



Everybody Out

**PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS**

Australian Public Transport Industrial Association

➤ *Industrial arm of the Bus Industry Confederation*

Welcome to the April 2020 Edition of Everybody Out

PUBLIC TRANSPORT INDUSTRIAL RELATIONS NEWS

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

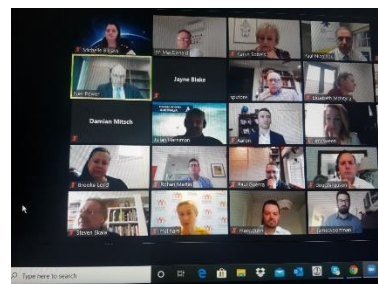


Wayne Patch, Chairperson

In this issue:

MEMBERS NEWS

- **The New Normal**



The new normal is working from home a couple of days a week with a few days in the Manly office just to prevent too much cabin fever.

The new normal is conducting Zoom meetings with relevant persons either up at BusNSW with Matt Threlkeld's 'you beaut' mega screen or just from the laptop, which does the job.



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In April, APTIA had access, courtesy of BIC's membership with ACCI, to the Attorney General, also Minister for Industrial Relations, the Hon Christian Porter and was able to push issues such as the extent of the new regulations relating to wage theft and the need for clarity about the role of casual employment.

In April, APTIA, also had access, courtesy of BIC's membership with ACCI, to Neville Power, who is Chairman of the National Covid-19 Coordination Commission, which advises the National Cabinet and was able to seek advice as to whether State jurisdictions might seek to mandate the National Covid-19 Safe Workplace Principles with regulation. Neville Power did not think State jurisdictions would seek to turn them into regulation but he did recommend strongly that all industries develop their own safety measures so that upon release of the restrictions the industry was ready to meet their obligations.

To this extent the new normal is regular meetings with the Transport Workers Union, including their various State branch organisers, to consider industry measures and ensure retention of jobs.



The new normal is relying upon the Fabian Cotter, Editor of the ABC Magazine, our excellent industry magazine, to get our messages out to members and to the industry at large.

The new normal is using Linked In; Twitter; Facebook and Instagram as a means of communication. Social media has come to the fore. It is very encouraging when a post on Linked in gets over 4,000 hits and nearly 100 likes.

Regretably the new normal is not necessarily enjoying each others Company, yet, but don't put away the shot glasses or your drinking mug. I am sure that BIC and APTIA are banking up to launch their national conferences and national seminars as soon as possible.



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Have you downloaded the COVIDSafe App?

Michael Apps and I have!!

INDUSTRY NEWS – What you need to know

- Corona Virus and the Bus and Coach Industry – Question and Answers



APTIA is a direct point of contact for the industry members to inquire about employment issues that you are confronting each day with their workforce.

BIC has developed a Covid-19 Industry Hub at www.ozebus.com.au/covid

The Industry Hub provides updated information from an industry perspective and is a valuable tool for BIC and APTIA member during this time.

This section of 'Everybody Out' details some of those regular questions that are concerning you and my response from an industry perspective as to how you should handle the problems you face.

Remember my advice is not legal advice and should not be relied upon without your obtaining your own separate legal advice.



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Can a driver with a chronic medical condition refuse to work if they consider themselves at risk?

It is becoming increasingly easy for an employee to get a medical certificate that will show they are not able to work because of their age i.e. over 70, or because they have a chronic medical condition which could place them at risk. It is difficult for an employer to do anything about this circumstance provided the medical condition is genuine enough.

What if a driver cannot work their full hours because of some diagnosed medical condition?

Prior to the corona virus it would have been possible for an employer to seriously look at reasons why an employee could not perform their full week. One of the anomalies of the Job Keeper allowance is that drivers will be paid the full \$1,500.00 a fortnight irrespective of whether they have worked enough hours to justify the payment. Similarly, a driver who seeks to take sick leave, even if it is unpaid will still qualify for the payment. An employer can offset their payment to cover the leave entitlements. Because of the corona virus it is easier for an employee to use one of the risk categories to justify leave.

If a driver is on long service leave and a public holiday falls due on that LSL is another day added to the entitlement?

If a driver is stood down, they can take their LSL if they have an entitlement. If they take LSL or annual leave and a public holiday falls on any day in which they are enjoying LSL or AL, the public holiday is credited to the driver's entitlements.

Can a driver take long service leave in advance or can the driver take a cash payment for the LSL in lieu of taking time off?

Long service leave cannot be cashed out. It must be taken. There is no mechanism for a driver to be paid LSL in advance in the same way that applies to annual leave. It is also not advisable for an employer to agree to a driver taking long service leave before they actually are entitled to it because when they are entitled to LSL it accrues as a total amount. It is not possible then to credit any LSL taken prior thereto.

Can long service leave be split up into a number of periods of time i.e. a period of 4 weeks taken over 8-week with a break each week?

Each State has as lightly different way of treating long service leave but generally LSL can only be taken in no more that two chunks of time. Once the LSL is due it should be taken and if it is not, an employer is penalised into paying the LSL when it is taken at a higher rate than when the LSL actually accrued.



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Does an employer get to decide who is eligible for the Job Keeper allowance?

When an employer registers to the job keeper allowance the employer has to nominate all of their employees who are either continuing to work or who have been stood down. It is a one in, all in, system. The employer must pay the allowance in advance but can use the money to set off against leave entitlements. An employee who has been made redundant rather than stood down does not qualify for the payment.

When am I required to pay an employee who has stayed at home either because they have returned from a holiday and are isolating for 14 days or who have decided because they are over 70, they are at risk?

If a driver does not have any leave entitlements to cover this circumstance and the driver cannot work because of a perceived health issues it is not a requirement generally that the driver would be paid by the employer unless the employer decides to pay on compassionate grounds. If the job keeper allowance applied, then the older driver could be stood down and paid the allowance.

Is payroll taxes payable in circumstances where an employer has been the recipient of the job keeper allowance?

Normal taxes are payable on the \$1,500.00 a fortnight so that the payment works out to about \$1,350.00 a fortnight. Payroll taxes are administered under State jurisdictions and are payable on the job keeper allowance. Some States have provided measures to employers to defer payments of the current monthly payments.

Are there greater safety precautions needed whilst drivers taking their breaks away from the depot?

A driver under the current circumstances would need to be able to take their breaks, meal or crib, at a location which is secure and only used by the driver and fellow employees. The location would need to have cleaning facilities for the driver and not be available to the public. Without such protections at the moment the driver might seek to return to the depot where such facilities are located.

If I find other work for a driver and they refuse to do it can I direct them to do it anyway?

If the driver is a recipient of the Job Keeper allowance, then legislation allows you to direct drivers to undertake other works which they have the skills to undertake. Cleaning and yard work would come under this category but mechanical might require some skill they are not up to. If the job keeper does not apply and the driver's original job description did not have the capacity for you to get them to do other work, then you may have a problem.



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What should an employer with drivers who are over 70 years of age and in a risk category?

There is no easy answer to this issue. It is reasonable that a driver who is over 70 isolates. It is also reasonable for an employer to require a driver over 70 to isolate by taking leave. Some options include taking of LSL, annual leave or even personal leave. It might be an option to stand down such a driver but, without the job keeper allowance, the employer will have to decide if they pay the driver. In some cases, the drivers imply retire.

If you are eligible for the Job Keeper Allowance are all your drivers eligible to get the allowance?

As an employer, once you become eligible i.e. because your revenue has fallen by more than 30% over a similar BAS tax year, all of your employees are then eligible to receive that allowance and you, as the employer, who must continue to pay your employees for work done, will also be entitled to set off the allowance against those payments, irrespective of what other sources of income you have available to you.

- **Corona Virus Economic Response Package Omnibus (Measures No 2) Bill**

This Job Keeper Bill, passed into legislation, gives qualifying employers the ability to make "Job Keeper-enabling directions" to stand down workers and change their duties and location.

Schedule 1 of the Act provides for the insertion of a new Part 6-4C into the Fair Work Act to provide for new Job Keeper-related rights for employers to change employment arrangements, while giving the FWC the power to handle disputes.

The amending Act provides for the automatic repeal of Part 6-4C on September 28.

It also requires that an independent review begin by July 28 and report to the minister by September 8.

The Omnibus Bill's explanatory memorandum says that the Job Keeper-enabling directions can provide "for increased flexibility around employees' hours of work via a new Job Keeper-enabling stand down direction, performance of duties and location of work".

It says the Bill "also enables employers and employees to make agreements for increased flexibility around annual leave arrangements and days and times of work".

Directions or agreements under the Job Keeper provisions must not be unreasonable and employees or their representatives must be consulted, while the FWC will be able to deal with disputes about their operation.

Employers will have to give three days' notice of a direction (which must be in writing, which includes electronic communication) or a lesser period by genuine agreement.



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The stand down provisions are available if employees cannot be usefully employed for their normal days or hours.

Existing terms and conditions continue to apply, except to the limited extent they are modified by directions or agreements under the Job Keeper provisions.

The legislation imposes a "wage condition" that requires qualifying employers to pay qualifying employees the fortnightly value of the Job Keeper payment, while it also contains an hourly rate of pay guarantee that ensures hourly rates are not reduced as a result of a Job Keeper-enabling direction.

The Bill provides for civil penalties of up to 600 penalty units (\$126,000) for employers that breach Job Keeper requirements, such as by failing to pass on the full \$1500 payment, or knowingly misusing a Job Keeper-enabling direction.

The Bill also extends protection of workplace rights under Job Keeper provisions, such as agreeing or disagreeing to perform duties on different days or at different times.

It further prohibits false or misleading statements as to workplace rights.

Provisions conferring power on the FWC to handle disputes over the operation of Part 6-4C give it the ability to make orders to give effect to a Job Keeper-enabling direction, to set one aside, or to make other appropriate orders.

The Bill amends the Fair Work Act 2009 by adding Section 789G (Part6-4C)

- **ACCI meetings with Christian Porter (Attorney-General) and Neville Power (Chairman National Covid-19 Coordination Commission)**



Isolating distance



When APTIA met with these two persons the following questions were asked on your behalf



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Christian Porter

"Attorney General - I notice that you have paused the Industrial Relations Consultation process that you initiated last year and continued into the start of 2020. I understand the reasons.

On behalf of the Australian Public Transport Industrial Association I actually forwarded a submission relating to the 'Improving protections of employees' wages and entitlements."

The concern that I have, as a registered organisation, is that my organisation, along with all Organisations and Trade Union, are shut out from representing their members in small claims' actions for unpaid wages by the simple exercise of an option by an applicant or their lawyer not choosing to proceed by way of a small claim but by way of a full application before a Federal Court. This only adds to the complexity and costs of the action, which in most cases should have been dealt with by persons at the coal face of that industry.

My question is to ask you to consider, as soon as you can, to reinvigorate the consultation process which can result in better processes than we currently have in place."

Neville Power

"Safe Work Australia presented to the National Cabinet last week a series of control measures to better deal with the corona virus in our workplaces. Those measures were then developed by the National Cabinet into a set of national covid-19 safe work principles.

Your National Coordination Commission has also created an Industrial Relations Working Group, according to the media release, to keep employees and customers safe during the COVID-19 crisis.

My questions is - in public transport the issues of reduced capacity on our buses and increased hygienic protections for both our drivers and passengers will have significant cost implication for the State jurisdictions who fund our services.

Do you see the State jurisdictions mandating some of the national principles or will they remain guidelines and how does your IWG fit into this conversation if they neither mandate the safety measures or fund them?"



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- **The Rise of Rogue Unions**

In Queensland and Western Australia, specifically, there has been a number of industrial associations, primarily registered as Incorporated Associations under the respective State legislation relating to incorporation of associations. These organisations represent employees and do not have the same status as a trade union and usually cannot register under the Fair Work (Registered Organisations) Act 2009 as they are prevented by an existing registered organisation which is a trade union also representing employees.

In Western Australia, Transport Edge Inc seeks membership from drivers and has represented drivers in enterprise agreement negotiations, unfair dismissal claims and dispute resolutions.

In Queensland, Bus and Coach Drivers Association Incorporated has also sought membership of bus drivers and has sought to represent them in enterprise agreement negotiations and dispute resolution.

It would appear that the first industry encounter with such a rogue union was in 2018 when an application to terminate an enterprise agreement covering 75,000 Coles supermarkets workers was made by self-represented night fill worker Penny Vickers.

See the decision of Deputy President Gostencnik, Coles Supermarkets Enterprise Agreement 2017, 2018 FWCA 2287.

The battle ground was between the unregistered Retail and Fast Food Workers Union (**RAFFWU**) who challenged Australia's largest private sector union the Shop, Distributive & Allied Employees Association (**SDA**).

The SDA supported Coles' attempt to have Ms Vickers' termination application dismissed when it was heard by the Full Bench of the Fair Work Commission in October of that year.

In an unorthodox move, the RAFFWU sought to intervene in support of the application by representing two individual Coles employees in the termination proceedings before the Full Bench. This intervention was strongly opposed by both the SDA (who in recent Senate enquiries have called the RAFFWU a "bogus union") and Coles (who referred to the RAFFWU as a "rogue union" during the course of the proceedings).

While the RAFFWU failed to convince the Commission that it should be heard in the proceedings in its own capacity, the decision by the Commission is unlikely to provide Coles or the SDA much comfort. This was because RAFFWU officials were still allowed to represent Coles employees in their individual



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capacities, providing the RAFFWU an opportunity to influence employees and, potentially, steer the direction of the proceedings.

This case illustrates the manner in which unregistered employee associations could seek to involve themselves in matters previously left to traditional unions, while not requiring those same organisations to comply with the strictures of legislation, such as the Fair Work Act 2009 or Fair Work (Registered Organisations) Act 2009 (Cth).

While this case clarified that the RAFFWU has no rights to terminate or vary an existing enterprise agreement on its own behalf, an unregistered union is not precluded from involvement during the crucial enterprise agreement negotiation process (noting the RAFFWU had announced it is a bargaining representative for "quite a few employees" for the proposed new Coles enterprise agreement).

The FWC held that an employee may appoint in writing a "person" to be their own bargaining representative. As "person" does not necessarily mean "natural person", unregistered unions who are also incorporated associations (like the RAFFWU) may in theory also be appointed to this position.

If the RAFFWU, or organisations like it, are appointed as bargaining representatives it will have rights to be actively involved in the bargaining process and have these rights as protected "workplace rights" under the Fair Work Act. These enforceable rights may include:

- being formally notified of all meetings and decisions made by the employer and other parties
- applying to have an enterprise agreement approved by the Commission; and
- making applications to the Commission, in its own capacity as a bargaining representative, for:
 - (i) bargaining orders
 - (ii) majority support determinations
 - (iii) scope orders; and
 - (iv) for the Commission to deal with a bargaining dispute.

The rights afforded to bargaining representatives are wide-ranging and have the potential to influence the bargaining process.

It is important that APTIA members understand the rights that these incorporated employee association have achieved through the fair work process.



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IMPORTANT DECISIONS

- Failure to properly explain an agreement leads to its application failure

Australian Nursing and Midwifery Federation v Armest Pty Ltd T/A Miles Witt Partnership; Australian Workers' Union, The; The Good Shepherd Limited as Trustee for the Good Shepherd Nursing Homes Charitable Trust [2020] FWCFB 2045 (21 April 2020)

A senior FWC member's approval of an enterprise agreement has been quashed over a failure to explain why they rejected union concerns.

Earlier this month, Vice President Adam Hatcher and deputy presidents Anna Booth and Alan Colman upheld RAFFWU's appeal against Deputy President Gerard Boyce's December 16 approval of Hungry Jack's national deal.

The deputy president had in his seven-paragraph decision vowed to publish further reasons "in due course" but had not done so by the time the bench overturned it.

The same full bench had quashed Deputy President Ingrid Asbury's succinct Christmas Eve approval of a Townsville nursing home's deal, citing its own observations in the Hungry Jack's decision as to the need to provide reasons in certain circumstances.

The "relevant principles" referred to in that ruling recognised that while the Fair Work Act does not require that reasons be given for every decision made, an "obligation to give reasons . . . will certainly be implied in any case where the decision significantly affects the rights and interests of relevant persons, the matter is seriously contested and the appeal facility in s604 is available", said the bench.

In the case of the Good Shepherd Home's agreement, the ANMF in late November lodged a declaration setting out a multitude of concerns with the BOOT.

Three days later, the Good Shepherd Home provided a number of undertakings responding to an earlier email in which the Commission raised its own concerns.

Deputy President Asbury's subsequent decision, said the bench, "was comprised of five paragraphs in which she addressed in short form the essentials for the application, noted that the ANMF and the AWU were covered by the agreement, accepted the undertakings . . . , expressed her satisfaction that each of the requirements of ss186, 187, 188 and 190 of the FW Act as relevant were met, and approved the agreement".

"There was no reference to the BOOT issues raised by the ANMF in the decision."



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- **A Genuine Redundancy is a Defence to Unfair Dismissal claim**

Kim McRae v Greyhound Australia t/a Greyhound Australia Pty Ltd [2020] FWC 1868 (28 April 2020)

In what stands as a tribute to the qualities the FWC looks for in employers' legal representatives, an experienced tribunal member has praised a senior associate for "a masterclass in the art of advocacy" that avoided bamboozling or belittling an unrepresented bus driver.

Deputy President Peter Sams made his observations in the course of upholding Greyhound Australia Pty Ltd's jurisdictional objection that the driver's dismissal after seven years transporting Downer EDI workers to Chevron's Wheatstone LNG project was a case of genuine redundancy.

Seeking compensation, the driver had contended she was unfairly dismissed in July last year as part of Greyhound's incremental demobilisation process as the project neared completion.

Before weighing the competing arguments, the deputy president said it was "incumbent" on him to recognise the preparation and presentation of Greyhound's case by the Herbert Smith Freehills lawyer as "a masterclass in the art of advocacy".

"Difficult and complex jurisdictional issues were logically, carefully and succinctly explained by reference to one or two key authorities and relevantly applied to the uncontested documentary evidence in the case," Deputy President Sams continued.

"[The lawyer's] oral presentation was measured and calmly delivered without superfluous flummery or laboured repetition.

"Notwithstanding the [bus driver] was obviously overwhelmed by complex legislative provisions and legal principles, [he] did not seek to take unfair advantage of [her] by ridiculing or bamboozling her with complex or legalistic language.

"Despite her submissions and arguments being largely unsupported by any evidence, [he] did not belittle or embarrass her in any way.

"His cross examination was courteous, respectful, brief and to the point."

The deputy president heard evidence that Greyhound drivers working on the Wheatstone project – at one-point numbering 130 – were regularly informed at toolbox meetings of "demobilisation rounds" prompted by client and head contractor Downer EDI.

As one of just 21 "high performers" remaining by the middle of last year, the driver was one of four "demobbed" after recording the lowest score in an appraisal based on performance, qualifications, skills and experience.



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Greyhound told the tribunal there were no alternative employment opportunities in Western Australia for the drivers.

"[Greyhound's legal representative] noted that while Greyhound has some flexibility as to the demobilisation process in Cl 11 of the agreement, ultimately the [bus driver's] employment did not end as a result of any act by, or conduct of Greyhound," said the deputy president.

"It was by the operation of law, being the contractual employment terms [with] . . . the instigating and contributing factor [being] . . . Downer's direction to reduce bus services.

"Greyhound cannot ignore this direction [and] once that process is set in motion, Greyhound is required to comply with the steps in Cl 11 of the agreement, and it did so."

In agreeing with Greyhound that the bus driver's demobilisation was a case of genuine redundancy, and therefore beyond the Commission's jurisdiction, Deputy President Sams observed that logic decreed the driver should have received a redundancy payment.

"Obviously, such a conclusion would have a massive retrospective impact on all the employees who had been earlier (or later) demobilised, and would be contrary to the custom and practice on this project, and presumably many other large construction projects where employee transportation services are provided by a contractor," he said.

"However, on closer reflection and careful consideration of the interaction of the specific terms of the agreement with the [bus driver's] contract of employment, my concern in this respect has been answered and dispelled by [the Greyhound legal representative's] submissions.

"I am satisfied that the legislative and agreement provisions can comfortably coexist with a genuine redundancy objection and Cl 10 which addresses the ordinary and usual circumstances where redundancy pay might be applicable during the life of the project, but where it is not applicable in the demobilisation processes.

"I also agree that this objection is clearer and will be better understood by the [bus driver], than the other two objections which involve more complex legal principles and problematic concepts.

"Accordingly, the application must be dismissed."

IMPORTANT DATES





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APTIA BREAKFAST – Sydney (23 September 2019) Note that it is likely that this breakfast will be postponed.



MOVING PEOPLE 2020

Energy Events Centre
Rotorua New Zealand
October 27 to October 30, 2020



BIC NATIONAL CONFERENCE Cancelled

Dates for the BIC and APTIA Annual General Meetings will be advised.



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