount payable by the employer to the person in lieu of the NES entitlement/s.
- Examples of where the loading amount is considered 'clearly identifiable' would include in correspondence, pay slips, contracts or in a relevant industrial instrument.
- The regulation makes clear that it applies to employment periods that occur before, on or after commencement of the regulation.

Change the Rules

The ACTU lead by Sally McManus carried the IR agenda in 2018. Early in the year the ACTU announced its 'change the rules' campaign which sought amongst other things:

- Industry based enterprise agreement negotiations
- Greater powers to the Unions to take strike action, outside of the agreement bargaining process
- Increased superannuation up to 15% by 2030 with an accelerated schedule to 12.5% sooner than 2025
- 10 days paid domestic and family violence leave for all employees
- Introduction of a median wage determination which would be reflect a fair pay rise for all
- Increased Union influence in Company decisions

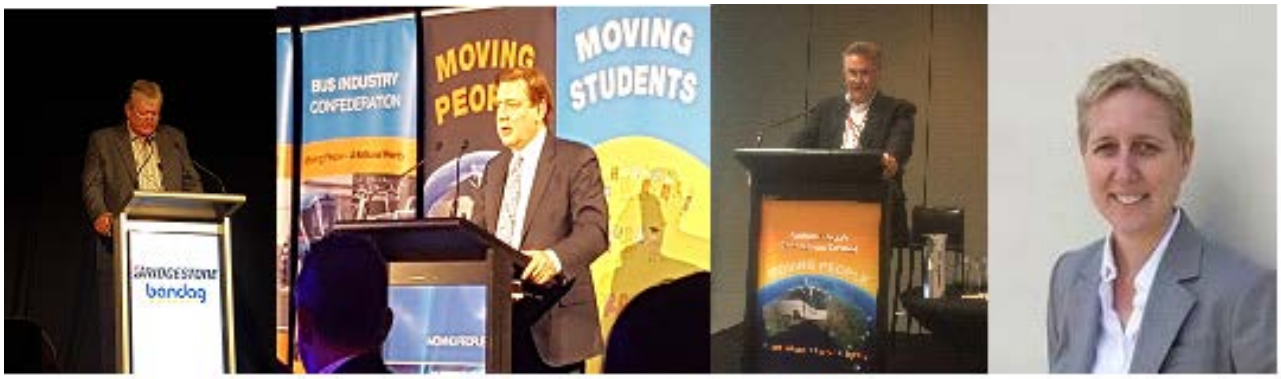
The Shadow Minister for Workplace Relations the Hon Brendan O'Connor has made it clear that in Government he would:

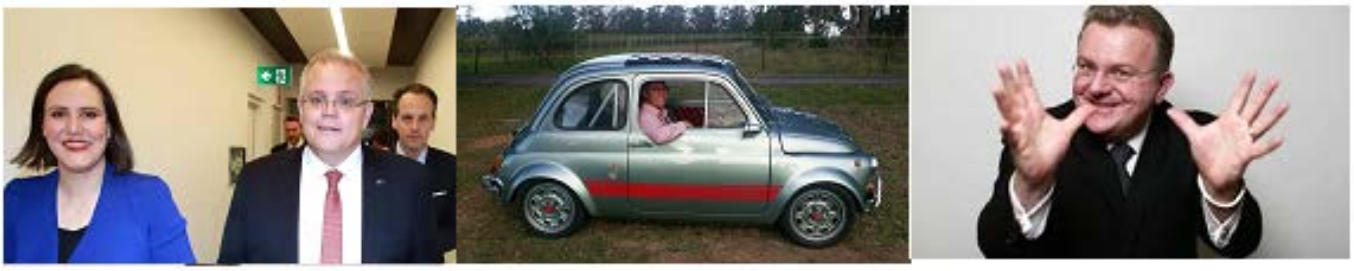
- Legislate to define casual employment as something akin to having no expectation that the work will be available except intermittently
- Reinstate penalty rates in those industries in which penalty rates were curbed on weekends
- Legislate to regulate labour hire to ensure that those employees receive the same rates of pay and employment terms as non-labour hire employees
- Seek to stamp out sham contracting by making penalties high for those who practice in this way
- Give greater powers to the FWC with respect to bargaining given his view that the bargaining system was failing the low paid workforce.
- Consider allowing industry bargaining across all industries. He did not commit to allowing strike action to occur across industries but did not rule it out either,
- Legislate to incorporate 10 days paid domestic violence leave into the NES
- Tackling the gender pay gap and providing secure employment

The Minister for Industrial Relations the Hon Kelly O'Dwyer has indicated that she will:

- Introduce legislation that enables casual conversion to occur with all employees as part of the NES

A Year in Photos (The people who impacted on our industry in 2018)





The Important Decisions in 2018

- Taking sickies does not constitute protected action
- BOOT protects all employees
- Cost awarded for baseless and groundless case
- Mobile phones and zero tolerance

Taking sickies does not constitute protected action

Hillsbus Co. Pty Ltd v. Gurdev Singh Bajwa & Others [2018] FWC 6861, 12 November 2018
The negotiation stage of bargaining for new agreements some drivers have staged industrial action in the form of multiple sick days.
That practice was considered in the Hillsbus case where Commissioner Ian Cambridge stated that the practice should be universally condemned and amounted to unprotected industrial action in accordance with section 418 of the Fair Work Act.
In his ruling Commissioner Cambridge ruled that the employer should not pay sick pay to the employees but reduce their sick days anyway.
The decision of Ian Cambridge begs the question as to whether an employer, in these types of circumstances, can take disciplinary action against each employee who has taken unprotected action and by wilfully misleading their employer that they should be entitled to receive paid personal leave have in fact been guilty of serious misconduct.

Part of the decision are set out below.
"Application for an Order that industrial action by employees or employers stop etc.
[1] This matter involves an application made under s. 418 of the Fair Work Act 2009 (the Act), seeking that the Fair Work Commission (the Commission) make an Order that industrial action that is happening, threatened, impending, probable or being organised is to stop, not occur or not be organised.
[3] The application has been made by Hillsbus Co. Pty Ltd (the employer) and it seeks an Order against Mr Gurdev Singh Bajwa and another 127 named individuals (the Employees) who are allegedly engaged in a particular form of industrial action as part of bargaining for a new enterprise agreement to replace the existing industrial instrument that covers the work of inter alia, the Employees, that being, the ComfortDelGro Cabcharge Pty Ltd and the Transport Workers' Union of Australia Fair Work Agreement 2015 (the 2015 Agreement).
[6] The operations of the employer that are the subject of the application are conducted in the State of New South Wales. The employer conducts a public transport business relevantly operating as a bus service in New South Wales. The 2015 Agreement has a nominal expiry date of 30 June 2018, and the employer has been engaged in negotiations for a replacement enterprise agreement. The negotiations for a replacement enterprise agreement have involved the employer and bargaining representatives including bargaining representatives from the Transport Workers' Union of Australia (the TWU). The TWU has not been identified as a respondent to the application.
[8] The alleged collective personal leave campaign significantly impacted particular operations of the employer such that a substantial number of bus services were delayed, cancelled or otherwise disrupted. On 7 November 2018, a significant number of members of the travelling public were adversely impacted as the employer was unable to operate approximately 300 specific services including school bus services, as a result of the extraordinary number of employees absent on personal leave

[9] In circumstances where none of the named respondents had appeared at the Hearing on 8 November, the Commission was persuaded to issue Interim Orders as requested by the employer and provide for further Hearing of the matter which has occurred today, 12 November 2018. Further, the Notice of Listing for the further Hearing of the matter included advice to the respondents that they should indicate whether they opposed the application and wished to state the basis for their objection to the Orders as sought by the employer.

[13] The material, submissions and statements provided by the various respondents has broadly indicated the reason(s) for their individual personal leave absence on 7 November 2018. This material would likely satisfy the basis upon which the relevant provisions of the 2015 Agreement would oblige the employer to make payment in respect of the personal leave absence of that particular individual. However, any satisfaction of the relevant terms of the applicable industrial instrument to provide basis for individual personal leave absence, may not necessarily satisfy the Commission that the resultant collective personal leave campaign was anything other than unprotected industrial action.

[14] The proper determination of this application has involved examination of the circumstances surrounding the alleged collective personal leave campaign as it manifest on 7 November 2018. The collective personal leave campaign when properly examined, represents covert industrial action involving an extraordinary number of individuals all making claim for personal leave such that there could be no proper basis to establish that this event was nothing more than an unusual coincidence.

[15] Importantly, it is relevant to consider whether such covert industrial action involving the collective personal leave campaign can properly satisfy the definition of industrial action.

[18] The evidence provided during the Hearing has established that an extraordinary number of individual absences on account of personal leave occurred on 7 November 2018. There was evidence including audio recordings, which strongly supported that individuals had been engaged in a covert campaign which encouraged others to participate in a coordinated manner, in an event that involved multiple claims for personal leave all made on the same day, 7 November 2018.

[20] Consequently, in summary, I am satisfied that a campaign of covert industrial action has been undertaken and there is proper basis upon which to find that this concerted activity satisfies the meaning of industrial action as contained in s. 19 of the Act. Further, I am satisfied that the industrial action is not protected industrial action and it is happening, impending, probable and is being organised. The industrial action is covert in nature and manifests as a collective personal leave campaign.

[21] Therefore the Commission must make an Order that the industrial action stop, not occur and not be organised for the stop period which I have determined to be until 30 November 2018.

[22] The covert industrial action taken in this instance must be unequivocally condemned. Covert industrial action taken in respect to public bus operations does not provide opportunity for the employer to implement steps to mitigate the impacts of the industrial action on the travelling public. The members of the public, including schoolchildren, who rely upon the provision of public transport services, and who were, at very least, greatly inconvenienced by the cancellations and disruptions to bus services on 7 November, are entitled to have the Commission properly apply the relevant legislative sanctions as a means to avoid any repetition of the unconscionable conduct of the respondents.

[23] Specifically, the determination that the respondents have taken unprotected industrial action shall mean that, although the individual applications for personal leave would otherwise require the employer to make payment for their absence on 7 November 2018, no payment could be made by the employer to any of the individual respondents in respect to the period during which they participated in unprotected industrial action. The result will mean that the respondent individuals will have their personal leave balance debited for their absence on 7 November 2018. However, the employer is prohibited from making any payment in respect of the absence which has been found to have been unprotected industrial action.

BOOT protects all employees

Loaded Rates Agreements [2018] FWCFB 3610 (28 June 2018)
In a significant rebuff to employer attempts to accelerate agreement approval processes, a five-member FWC full bench as part of its "loaded rates" ruling has affirmed the requirement to apply the BOOT to each and every covered employee. Handed down eight months after FWC President Iain Ross referred a clutch of loaded rate agreements to Vice Presidents Adam Hatcher and Joe Catanzariti, Deputy President Val Gostencnik and Commissioners Tim Lee and Katrina Harper-Greenwell, yesterday's decision comprehensively rejected employer group arguments against "line by line" scrutiny of deals. "The requirement that 'each'. . . employee and prospective employee be better off overall is a rigorous one," said the full bench.

"Thus, every award covered employee or prospective employee must be better off overall, with the corollary that if any such employee is not better off overall, the relevant enterprise agreement does not pass the BOOT. "Thus, in an agreement containing loaded rates in whole or partial substitution for award penalty rates, it is not sufficient that the majority of employees – even a very large majority – are better off overall if there are any employees at all who would not be better off overall."

Acknowledging there was potential difficulty in applying the BOOT "to every prospective award covered employee", the bench said that while it "necessarily involves a degree of conjecture", the task was made easier in large or mature businesses with established roster patterns.

That observation harkened back to the decision in Hart v Coles Supermarkets Australia Pty Ltd where a full bench quashed approval of the retailer's agreement because it disadvantaged employees on certain rosters. The Coles deal contained loaded rates higher than those in the modern award and intended to compensate for lower penalty rates for evenings, weekends and public holidays.

In its summary of the current case – in which five agreements provided the vehicle to examine how the BOOT should be applied to enterprise agreements that roll up penalty rates and other benefits into loaded rates of pay – the full bench said the issue had become "particularly pertinent" since the Hart decision. The ACCI, in its submission to the bench, argued the BOOT "should not require inquiry into the circumstances of every individual employee" and should assess the "net impact of an agreement on the whole rather than a 'line by line' comparison with the award".

The Ai Group, meanwhile, suggested that the Commission had recently adopted an "overly theoretical approach" to the assessment of the BOOT, including in relation to enterprise agreements containing loaded rates. Furthermore, it said, the Commission spent too much time looking at "circumstances that were extremely unlikely to arise". The National Retail Association claimed in considering how to apply the BOOT to loaded rates of pay, the Commission should take into account only the operational circumstances of the employer's business at test time, "not at some hypothetical future point in time when these circumstances may have changed".

In response, the bench said that applying the BOOT "would be rendered nonsensical and ineffective with respect to such prospective employees if only the employer's existing operations, which did not involve the use of prospective employees in the categories permitted by the agreement, could be taken into account".

Also rejecting as "illusory" an Ai Group distinction between an agreement's terms and "the practices and working arrangements that may flow from those terms", the bench said that in order for a "meaningful comparison to be made", the application of the BOOT to a loaded rates agreement will require an examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement". The bench also rejected the Ai Group's argument that the Commission should not require the employer to produce indicative rosters of hours that employees will work under the agreement, "but should rely on the materials lodged with the application for approval".

"That submission. . . would amount to the Commission adopting a 'don't ask, don't tell' policy," observed the bench. In the bench's estimation, however, it was "difficult to envisage how it would be possible to provide for a loaded rate for casual employees that was capable of passing the BOOT". "This is because it would always be possible for the casual employee, in a given pay period, to be engaged to work on a day or at a time which would attract the payment of penalty rates under the relevant award and not to be engaged on any other hours or at any other times."

One way around this, suggested the bench, might be provide casual workers with guaranteed hours and rosters. "In that circumstance it may be possible to construct a loaded rate for them, in the same way as for full-time and part-time employees above, which is capable of passing the BOOT based on particular prescribed rosters." Of the five agreements before the bench – Aldi's Prestons region and Stapylton region deals, Allied Security, PSA Security and JWT Services – only the retailer's eluded the axe. Assessed against five awards – the retail, the storage, the Road Transport and Distribution Award 2010, the Manufacturing and Associated Industries and Occupations Award 2010 and the Miscellaneous Award 2010 – Aldi's "largely identical" agreements left the Commission "concerned that employees do not appear to be better off overall. . . because the loaded rates of pay do not appear to be high enough to compensate employees for a range of modern award entitlements not provided for in the agreement".

Among the entitlements listed were overtime for part-time and retail employees, time off in lieu, agreed additional hours, expected hours of work and meal allowances. The bench also expressed reservations about Aldi's "unique" bankable hours arrangement, characterised by the NUW as "security of tenure without security of hours". Among the bench's concerns was that it did "not require that an employee be offered their full quantum of contract hours regardless of whether they have a negative bankable hour's balance". With no undertakings proposed by Aldi, the bench identified four issues for resolution: concern about whether the loaded salary rates for store managers, assistant store managers and trainee store managers are sufficient to pass the BOOT in respect of all realistically possible work scenarios; whether the point of comparison for the purpose of assessing the BOOT in relation to part-time employees is part-time or casual employment under the Retail Award; the agreement's "make good" provision; and the use of "notional shift hours" when calculating leave payments. Further consideration of the Aldi agreements is to proceed before a single Commission member.

As to the three security industry agreements, when set against the Security Award the covered employees were marginally better off overall "when considering only the absence of shift and weekend penalties from their loaded rates", the bench said. All, however, were dismissed as being "fundamentally defective" in terms of pay for casual employees. Although JWT, comprising two full-time workers and one part-timer, does not currently employ casuals, the bench said its deal's provisions for casual employment, "the fact that it only had three employees who voted to approve the agreement but would undoubtedly require more to service any security contract, and our general understanding of patterns of employment in the contract security industry, would cause us to conclude that it will in future employ casual employees". "There is therefore nothing hypothetical or unrealistic in taking casual employment into account in assessing the BOOT for each agreement."

Cost awarded for baseless and groundless case

Somerville v AFS Security 24/7 Pty Ltd & Ors (No.2) [2018] FCCA 2234 (17 August 2018)
The Federal Circuit Court has slugged an unrepresented litigant with an order to pay $12,500 of his former employer's legal costs, finding that although he did not run the case vexatiously, mere allegations unsupported by evidence rendered it "baseless and groundless".

The fire services technician claimed AFS Security 24/7 Pty Ltd (trading as Armidale Fire & Safety) took adverse action against him in breach of s340 of the Fair Work Act by "unilaterally" dismissing him the day after he alleged he was underpaid $4360 between February and August 2016. The technician further alleged that AFS told him the reason for his dismissal was a "restructure" but claimed it could not have been a genuine redundancy as AFS went on to hire a casual labourer to perform his duties and did not consult with employees about any organisational change.

Seeking compensation of $19,863, including the $4363 in alleged underpayments and $15,500 in lost income as a result of the dismissal, the technician also sought penalties against AFS. However, Federal Circuit Court Judge Nick Nicholls in May found AFS decided to dismiss the technician solely because it was undergoing a restructure prompted by financial concerns. Dismissing his application, Judge Nicholls also noted that when the technician told the company it had wrongly calculated some payments for "travel time", AFS agreed and paid him for the additional hours.

In awarding costs of $12,490 to AFS this month, Judge Nicholls accepted that the technician initiated his case because "he believed that it was the appropriate course" but slammed him for lodging his claim without supporting evidence. The judge said the technician did not initiate the case vexatiously, but he was "satisfied however, that the proceedings were instituted 'without reasonable cause'".

Noting the technician was not a lawyer nor legally represented, Judge Nicholls said "even a layperson" would understand "the difference between speculation, and evidence on which to base that speculation, such that it becomes reasonable" to run a case. "A belief, even if genuine, in the righteousness of the cause, is not sufficient, of itself, to argue that the institution of the proceedings was reasonable," Judge Nicholls said.

While "at its highest", the technician believed he was dismissed for making a complaint, Judge Nicholls said there was "nothing in his pleading (and affidavit) as at the time of instituting the proceedings, to reasonably indicate that that was the case". "What made [the technician's] institution of the proceedings as being 'without reasonable cause' was the lack of 'grounds' in the application.

"That is, mere allegations and supposition unsupported by evidence, render the application as being baseless and groundless." AFS had sought costs of $15,070, including $12,490 in professional fees and $2580 in other "disbursements" including the loss of wages, travel expenses, meal expenses and accommodation costs of the company's solicitor, director and business manager. But Judge Nicholls ordered the technician to pay the costs of the professional fees only as AFS had "not made any attempt to explain how these 'disbursements' constitute party/party costs".

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.

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".

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".

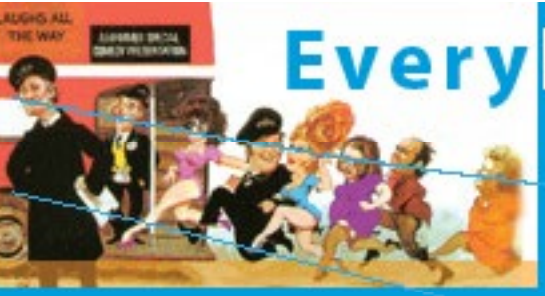
Given the "extensive [practical and academic] experience" of the HR manager, the commissioner said the "denial of procedural fairness in this matter was significant, accordingly I find the dismissal of [the factory worker] to be unfair". Commissioner Harper-Greenwell said she would invite submissions on an appropriate remedy.

Important Dates

21 March 2019 *Brisbane*	APTIA Breakfasts
18 June 2019 *Melbourne*	
29 September 2019 *Sydney*	
22 February 2019 *Canberra*	IWG Meeting
18-20 November 2019 *Canberra*	BIC National Conference
17 November 2019 *Canberra*	BIC & APTIA Annual General Meetings

Ian MacDonald
National Industrial Relations Manager
Australian Public Transport Industrial Association

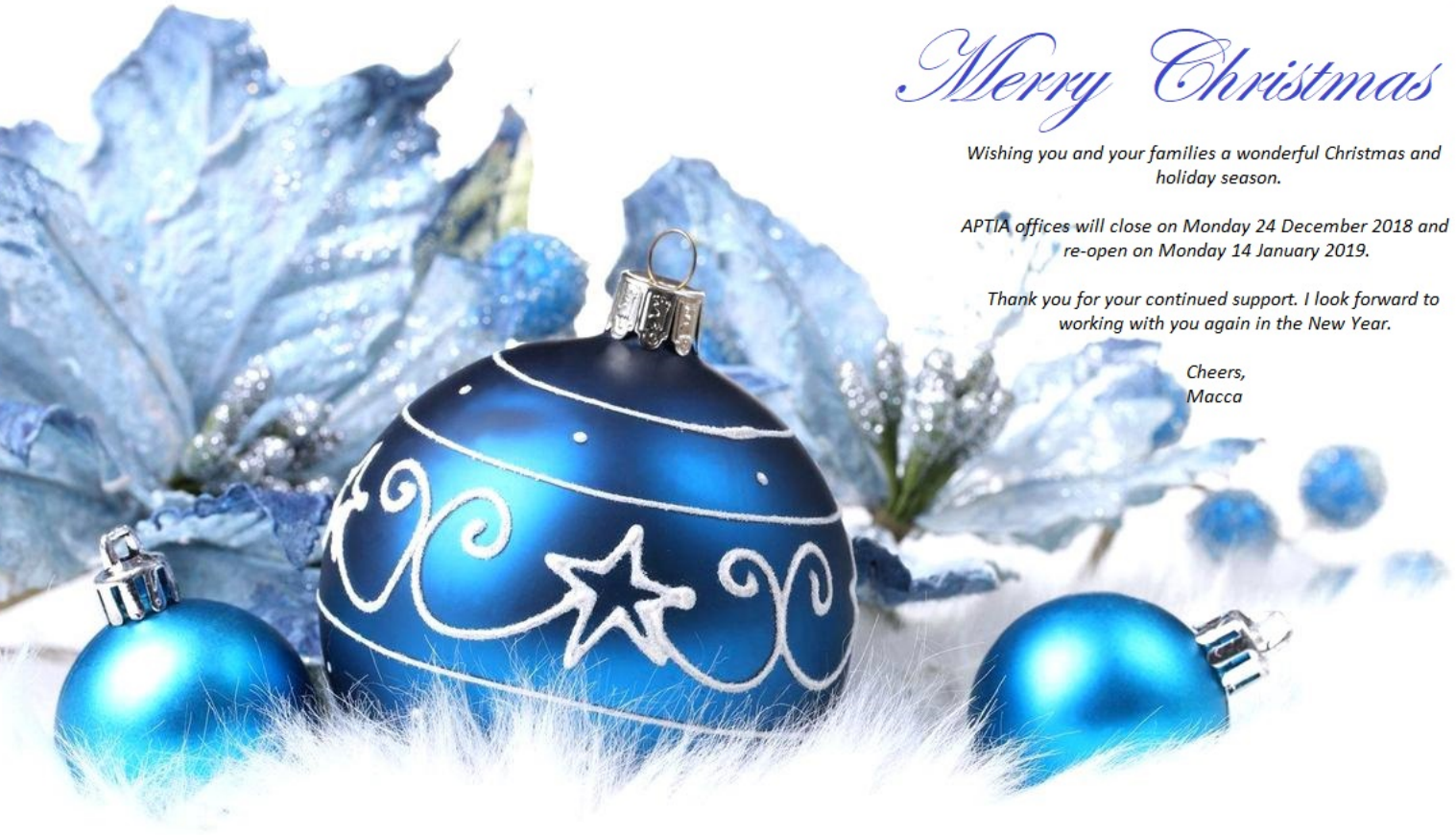
Phone	+61 2 9907 6372
Fax	+61 2 9932 7125
Mobile	+61 427 206 326
Email	imacdonald@bic.asn.au
Address	PO Box 1047 Manly NSW 1655



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

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



Merry Christmas

Wishing you and your families a wonderful Christmas and holiday season.

APTIA offices will close on Monday 24 December 2018 and re-open on Monday 14 January 2019.

Thank you for your continued support. I look forward to working with you again in the New Year.

Cheers,
Macca

Bus Australia Network

BIC Bus Industry Confederation moving people
busnsw Bus & Coach Association NSW
BusSA Bus & Coach Association SA
BusVic Bus Association Victoria
QBIC
TasBus Tasmanian Bus Association