Welcome to the September 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

- **National Industrial Relations (Mini) Seminar**

APTIA will hold an Online Zoom Seminar on Wednesday 4 November 2020 between 10.00am and 12 noon (AEDST) titled:

"Working our way through the Pandemic."

Speakers and Topics:



10am – Introduction.
Provides an outline of the actions taken by BIC and APTIA to address the issues tossed up by the pandemic e.g. communication through BIC's Covid Hub, the Coach and Charter industry downturn, industry health and safety measures, industrial relations reform, dealing with Casual employment, Job keeper changes to Awards and the Fair Work Act.

10.15am – How to handle leave entitlements.
Dealing with IR issues during the pandemic (Including how job keeper applies, what changes have been made to the Fair Work Act relating to leave and stand downs and to Awards to accommodate job keeper, how taking leave has changed including long service leave, personal leave, pandemic leave and annual leave. **Presentation by Tim Capelin, Piper Alderman, solicitors.**

11.00am - How to deal with health and safety.
Instruction on how to protect the health and welfare of your employees including their mental and physical health. Developing and implementing policies that work. A consideration of the impact of various mitigating measures such as masks, screens, distancing, and rear exits. **Presentation by Nikki Brouwers, Navigate Health.**

11.30am - Industrial Relations reforms in the pipeline.
Includes a consideration of the potential outcomes from the Attorney General's Roundtable discussions, the ALP's IR platform for the next election and the ambitions of the trade unions and employer groups for future IR reform. **Presentation by Ian MacDonald, BIC**

12 noon – Close

"The Seminar has already been well subscribed and if you have issues of drivers not wanting to come to work, concerns about the mental health of some of your staff or are just worried about proposed changes to casual employment this seminar is for you." Ian MacDonald, National IR Manager, BIC.

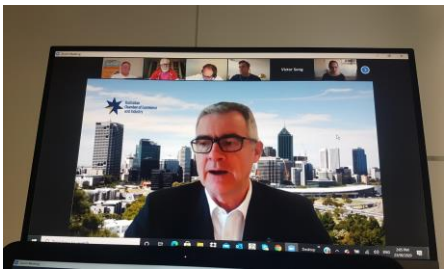
To Register: Email imacdonald@bic.asn.au by Friday 23 October 2020.

- **APTIA Online**

The month of September saw a number of significant online meetings to which APTIA was represented.

These meeting include:

- A Zoom meeting with Andrew Hastie MP, federal member for Canning in WA, the Chair of the Parliamentary Committee on Intelligence and Security
- A Zoom meeting sponsored by the New South Wales Industrial Relations Society of which APTIA is a member (Former Deputy President Hamberger is the chair with Alana Mathieson, former ACCI Workplace Policy Director)



- A Zoom meeting of the ACCI Workplace Policy Committee called by James Pearson to discuss the Attorney Generals IR Roundtable meetings and a definition in casual employment.
- A Zoom meeting with members of BIC's Industrial Working Group to consider a submission to the Attorney General on IR reform and the industry position on a definition of casual employment (IWG member, Paul Harris from Kinetic contributes to the meeting).

- A Zoom meeting with the Attorney General Christian Porter where APTIA puts to the Attorney General the need to make IR flexible, especially in circumstances where casual employees seek to remain casual.

INDUSTRY NEWS – What you need to know

- **A review of the 2020 Budget and predictions for future wage rates**

Wage Rates

The Federal Government is forecasting in its Budget that price inflation will substantially outpace wages in the current financial year, before level-pegging in 2021-22.

Treasury expects that the CPI will rise by 1.75% in 2020-21 and the Wage Price Index just 1.25%.

It says that in 2021-22, CPI and the WPI will grow in parallel at 1.5%.

In 2019-20, the CPI went backwards by 0.3%, while WPI increased 1.8%.

Budget Paper 2 says "a declining unemployment rate beyond the December quarter 2020 is expected to support a gradual pick-up in wages", adding that recent business liaison discussions "support this outlook".

It says inflation expectations "remain weak by historical standards".

The rebound in CPI in the current financial year will be "driven by the unwinding of childcare policies and administered price changes in the second half of 2020".

"Measures of underlying inflation are expected to be near record lows over the first two years of the forecast period [2020-21 and 2021-22], reflecting that there will remain significant additional capacity in the economy for some time and weak wage growth.

"Consumer price inflation is not expected to return to the bottom of the RBA's target band of 2 to 3 per cent until the end of the [four-year] forward estimates," it says.

Note:

Bargained private sector wage rises recovered to near three-year highs in the March quarter, before they felt the effects of the coronavirus pandemic, according to the Attorney-General's Department.

The Trends in Federal Enterprise Bargaining report, released late in September 2020, shows that the 920 quantifiable private sector agreements approved in the June quarter paid an average annualised wage increase of 2.9% to 93,300 employees, up from 2.7% in the December and September quarters.

Employment

The virus-driven 4.3% drop in employment in 2019-20 will be short-lived, with growth of 2.75% in the current financial year and 1.75% In 2021-22.

Unemployment will be slow to respond however, increasing from 7% in 2019-20 to 7.25% in the current financial year, before dropping to 6.5% in 2021-2

Budget (IR focus)

(i) The Morrison Government will modestly increase funding to the Fair Work Commission over the next two years as part of its response to COVID-19, which is expected to drive up employer insolvencies and increase demand for the Fair Entitlements Guarantee scheme.

(ii) The Budget provides $35.3 million over two years in extra temporary funding for the Fair Entitlements Guarantee scheme, to be spent on resources and staffing.

(iii) The Budget papers also reveal that the special allocation for the FEG scheme will rise from about $157.8 million in 2019-20 to $480.1 million in 2020-21, which is predicted despite the government planning to introduce a new debt restructuring process for incorporated businesses with liabilities of less than $1 million.

(iv) The Budget lifts funding to the Fair Work Commission by $5.1 million over the next two years, consisting of $3.2 million this financial year and $1.9 million in 2021-22.

(v) Attorney-General and IR Minister Christian Porter said the Budget "provided the extra funding "to meet demand arising from COVID-19 and ensure workplace disputes are resolved as quickly as possible".

- **The ALP Industrial Relations focus**

The ALP has produced a draft national platform that pledges to ensure that workers in the gig economy earn a living wage and have access to "the same protections and standards as all Australian workers", while vowing to address the broader challenges of insecure employment.

The draft platform, which has been seen by *Workplace Express*, argues that Australians faced stagnating wages even before the COVID-19 pandemic.

"COVID-19 has exacerbated these existing issues and created new challenges, particularly for many service industries such as those providing personal care, hospitality and retail," it says.

"Too many Australians now find themselves without work, or with less work than they would like.

"Australians returning to the workforce should not face the prospect of insecure jobs without the protections and certainty that previous generations have relied on to buy a house, raise a family, or build their lives.

"Labor believes that in the workplace there is a need for new rights, new forms of equality that recognise the full range of human diversity, new types of safety and a better balance between work and life."

The draft 2020 platform replicates many policy pledges taken to the 2019 election and is silent on others that are strongly supported by the union movement, such as support for uniform industrial manslaughter laws.

Labor's shock election loss was partly blamed on having too many promises aimed at too many groups, along with the lack of electoral appeal of the then leader Bill Shorten (see Related Article).

Incoming Labor leader Anthony Albanese vowed to produce a slimmed-down party platform, and the 2020 draft platform comes in at 99 pages, less than half the length of the 2018 document.

The 2020 draft platform was produced by shadow cabinet and will go to the ALP policy forum comprised of 20 Federal MPs, 20 rank-and-file Labor members and 20 union representatives.

The final document is expected to be released publicly at the end of the month, but the party has yet to decide on how it will finalise the platform after the ALP national conference scheduled for December was cancelled due to coronavirus safety concerns.

Albanese first flagged the push for "new forms of protections" for gig economy workers in a speech in October 2019, where he also invoked the Hawke-Keating legacy in pledging to work with business.

Using similar wording to the 2018 platform, the 2020 document says that Labor understands the growth of the gig economy and information technology platforms have both positive and negative effects on ways of working.

"Labor will ensure that the Fair Work Act provides appropriate coverage and protection for all forms of work and that gig economy platforms and other working arrangements are not used to circumvent industrial standards or to undermine workers' rights to collectively organise and access their union," says the draft platform.

The draft 2020 platform repeats the 2018 position of maintaining the FWC and Fair Work Ombudsman, while abolishing the ABCC and the Registered Organisations Commission.

"Labor will deliver effective, low-cost, informal and prompt resolution of disputes through the FWC, the FWO and small claims procedures in the courts," it says.

"Labor will improve access to collective bargaining including where appropriate through multi-employer collective bargaining, to assist workers in low-paid and hard-to-organise industries."

However, the new document makes no specific reference to restoring the arbitral powers of the FWC, which featured in the 2018 platform and Labor's 2019 election policy.

The 2020 platform says that Labor will reduce the gender pay gap and ensure that the equal remuneration provisions in the FW Act "deliver" for low-paid women, while removing obstacles to super for women.

"Labor will enact a strategy for achieving equal pay for equal or comparable work, underpinned by legal and reporting obligations," it says.

"Labor recognises the need for law reform to promote pay equity."

It also pledges to allow up to two years' unpaid parental leave and the goal of 26 weeks' paid parental leave, while boosting childcare and flexible work and ensuring that workers experiencing harassment in the workplace have access to a "fair, expedient process in the workplace relations system".

But the 2018 platform and Labor election pledges were more specific on pay, pledging to establish a statutory Equal Remuneration Principle to guide the FWC consideration of whether feminised industries are paid fairly, while establishing a new Pay Equity Panel within the Commission.

Other parts of the 2020 platform that are similar to the 2018 platform are:

(i) supporting penalty rates as a means to compensate workers for working "excessive or unsociable hours", while preventing awards being varied to cut workers' take-home pay
(ii) increasing the super guarantee to 12% and setting out a "pathway" to increase it to 15%
(iii) legislating the super guarantee as part of the National Employment Standards (NES) so it is enforceable as an industrial entitlement
(iv) introducing an "objective test" in legislation for determining when a worker is a casual
(v) tougher laws on sham contracting
(vi) a national labour hire licensing scheme
(vii) legislating to ensure labour hire workers receive the same pay and conditions as direct employees doing the same work
(viii) requiring that collective agreements are genuinely agreed by a representative cohort of workers
(ix) preventing unilateral termination of collective agreements that reduce workers' entitlements
(x) introducing a mechanism for terminating any remaining "Work Choices" agreements
(xi) a strongly enforced "safe rates" scheme for all parties in the transport supply chain
(xii) boosting the Fair Entitlements Guarantee to guarantee notice of termination and redundancy pay as a basic employment right that includes redundancy pay of to four weeks' pay per year of service
(xiii) introducing 10 days' paid domestic violence leave in the National Employment Standards: and
(xiv) working with the states and territories on a minimum standard for long service leave.

- **Changes to the Fair Work Act 2009**

On 3 September 2020, the **Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Act 2020 ('the amendment')** received Royal Assent.

The amendment makes changes to Part 6-4C of the Fair Work Act 2009 (Cth) ('the Act').

Part 6-4C was added to the Act in April 2020 to help employers who qualify for the JobKeeper scheme to deal with the economic impact of COVID-19.

Part 6-4C gives employers flexibility and helps employees to remain in employment and connected to their workplaces during the COVID-19 pandemic.

Changes made in the amendment Schedule 2 of the amendment

- extends the operation of some of the temporary JobKeeper provisions in Part 6-4C of the Act until **29 March 2021,** in line with the extended end date of the JobKeeper scheme.
- *The provisions in Part 6-4C about annual leave will be repealed on 28 September 2020 as originally intended.*
- The amendment also extends the Commission's powers to deal with disputes arising under Part 6-4C until 29 March 2021. The Fair Work Commission has power to deal with JobKeeper disputes including by mediation or conciliation, arbitration and to make orders to give effect to decisions.

- The amendment creates two categories of employers who can access particular flexibilities under Part 6-4C in certain circumstances:
  (i) employers eligible for JobKeeper payments on or after 28 September 2020 ('qualifying employers'); and
  (ii) employers that were entitled to at least one JobKeeper payment for an eligible employee before 28 September 2020, but no longer qualify for JobKeeper payments on or after 28 September 2020 ('legacy employers').

- Legacy employers that hold a 10% decline in turnover certificate can continue to temporarily vary the working arrangements of their previously eligible employees if they meet certain conditions.

Qualifying employers can continue to access the full range of remaining flexibility measures in Part 6-4C until 29 March 2021 (with the exception of annual leave provisions, which will be repealed on 28 September 2020).

Qualifying employers can still temporarily vary certain work conditions such as hours, duties, and location of work. The amendment also extends the existing safeguards in relation to these flexibility measures available to qualifying employers, including that a JobKeeper enabling direction will not apply if it is unreasonable in all the circumstances (s.789GK).

Legacy employers will have access to modified flexibility measures from 28 September 2020, allowing these employers (subject to meeting the specific requirements of each provision) to give employees, for whom the employer was previously entitled to a JobKeeper payment

(i) a JobKeeper enabling stand down direction (s.789GJA) (to reduce the employees' hours of work to no less than 60% of the employee's ordinary hours as at 1 March 2020, provided the direction does not require the employee to work less than 2 consecutive hours in a day that they perform work)

(ii) a JobKeeper enabling direction regarding duties of work (s.789GJB), or
(iii) a JobKeeper enabling direction regarding location of work (s.789GJC); and
(iv) ask employees for whom the employer was previously entitled to a JobKeeper payment to agree to perform their duties on different days or at different times (s.789GJD), provided the agreement does not require the employee to work less than 2 consecutive hours in a day.

The employee cannot unreasonably refuse such a request. The existing safeguards that apply to JobKeeper enabling directions and requests made by for qualifying employers will also apply to JobKeeper enabling directions and requests made by legacy employers under the amendment. Additionally, the flexibility provisions for legacy employers are subject to expanded consultation requirements in s.789GMA.

Legacy employers must give at least 7 days' notice before giving a JobKeeper enabling direction, rather than the 3 days' notice that qualifying employers are required to provide.

Legacy employers are also required to provide information about a proposed direction to the employee or their representative and invite them to give their views about the impact the proposed direction may have on the employee.

The employer must give genuine consideration to these views. Sections 789GJE and 789GJF of the amendment provide that directions and agreements made by legacy employers will immediately cease to apply if, at the start of 28 October 2020 or 28 February 2021, the employer no longer satisfies the 10% decline in turnover test. Before 28 October 2020 or 28 February 2021, a legacy employer is required to notify employees subject to a direction or agreement if the direction or agreement will terminate on that date or continue.

Sections 789GCB, 789GCC and 789GCD set out when an employer satisfies the 10% turnover test and provides that an eligible financial service provider may issue written certificates to employers stating their opinion that the employer turnover has declined 10% for the specified period (10% decline in turnover certificates).

Where the employer is a small business with fewer than 15 employees, a statutory declaration can be made by the employer or someone authorised by the employer with knowledge of the employer's financial affairs.

This is taken to be a 10% decline in turnover certificate. Other aspects of Part 6-4C that will continue until 29 March 2021 including:

(i) requirements that employers comply with the employer payment obligations to employees
(ii) the right of employees working reduced hours to request to engage in reasonable secondary employment or undertake training or professional development; and
(iii) rules about accrual of service and calculation of benefits.

- **The Future of Australian Workplaces**

Any IR legislative package introduced by the Morrison Government after the working groups process will be pragmatic, balanced, and realistic and will not be ideologically driven, IR Minister Christian Porter told employers in WA this morning.

Speaking to a CCI WA breakfast in Perth, Porter said the "likely package" of changes "will not be driven by ideology".

"It will need to be pragmatic, appropriately balanced and be realistic in scope.

"It will be driven by the necessity to improve employers' confidence to hire and thereby create jobs."

Porter continued that proposals that are "polarising or extreme" are unlikely to win support in the Senate.

He told the Future of Australian Workplaces forum at the Perth Convention and Exhibition Centre that the coronavirus pandemic "has put a spotlight on the inflexibility of our current IR system, which was in many respects found wanting back at the start of this year".

"When we were designing JobKeeper IR flexibilities something as simple as being able to get employees to work from home didn't fit comfortably with many modern awards."

"If an employee working from home works at such times as suits the employee's circumstances, such as starting early, attending to family responsibilities for more than an hour, and working later than normal hours, the working arrangements will not conform to clause 25.2 that hours are worked continuously.

"Before the IR flexibilities enabling directions to be given on location and hours of work, the awards made coping with the pandemic with increased working from home incredibly difficult."

He said the JobKeeper IR flexibilities had been critical in enabling businesses to "adapt, pivot and overcome" during the worst parts of the pandemic, saving tens of thousands of businesses and hundreds of thousands of jobs.

Porter told the breakfast that a survey of employers conducted by his department showed that three out of four used the JobKeeper flexibilities and 80% wanted them to continue beyond September 28.

It also revealed that only 22% expected to resume full operations by this month and just 36% by March next year.

They also said that the most likely consequence of no longer having access to the flexibilities would be job losses or business closures.

He continued that the survey, which he promised to release soon, also indicates that 84% to 98% perceived the provisions as "important' or "essential" to keeping their employees in work.

Turning to the IR working groups, Porter said that with the formal process over, now "the task of synthesising views into workable products for change is on foot with a view to having legislative products finished in the weeks after the next budget".

He said that the Government "intends that meaningful reforms will be brought to Parliament in coming months".

Porter said he is continuing to have conversations with parties about "final legislative products", adding that he is "still sensing that a degree of consensus will be possible", even though "at many points it appears that trying to get agreement on IR changes between employer groups and the unions is about as easy as getting Clive Palmer and Mark McGowan to go out for a relaxed dinner together".

Porter said he was not going to break the rules of engagement by revealing specific proposals put to the five working groups, he said he had set the casuals roundtable the task of "achieving certainty and fairness around casual employment, so that businesses can be confident to legitimately use this form of employment in a way that's fair for employees too".

"I understand the importance of this issue for many people here today and I want to assure you that I am confident we will solve it."

He indicated that in the wake of the *Skene* decision, employers face backpay liabilities of $18 billion to $39 billion.

While he has intervened to support the *Rossato* special leave application, "we have "to address the root problem that is the remarkable failure of the Fair Work Act having been originally drafted without an agreed definition of casual employment, an omission made all the more baffling by the fact that many entitlements in the National Employment Standards are expressed to not apply to casuals".

Porter said that the FWC received "very few" JobKeeper disputes and praised the tribunal for resolving them "expeditiously".

From the start of the jurisdiction on April 9 until September 22, he said the tribunal received 714 JobKeeper dispute applications and identified jurisdictional issues in 70% of them.

"There were 53 decisions and orders issued in relation to JobKeeper applications, including decisions on jurisdictional matters.

"Keep in mind 3.3 million employees were liable to be subject to the new flexibilities," he continued.

- **The Criminalisation of Wage Theft (Queensland and Victoria)**

Employers that engage in deliberate wage theft face jail terms of up to a decade and 14 years when fraud is involved after the passage of legislation in Queensland's Parliament today, while employees under federal and state laws will have access to what the Palaszczuk Government promises will be a "simple, quick and low-cost" recovery process for underpayments.

IR Minister Grace said in her second reading speech in July that the legislation's amendments to the criminal code "reflect the seriousness of wage theft and signal Parliament's intention to provide a deterrent to those employers who deliberately underpay and take advantage of their workers".

She continued that the legislation would also provide an "accessible small claims process for wage recovery matters for all Queensland workers".

She said the report of the inquiry into the legislation "found that wage theft is endemic across Queensland, affecting 437,000 workers and costing them approximately $1.22 billion in wages and $1.12 billion in unpaid superannuation each year".

The report also "highlighted the bleak situation facing underpaid workers who must attempt to navigate the legal system to recover their wages, with approximately half of affected workers opting not to even pursue a claim".

In the wake of the Bill's passage, the Queensland Council of Unions this afternoon renewed its call for "detailed public guidelines" that set out the criteria for police to investigate an alleged wage theft offence.

It also wants a clear picture of the "gateway" or public interest test for a wage theft prosecution.

The guidelines would also set out how the police might deal with wage theft complaints and the types of matters considered to be wage theft.

QCU deputy secretary Jacqueline King said the Queensland wage theft legislation differs from that of Victoria in that the southern state has an industrial inspectorate to investigate matters, whereas the sunshine state will be relying on police to investigate and for police prosecutors to launch prosecutions.

She expects the Queensland Police Service would draft such guidelines with assistance from the State's Office of IR.

King returned to the peak body as its deputy secretary in February this year, some 21 years after her last role as an industrial officer at the organisation.

Meanwhile, Victoria's wage theft legislation takes effect in the middle of next year

IMPORTANT DECISIONS

- **Application of Section 121 – Exclusion from Dismissal upheld despite not amounting to serious misconduct**

Cameron Fraser; Construction, Forestry, Maritime, Mining and Energy Union v JFM Civil Contracting Pty Ltd [2020] FWCFB 4866 (15 September 2020)

An FWC full bench has quashed a decision to reduce a $12,000 retrenchment payout to zero, ruling that the Fair Work Act's "incapacity to pay" provisions do not apply when the entitlement arises from a source such as an award.

Vice President Adam Hatcher and deputy presidents Ingrid Asbury and Val Gostencnik overturned Commissioner Paula Spencer's May 15 decision that allowed JFM Civil Contracting Pty Ltd to cut the eight-week redundancy entitlement conferred by the 2010 Building and Construction General On-site Award.

The commissioner noted that the Fair Work Act's s123(4)(b) removes this exclusion from severance obligations for small business employers "if there is an industry specific redundancy scheme that is applicable".

"In the current circumstances, clause 17.1 of the award provides for an industry specific redundancy scheme and that the exclusion for small business employers is not applicable, therefore making the redundancy payable in accordance with clause 17.3 of the award, where an employee ceases to be employed by an employer," she said in the May ruling.

She found JFM held an obligation to make a redundancy payment but found it in a poor economic position, having "negative equity" of $5.8 million and losing two projects due to COVID-19.

Financial statements showed demonstrated JFM's "stark incapacity to pay and to remain operational".

In its decision, determined by consent "on the papers", the bench said that neither JFM nor the CFMMEU disputed that the award provided the entitlement and that the instrument covered the employee.

As a result, the s119 redundancy pay entitlement "did not apply" and "he did not derive a redundancy entitlement from it, because the effect of s123(4)(b) was that [the NES redundancy pay provision], which contains s119, did not apply to him".

"Consequently", it said, the s119 incapacity to pay provision "also did not apply (both because [the employee] was not entitled to a redundancy payment under s119 as required by s120(1)(a) and because s123(4)(b) rendered s120 inapplicable to him)".

"There was therefore no power under s120 to reduce [the employee's] redundancy entitlement."

The bench observed that Commissioner Spencer "appears to have erroneously conflated" the employee's award redundancy entitlement under clause 17 with that provided under s119.

She recognised the award entitlement in her ruling, "but in the next paragraph the commissioner referred to Mr Fraser's redundancy entitlement as being eight weeks' pay 'in accordance with s 119 of the Act'".

"However, the Commissioner subsequently expressed her satisfaction that JFM 'had an obligation to pay redundancy pursuant to the industry specific redundancy scheme'.

"This involved a failure to recognise that the relevant effect of s123(4)(b) is that, where an employee is entitled to redundancy pay under an industry-specific redundancy scheme in a modern award, the redundancy entitlements provided for in s 119 do not apply."

The bench granted permission to appeal, upheld the appeal and quashed the commissioner's ruling.

The employee had worked for more than four years with JFM, which experienced a downturn in business last year when it failed to renew work with Gold Coast City Council.

The company's managing director told Commissioner Spencer it had operated under "negative profit conditions" for more than a year, and had been "overlooked" for $7.2 million contract with the council in September last year after "primarily" tendering to that organisation and performing infrastructure work worth $360 million since 1984.

After missing out on the contracts, it issued a five-week "potential notice of redundancy" to its employees on November 11.

The employee who brought the case stopped work for Christmas on December 12, five weeks after the notice.

The company told the Commission that "the business would see how things went for whoever did not find other work and came back to work"

It said it remained "without work" on January 13.

Nine days later the employee told JFM he could take some casual work with another employer.

He took up the work, but JFM told him he had not been laid off and that he could return if the company won new contracts, but the employee declined the offer.

A fortnight later, he asked for his eight-week redundancy entitlement under the award.

The company claimed the worker had resigned and that it its incapacity to pay had been heightened by the postponement of two jobs due to the coronavirus pandemic.

The bench ruled the CFMMEU had standing to appeal, after it apparently had no involvement in the proceedings before Commissioner Spencer.

CFMMEU construction and general division national secretary Dave Noonan said in a statement this morning that the union in the case "has demonstrated its important role in safeguarding people's hard-won industrial rights".

“It is also worth noting that this worker was not a member of a redundancy fund.

"Redundancy funds are encouraged by the union to assist in fulfilling redundancy entitlements for construction workers."

- **What constitutes the making of a genuine agreement (s.180 (5))**

Construction, Forestry, Maritime, Mining and Energy Union v McNab Constructions Pty Ltd [2020] FWCFB 5080 (22 September 2020)

A senior FWC member's failure to seek the details of a construction employer's pre-ballot explanation of its proposed agreement has led to it being quashed, after a full bench rejected the proposition that the company could rely on its sworn statement about the process.

The CFMMEU in its challenge to the approval argued Deputy President Nicholas Lake made a legal error in approving McNab Constructions Pty Ltd.’s deal as he could not be satisfied the employer took all reasonable steps prescribed by s180(5) of the Fair Work Act to ensure genuine agreement.

Noting that the agreement had been unanimously voted up by McNab's 41 employees, deputy presidents Val Gostencnik, Alan Colman and Tony Saunders further observed that although based on a 2016 predecessor deal, it contained "a number of material changes, including in relation to coverage of the agreement, overtime, weekend penalties, night work, allowances, casual conversion, and shift work".

"The [CFMMEU] submits. . . that there was no basis for the deputy president's finding that 'the explanatory material provided to employees was sufficient to explain its effect in detail'," the bench said.

"[The employer] points to the detailed information contained in the employer statutory declaration filed in support of the application for approval of the agreement in relation to the steps it took to explains the terms of the agreement, and the effect of those terms, to the relevant employees."

McNab claimed those steps, the bench noted, included holding meetings with relevant groups of employees and providing employees with a summary of the agreement compared to the 2016 agreement and (for apprentices) a summary of the agreement compared to the award.

"However, neither summary was attached to the employer statutory declaration or otherwise provided to the deputy president," the bench said.

"That was so notwithstanding the following note beneath question 2.7 in the employer statutory declaration (Form F17): *'Do not simply state that the terms of the agreement were explained to relevant employees. Describe the steps taken and what was explained and provide the date on which each step was taken. Also, lodge copies of any materials that were used to explain to employees the terms of the agreement and the effect of those terms*."

Deputy presidents Gostencnik, Colman and Saunders referred to the full Federal Court ruling in *One Key Workforce (No 2)* to set out "why the content of the explanation given is an important consideration in assessing whether all reasonable steps were taken for the purposes of s180(5)".

"In the present case it is clear that the deputy president had evidence which demonstrated that the [employer] had taken a number of steps to explain the terms of the agreement to relevant employees but [he] did not have any material before him as to the content of any explanation given to employees about the terms of the agreement or the effect of those terms."

"The omission of any such material was of particular significance in circumstances where there were material differences between (a) the agreement and the 2016 agreement and (b) the agreement and the award.

"This was not a case of a general rollover with a discrete and obvious change – for example, a simple percentage wage increase – such that a sworn statement from the deponent of the F17 statutory declaration that the employer explained the difference between the proposed and current agreements necessarily conveyed what the content of that explanation was.

"In the present case, the content of the explanation of the new terms and their effect was not before the deputy president.

"It follows that it was not open to [him] to be satisfied that all reasonable steps had been taken to ensure that the terms of the agreement, and their effect, had been explained to the employees who voted on the agreement.

"Further, without having seen the summaries of changes provided to employees or any other material disclosing the content of any explanation given to one or more employees, it was not open to the deputy president to conclude that 'the explanatory material provided to employees was sufficient to explain its effect in detail'."

Quashing the deal and remitting it to Deputy President Lake for consideration, the bench suggested the employer "might wish to supplement the material filed in support of the application to assuage the concerns as to compliance with, for example, s180(5) of the Act".

- **FWC involvement in General Protections cases**

Coles Supply Chain Pty Ltd v Milford [2020] FCAFC 152 (11 September 2020)

In a significant decision unsettling the FWC's approach to general protections applications, a full Federal Court has ruled that a Commission bench "misconstrued" limitation on the tribunal's powers to first establish whether workers have been dismissed before considering such matters.

The full court finding came after Coles applied for a judicial review of last year's FWC full bench ruling clearing the way for a casual employee who worked his last shift in 2014 to pursue a general protection claim lodged four years later.

FWC Vice President Adam Hatcher and deputy presidents Richard Clancy and Ian Masson in that decision contemplating two earlier findings by Deputy President Anna Booth said the deputy president's acceptance of Coles' position that the employee was dismissed in 2014 "necessarily involved a denial that the 2018 dismissal pleaded in [his] application ever occurred".

"Although the Deputy President disavowed doing so, the first decision involved in substance [her] doing what the Full Bench in Hewitt said the Commission had no power to do – that is, dealing with the merits of [the employee's] application and determining that he was not in fact dismissed in the circumstances claimed in his application," found the bench.

In 2013's *Hewitt* decision, an FWC full bench led by Justice Iain Ross ruled that the tribunal lacked power to dismiss general protections applications on jurisdictional grounds and must hold a conference once a claim has been lodged.

Justice Ross, Vice President Adam Hatcher and Commissioner Leigh Johns reached their position in the course of overturning Commissioner Michelle Bissett's finding that she was required to determine whether a worker had been dismissed before she could address her s365 general protections claim.

After rejecting the employee's argument that she was constructively dismissed, Commissioner Bissett had ruled there was therefore no dispute that could be dealt with in a conference under s368 of the Fair Work Act and that, consequently, she could not issue the s369 certificate required as a prerequisite to the application being dealt with by a court.

Hewitt's seven-year sway over such matters has now been upended, however, after Justices Steven Rares, Berna Collier and Natalie Charlesworth said last year's FWC bench erred when it "misconstrued the provisions of the FW Act defining the boundaries of the [tribunal's] authority to deal with the dispute".

"It is difficult to comprehend why the FW Act would permit (as it does) the FWC making a finding about *when* a dismissal occurred in a case of suspected dishonesty, but preclude it from making a finding about *whether* a disputed dismissal had occurred," observed the judges.

"The Full Bench said that [the former Coles worker's] case was different because the relevant dispute was not in truth about the precise date upon which the pleaded dismissal took effect, but whether there was a dismissal at all.

"The Full Bench erred in reducing the issues Coles had raised in that way.

"Coles by its written response . . . alleged that [the worker] had been dismissed as of 1 October 2014.

"It did not abandon that position.

"It then advanced an additional and alternative contention to the effect that [the worker] had not been 'dismissed' as defined.

"Hamstrung as she was by the decision in *Hewitt*, [Deputy President Booth] proceeded on the basis that it was not permissible to make a finding about whether there had been a dismissal.

"In the present case, the finding that [the worker's] employment ended effective from 1 July 2016 at the latest was fatal to his claim that the *reason* for his alleged dismissal was the exercise of a workplace right on 20 July 2018, some two years later.

"But none of that means that [Deputy President Booth] exceeded her powers under ss366 or 368, properly construed.

"On any interpretation of the first and second decisions, [Deputy President Booth] declined to deal with the particular dispute to which s368 is directed, because she was not satisfied that she had the authority to do so."

Justices Rares, Collier and Charlesworth said it could not be accepted that by operation of s370 the power to decide whether someone was entitled to make an s365 application to the FWC was "deferred" exclusively to the Federal or Federal Circuit Court.

"Section 370 is to be interpreted against the background that the FWC may determine the question of a person's entitlement to make an application to it, although not conclusively."

"Whilst [the worker] is correct to state that this Court has the power to determine whether a person is entitled to make an application to the FWC under s365 of the FW Act, it does not follow that the FWC is precluded from making decisions about the limits of its own powers in cases (such as the present) where there is a genuine challenge to those limits.

"The opening words to s368 of the FW Act would be rendered useless if the FWC were bound to deal with an application that the applicant had no entitlement to make, or that did not accord with the express requirement in s366(1).

"It is true that a court may decline to recognise an 'application' or resulting certificate as valid when determining an objection to competency of a legal proceeding under s370 of the FW Act.

"However, there is nothing in the text, context or purpose of the FW Act evincing an intention that the first opportunity for a respondent to challenge the authority of the FWC to deal with a dispute should be by way of collateral attack on the validity of a certificate after it has been compelled to participate in the FWC's processes and after court proceedings have commenced."

Returning to the reasoning in *Hewitt*, the full court said it was now "disapproved".

"The proposition that a person who was determined by the FWC not to be a person entitled to apply under s365 could as a matter of practical reality succeed on an application for relief under Pt 4-1 of the FW Act in relation to a contravention of Pt 3-1 involving dismissal is a peculiar one," the judges said.

"What is the person to plead?

"To avoid a successful objection to the competency of such an application, it would be necessary for the litigant to show that the prohibition in s370 does not apply.

"Such a contention would involve a denial by the applicant that he or she is a person who is entitled to apply to the FWC under s365 and so deny the objective circumstance of his or her dismissal in s365(1)(a).

"Taking that position would be fatal to the substantive allegation that he or she had been dismissed for a prohibited reason.

"The scenario posited by the Full Bench could not sensibly arise."

Quashing last year's full bench decision, the full court ordered that the former Coles worker's appeal be reheard.

"Unless the Full Bench grants [the worker] permission to appeal, [Deputy President Booth's] decision will bind the parties unless it is affected by jurisdictional error."

"To the extent that it is unclear whether [Deputy President Booth] made any finding in relation to whether there was or was not a dismissal, it is for the parties to determine the relief that can or should be sought in relation to that uncertainty."

IMPORTANT DATES

BIC and APTIA ANNUAL GENERAL MEETINGS – To be advised

NATIONAL IR (MINI) SEMINAR – 4 Nov (10.00am-12.00am AEDST)

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