



AUGUST 2021 EDITION

Everybody Out is an industry newsletter produced by the Australian Public Transport Industrial Association (APTIA), the industrial arm of the Bus Industry Confederation (BIC). The editor of this newsletter is Ian MacDonald, National IR Manager of the BIC. Enquiries relating to the contents of this newsletter can be directed to:

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Wayne Patch
APTIA Chairman

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MEMBERSHIP NEWS

Our new Executive Director



Roz Chivers has been appointed Executive Director of the Bus Industry Confederation.

Formerly the Deputy Chief Executive and Executive Director, Policy and Research at Australian Local Government Association, Roz has commenced as BIC Executive Director and will be located in Canberra.

Roz describes herself as a passionate, driven advocate, government relations and public policy practitioner with extensive experience in policy and program development and implementation, strategic partnerships, intergovernmental relations, and community engagement and communications.

Roz thrives on complex policy challenges which require a balance of strategic vision and attention to detail.

Her professional interests are in areas related to social and environmental justice, human services, urbanisation, local planning and regional development, the environment, sustainable agriculture, energy, food security and economic justice.

And now, public transport, bus, and coach style.

Roz, as the Executive Director of the Bus Industry Confederation, will lead the bus and coach industry into a post pandemic era with many challenges, none the least being restoring confidence in public transport and developing policy in an environment of vehicles powered by renewable energy and eventually powered autonomously by a computer.

Representing employers at the International Labour Organisation (ILO)



International
Labour
Organization



APTIA will be one of eight employer representatives at a technical meeting of the ILO in Geneva, over the next week on the future of decent and sustainable work, in urban transport services. Whilst most of Europe and Asia is able to attend in person our attendance will be virtual.

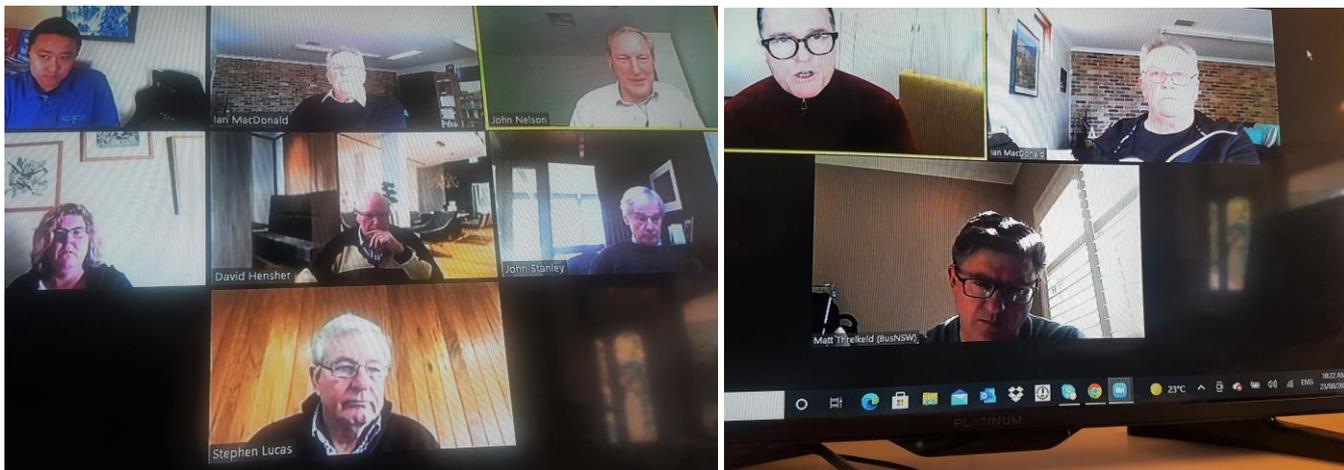
The International Organisation of Employers (IOE) has convened the employer representatives, whilst the International Transport Workers Federation (ITF) has convened eight employee representatives, from around the world, to also attend.

The Australian Chamber of Commerce and Industry (ACCI) is an affiliate of the OIE, whilst the Transport Workers Union of Australia (TWU) is an affiliate of the ITF.

Apart from the ILO secretariat and assorted observers, every member of the ILO, around 187 countries, is also invited to participate.

It is the first time in 60 years that the ILO, a tripartite arm of the United Nations since 1919 (originally the League of Nations) has convened a technical meeting which is focussed only on urban transport.

APTIA has been working closely with Scott Barklamb, Director of Workplace Relations, ACCI, Matias Espinosa from OIE and Mark Birrell, Past President of the Victorian Chamber of Commerce and current Non-Executive Director of Transurban Limited, an observer in the meeting (Pictured above)



The ILO has issued a series of discussion points, which will be focus of the meeting, as set out below:

1. What decent work challenges and opportunities have arisen in urban passenger transport operations and services? What have been the key drivers of change, aside from the coronavirus disease (COVID-19) pandemic?
2. What policies, measures and practices have worked, what has not worked, and what needs to be done to address these decent work challenges and opportunities?
3. Taking into account the great diversity in different countries and cities in the organization of urban passenger transport, what recommendations can be made for future action by the International Labour Organization and its Members (governments, employers', and workers' organizations) regarding the promotion of decent and sustainable work in urban passenger transport operations and services

APTIA has been most fortunate to utilise the wealth of knowledge that exists in public transport, within Australia.

In preparation for the meeting, APTIA acknowledges the input from Dr Chris Lowe, Executive Director of BusVIC and Matt Threlkeld, Executive Director from BusNSW.

Additionally, and foremost APTIA has been able to draw from the knowledge of Professor David Hensher, Professor John Nelson, Professor John Stanley, Dr Yale Wong, Stephen Lucas, former BIC Chairperson and Roz Chivers, Executive Director of BIC.

Industrial Working Group Meeting



BIC's Industrial Working Group met on 18 August 2021 to consider changes to the Passenger Vehicle Transportation Award, an industry approach to vaccinations and a response to the decision in Rossato.

Set out below are the resolutions.

Review of the Passenger Vehicle Transportation Award 2021

Casuals – FWC review required by Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021

It was resolved:

That the IWG supports the proposed changes to the PVTA, outlined in the Statement of the FWC on 11 August 2021, and instructs APTIA to advise the FWC, accordingly.

Family and Domestic Violence Leave – FWC review

It was resolved:

APTIA does not support an employer sponsored paid FDV and will seek ACCI's representation, if required support.

Vaccinations

It was resolved:

1. *APTIA members should encourage their employees to receive vaccinations due to the fact that public transport is an industry in which there is significant contact with the public and transmission is a real threat for a driver whilst on the road.*
2. *APTIA should consider incentives to encourage as many employees as possible to become vaccinated.*
3. *In circumstances where part of the workforce is at high risk of exposure employers will need to consider ensuring that those drivers, who are exposed to high risk, are vaccinated.*

The decision of the High Court in Rossato

It was resolved:

That APTIA strongly recommends to its members the following implications from the High Court decision in Rossato.

Clearly designate the employee as a casual by reference to the definition of a "casual employee" in the Fair Work Act, and specify the employee's payment arrangements, including the fact that casual loading is payable.

Working from Home

APTIA members were invited to send in photos of their home offices. The incentive was a long lunch with APTIA for the prize winners. Hopefully I will eventually get around to a long lunch with all of you.

Thank you to those members who sent their photos in and joined in the fun.

Here they are:



- Sam Lucas, Warrnambool Bus Lines, from Cooktown, Qld – too nice of a view!
- Aaron Lewis, Rover Motors – special mention, cars, cars, cars
- Stephen Lynch, BusNSW – Looks good but what about the size of the computer?



- John Muir, Clarks Logan City Bus Service – lost points for shorts in winter
- Peter Dwyer, Piper Alderman, solicitors – a long way from 26 floor, Riparian Plaza, Eagle Street, Brisbane
- Peter Kavanagh, General Counsel, BAV – great antique desk, but needs some photos on the wall

SPECIAL MERIT AWARD



- Madonna, BIC – A special mention for a special person

AND THE WINNER IS?



- Tony Hopkins, CDC NT, Queensland, and NSW Country – now that is some office, on the 1801 CC Harley Davidson. A worthy winner!

INDUSTRY NEWS – What you need to know?

Wage Rates

Public sector pay increases have crashed to a record 24-year low, while growth in the private sector remains "subdued", according to the ABS.

The June quarter Wage Price Index shows that rates of pay excluding bonuses increased by 0.5% over three months and 1.9% annually in the private sector, seasonally adjusted.

In the public sector, rates increased by 0.4% in the quarter and 1.3% annually, the lowest yearly growth since the ABS started compiling the index in 1997.

Across the economy, rates grew by 0.4% and 1.7%.

Meanwhile, the ABS has updated its estimate of underlying WPI, which indicates that below-the-radar growth is dropping.

In the June quarter, underlying growth fell to 1.6% annually, against the unadjusted 1.8% recorded across the economy.

ABS head of prices statistics, Michelle Marquardt, in a statement, described the private sector growth recorded in the quarter as "generally subdued".

The most recent Consumer Price Index release showed inflation spiked to 0.8% for the June quarter and 3.8% annually, but it is expected to return to trend levels.

Vaccinations

The issue of vaccinations will pre-occupy the public transport industry for many months to come.

The issues will be:

- Whether to mandating vaccinations for all drivers or will Government mandate vaccinations in public transport?
- How to deal with drivers who do not wish to vaccinate. Can they still be employed if they are unable to drive?
- What incentives to provide to get drivers to vaccinate or protections for drivers who have side effects from getting the job.

There is so much literature around at the moment but not a real definitive answer to the questions other than the responsibility lies with the employers.

Set out below are some of the more recent developments.

Indemnity scheme for employers

The Federal Government has delivered on an indemnity scheme to protect employers who may face costly claims when they facilitate jobs in the workplace. The commitment reduces the risks and uncertainties businesses faced for implementing voluntary vaccination drives.

Employers have long advocated for indemnity protections so that employers would not be saddled with the costs from a reaction or injury caused by vaccination. ACCI has worked closely with the Australian Medical Association and the Insurance Council of Australia to secure this commitment as respective representatives of the medical profession, medical indemnity insurers and employers.

The Minister for Health and Aged Care has announced details of a no fault COVID-19 Vaccine Claim Scheme following extensive consultation with the peak medical, business and insurance sectors to ensure a comprehensive National Scheme. The Scheme will provide Australians with quick access to compensation for COVID-19 claims related to the administration of a Therapeutic Goods Administration approved COVID-19 vaccine delivered through a Commonwealth Government approved program.

Minister for Health and Aged Care, Greg Hunt, said the COVID-19 Vaccine Claims Scheme offers protection to Australians receiving a TGA approved COVID-19 vaccine, irrespective of where that vaccination occurs. "Side effects, or adverse events, from COVID-19 vaccinations can occur, but most are mild and last no longer than a couple of days.

The Scheme will cover the costs of injuries above \$5,000 due to a proven adverse reaction to a COVID-19 vaccination. Claims will be assessed by independent experts, and compensation paid based on the recommendations. The cost of compensation payments under this Scheme will be fully funded by the Commonwealth and is designed to help the small number of people who unfortunately experience a moderate to significant adverse reaction to a COVID-19 vaccine.

Note:

From 6 September Australians who suffer injury and loss of income due to their COVID-19 vaccine will be able to register their intent to claim at www.health.gov.au/COVID-19-vaccination-claim-scheme.

Advice from the Fair Work Ombudsman

The FWO is updating its information on workplace vaccinations amid continued legal uncertainty over the circumstances in which employers can make it mandatory for employees to have COVID-19 jobs.

The Ombudsman made an interim update to its website after a press conference by Prime Minister Scott Morrison on Friday following a meeting of National Cabinet, which heard advice from the Solicitor-General, Dr Stephen Donaghue QC.

The FWO website currently says the "overwhelming majority of employers should assume that they can't require their employees to be vaccinated against coronavirus", but there are "limited circumstances where an employer may require their employees to be vaccinated".

On Friday last, the PM told a press conference the advice from the Solicitor-General included where employers could require employees to be vaccinated.

Morrison said the only mandate on workplace vaccinations was an agreement to rollout vaccines for aged care workers, plus public health orders by some States covering workplaces such as public health and quarantine.

"But ultimately, employers need to consider these matters and make their own decisions."

"Remembering we do not have a mandatory vaccination policy in this country.

"We do not have that.

"We are not proposing to have that.

"That is not changing.

"But an employer may wish to make a reasonable directive to staff, and if they do so, they would need to do so consistent with the law."

The PM said the advice on the "reasonableness" of any direction to an employee extended to "four tiers" of employees:

- First tier – for employees who are at risk of acquiring the virus through direct contact, such as workers in quarantine facilities who were covered by public health orders, the legal position is "very, very clear". However, this tier may include other groups like airline workers.
- Second tier – those working with vulnerable people such as in aged care.
- Third tier – workers who face the public in their daily work. "So, we're talking about retail, supermarkets, things of that nature, working in essential occupations where there's a lot of contact."; and
- Fourth tier – such as public servants or those who are not in often close contact with others in the course of their work. "These basically work on a sliding scale, if you like, in terms of how the reasonableness test might be applied."

A statement by National Cabinet said businesses have a legal obligation to keep their workplaces safe and to eliminate or minimise so far as reasonably practicable the risk of exposure.

"In general, in the absence of a State or Territory public health order or a requirement in an employment contract or industrial instrument, an employer can only mandate that an employee be vaccinated through a lawful and reasonable direction."

"Decisions to require COVID-19 vaccinations for employees will be a matter for individual business, taking into account their particular circumstances and their obligations under safety, anti-discrimination and privacy laws."

Rossato

The decision of the High Court in **Rossato v. Workpac Pty Ltd (August 2021)** is probably the most defining moment for employment within the bus and coach industry where casual employment is such a large portion of the workforce.

Set out below is a summary of the case and its implications

Background

You may remember that this case, along with a similar case, **Skene v. Workpac** changed forever the way in which casual employment was considered in Australia.

The two decisions had specific ramifications for our industry, where the bulk of our regional school bus drivers were casual.

Both cases, until today, upheld the concept that a casual employee, with an expectation of continuing employment was not a casual employee and as such entitled to paid personal and annual leave and other NES entitlements, such as leave without notice on termination and redundancy payments.

The Federal Courts held that the ongoing nature of the work, i.e., separate mining industry contracts, was sufficient to create regular and systematic work.

The Federal Courts also refused to allow Workpac to set off the additional loading payments to Rossato, against the entitlements to accrued paid leave. The decisions potentially opened the door to significant back pay claims in the billions for employers.

Federal Legislation

Both cases were the catalyst for the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*, which defined casual employment as not having a firm advance commitment to ongoing work at the commencement of employment.

The Act also introduced a broad casual conversion clause into the National Employment Standards and allowed casual loading set offs in circumstances where leave was payable.

The High Court, in Rossato's case, was able to take into consideration, in the Appeal, the recent legislation.

The High Court

Workpac sought to overturn the full Federal Court's Rossato judgment claiming that Rossato's employment depended entirely on the terms of his contract of employment, both implied and expressed.

The High Court determined that the parties had committed the terms of their employment relationship to writing and had adhered to the terms, which did not guarantee continuing employment, only a mere expectation, which was insufficient.

The High Court had moved away from the original principles, enunciated in the Federal Court cases, which looked at the nature of the employment over an extended period of time.

The Impact for our industry

The High Court decision is a vindication of the legislation and allows employers to employ casuals, so long as the mechanisms provided in section 15A of the Fair Work Act are adhered to, i.e., at the commencement of employment, the casual employee has no firm advance commitment of ongoing work and is able to accept or reject such work. So long as letters or employment, the Awards (currently under review) and enterprise agreements clearly reflect these circumstances, employers are vaccinated (excuse the pun) against the previous decisions in Skene and Rossato.

Useful Takeaways

- A key feature of casual employment is the absence of a firm advance commitment of ongoing employment. This is a reasonably high threshold.
- A firm advance commitment is different to a reasonable expectation of continuing employment. The latter isn't inconsistent with casual employment and is in fact recognised as a feature of casual employment elsewhere in

the FW Act, for example, in respect of requests for flexible working arrangements under the NES and the qualifying period for unfair dismissal eligibility.

- An employee's contract of employment will be integral in determining whether a firm advance commitment exists. In departing from the approach taken by the FCA, the High Court found it was inappropriate to place greater emphasis on "unenforceable expectations or understandings" which might have developed on behalf of either party during the relationship, than express contractual terms.

- Characteristics of the employment relationship - like working in accordance with a roster - might foster a sense of regularity and consistency in the relationship but won't override relevant contractual terms. In this case, the contract committed each party only for the duration of each "assignment"; the provision of a roster covering a longer period was no guarantee that any future assignments would actually be worked.
- Provided the contract doesn't contain terms which give rise to a firm advance commitment, it will be determinative in characterising the relationship as casual.

Fall-out from the Decision

IR academics say the High Court's "revolutionary" approach in *Rossato* signals an intention to rewrite the rules for determining employment status, with potentially dire consequences for gig workers and others seeking to challenge their characterisation.

University of Sydney labour law professor Shae McCrystal says the justices' approach in quashing a full Federal Court finding casually-engaged Workpac mineworker Robert Rossato an employee puts Australia out of step with common law jurisdictions around the world (see related articles here and here).

University of Adelaide professor Andrew Stewart, meanwhile, says the significance of the High Court's judgment is not in overturning *Rossato*, or *Skene*, as the Morrison Government's new casuals legislation "has already done that".

"The real significance is the incredibly pointed way in which the plurality went out of their way to signal that they're about to rewrite the rules on how you determine employment status," Stewart told *Workplace Express*.

"It's how far the High Court takes the primacy of freedom of contract that I think has really shocked us," he says.

Stewart says the High Court "has now told every court beneath it: 'Your only job is to look at what parties have formally agreed, and unless that conflicts, explicitly, with legislation or unless it can be shown that the agreement is a sham – which is very hard to do as a matter of practice – then the contract should be given effect'".

"It's a revolution from the High Court in terms of how employment law is to be interpreted and applied," he says.

"It's the emphasis on freedom of contract and the crystal-clear signals that the High Court is about to go down a very different path when it comes to assessing employment status."

Respect at Work legislation

A Coalition-dominated Senate inquiry has backed the FWC's request to delay implementing proposed extensions to its anti-sexual-harassment jurisdiction, but declined to support Sex Discrimination Commissioner Kate Jenkins' call to include her "positive duty" recommendation in the Morrison Government's Respect at Work legislation.

In its report handed down, the Education and Employment Legislation Committee's chair Senator James McGrath acknowledged "concerns" that particular recommendations contained in Jenkins' landmark Respect@Work report had not made their way into the yet-to-be-debated Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

"However, the committee is comforted by [departmental] advice that the current bill does not represent the entirety of the government's response," said Senator McGrath.

"The committee also appreciates that some of the recommendations require further consideration and analysis before they can be implemented through legislation.

"The committee is encouraged by the government's commitment that more consideration will be given to a number of these recommendations, including further improvements to the WHS framework."

"That said, the committee recommends that the commencement of the amendments that extend the anti-bullying jurisdiction of the FWC be deferred until no earlier than two months after Royal Assent."

Such a delay, the senator said, would give the Commission time to make the necessary changes "to case manage and determine applications for orders to stop sexual harassment", as argued in its submission.

The inquiry heard that the FWC is developing a benchbook on the new jurisdiction, which will be available as soon as the new regime begins.

The inquiry however resisted urgings from numerous stakeholders to recommend that the legislation include the imposition of a positive duty on employers to take "reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible".

Note:

The Bill is expected to go to the Parliament in the current sitting which will detail its commencement date.

IMPORTANT DECISIONS

Wider representation for lawyers

The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria v Victoria Police/Chief Commissioner of Police [2021] FWC 4582 (29 July 2021)

A second FWC decision has affirmed a less stringent approach to granting legal representation.

A little more than two weeks after Deputy President Michael Easton observed that the Commission in deciding whether to grant permission "can attach more importance to 'the complexity of the matter' than the statute permits", another member has cited his case in allowing the Victoria Police to lawyer-up for a dispute with the Victorian Police Association.

Victoria Police in contesting a flexible work request sought permission on the basis of both efficiency and fairness, under ss596 (2)(a) and (2)(c) respectively.

"On the matter of efficiency Victoria Police submits that its lawyers will be able to assist the Commission in understanding of both the legal and factual matrices raised by the application and, in this way, narrow the matters in dispute between the parties leading to efficiency in dealing with the application," noted Commissioner Michelle Bissett.

"Further, it says that there is some complexity in the question of construction of the clause and in its interaction with the related provisions in the FW Act."

Regarding fairness, Victoria Police argued that the aggrieved officer was represented by a registered organisation "which can 'deploy experienced industrial advocates' to argue the case and fairness dictates that advocates be opposed by advocates".

Victoria also held that a dispute settlement clause in the relevant agreement provided that parties could choose to be represented at any stage.

The Police Association opposed the application on the grounds that the matter was not complex, and that Victoria Police was capable of being represented by a "well-resourced" workplace relations division.

The association further said that the agreement clause did not remove the requirement for permission to be granted under s596.

While conceding that interpreting the agreement's flexible work provisions did not appear complex, Commissioner Bissett said the evidence surrounding the association's decision to refuse the request "need to be marshalled and set out with clarity" to help her determine if the grounds were reasonable.

"The efficiency to be derived from the presence of lawyers and well-trained advocates cannot be ignored," the commissioner said.

"I do not consider that the Commission is required to *find* complexity in the matter as a pre-condition to considering if the matter could be dealt with more efficiently, but rather accept that complexity is a matter that needs to be *considered*."

"I accept that the provisions of the agreement may not be complex but that does not mean that the facts, applied within the agreement provisions, is a simple task or that it will not be more efficient if permission was granted.

"Given my decision I do not need to otherwise consider matters of fairness."

Commissioner Bissett finally observed that she did not believe that Victoria Police needed to show that it could not effectively represent itself when it was not relying on that part of the legislation at s596(2)(b).

Lockdown did not undermine in-person vote on deal: FWC

City Of Gosnells Waste Collection Enterprise Agreement 2021 [2021] FWCA 4895 (10 August 2021)

The FWC has called out a union bargaining representative for his "unexplained" change of heart about in-person voting for a new deal occurring during a COVID-19 lockdown, noting that his opposition only surfaced after the non-appearance of two holidaying workers helped it get up by a slim margin.

Two days before a Perth council's rubbish collectors were due to vote on a new deal in late June, the State government issued stay-at-home orders.

City Of Gosnells' organisational performance manager (OPM) responded by contacting ASU and TWU bargaining representatives to confirm that the council still intended to conduct the ballot, as essential workers were not captured by the orders.

After the ASU told the OPM it was comfortable with the vote proceeding, the TWU's bargaining representative was via email asked, "Just checking with you to make sure you are ok as well?"

The TWU's bargaining representative within two minutes replied that it was "not a problem at all".

With two workers on holiday opting not to attend the ballot despite being told they would be paid to do so; the deal was voted up 11-9.

In considering whether to approve the agreement, Commissioner Nick Wilson observed that less than half an hour after the vote took place the TWU's bargaining representative "had a significant and unexplained change of heart sending an email to [Gosnells' OPM] and others complaining that not everyone who wished to vote had been given an opportunity to do so".

In opposing the deal's approval on the basis, it was not genuinely agreed, the TWU called on the two workers who had been on leave to give evidence.

One worker told the Commission he would have attended the ballot if not for the lockdown orders.

"His evidence though shows that he presumed the ballot would be suspended or rearranged after the orders were made, but that he took no steps at all to ascertain if that was the case, or what other arrangements could be made," Commissioner Wilson said.

"If nothing else, he was not inquisitive of these matters."

The other worker, meanwhile, was "of the opinion" that since he was on annual leave, he did not want to travel to the council offices to vote.

He attempted instead to provide an absentee vote to his supervisor.

"The reason he did not attend the ballot was because he was on annual leave and not the lock-down," concluded Commissioner Wilson, further noting that the council's procedures only allowed for absentee ballots in cases when employees might be overseas.

"Naturally enough, in the absence of an electronic or surface mail voting procedure conducted over a week or more, it is foreseeable that if a vote is to be conducted through some form of attendance measure that not everyone may actually attend," said the commissioner.

"The important issue is that they have the opportunity to vote.

"There is no direct obligation within the [Fair Work] Act that would require an employer to ensure that all employees are able to attend the workplace for an attendance ballot.

"Instead, the obligation is to ensure that they have the opportunity."

Despite "seriously doubt[ing]" that the government intended the essential worker carve-out in its orders to include travel for voting on an enterprise agreement, Commissioner Wilson noted that the first worker had not asked the council about his options.

"Because he did not communicate with anyone about his assumption the ballot would be suspended, it follows he had an opportunity to cast a vote, and his failure to do so is not a matter to which s.188 (1)(c) applies," found the commissioner.

'[The second worker] simply did not want to attend to vote.

"He too had an opportunity to cast a vote, and his failure to do so is also not a matter to which s188(1)(c) applies.

"If either [worker] thought so strongly about the circumstance that they thought it imperative for them to vote they could either have withdrawn their application for leave or pressed the [council] to make alternative voting procedures given the Stay-at-Home Orders."

Commissioner Wilson nonetheless suggested that the council, "presumably [being] a model of democratic functioning", should ensure such a situation did not arise again.

"It needs to ensure its enterprise agreement voting procedures adequately deal with the foreseeability that some employees will be physically absent."

"It is insufficient and anomalous for the [council] to say that someone overseas on the day of the ballot *may* (but not automatically) be granted an absentee ballot, but a person observing what they understood to be the Commissioner of Police's instructions to them is not."

Commissioner Wilson also suggested that TWU's bargaining representative was "accountable to some degree" for the situation.

"Patently he only saw a problem when his members complained within minutes of the vote having been declared."

"He should have thought more carefully of the situation and perhaps after having regard to the implications for his members before responding [the council's OPM] that the ballot could proceed.

"The City of Gosnells was entitled to rely upon what had been said to them by the TWU's bargaining representative."

Notwithstanding the TWU's objection, the commissioner approved the agreement after finding it was genuinely agreed.

IMPORTANT DATES (To be advised)



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