



OCTOBER 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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- APTIA Council meeting – 9 February 2022
- Industry Summit – 1 & 2 March 2022
- BIC AGM – 28 February 2022

MEMBERSHIP NEWS

APTIA's National IR Seminar

APTIA will hold a National IR Seminar on Thursday 25 November commencing 2.15pm sharp,

Titled: "Vaccinations and Respect at Work – What you need to know"

14:15pm Introduction

This summit will follow the APTIA AGM at 14:00pm AEDST. The summit will be chaired and introduced by Ian MacDonald, National IR Manager of the Bus Industry Confederation (BIC). In his opening, Ian will provide an APTIA perspective on the standing issues relating the mandating of vaccinations and compliance with sex discrimination. Q&A will follow at the conclusion of the 2nd presentation.

14:20pm *Understanding responsibilities of Employers whether to mandate Covid-19 vaccinations in the workplace.*



Presentation by Jennifer Low, Director of Work Health and Safety and Workers Compensation - Australian Chamber of Commerce (ACCI)

14:40pm *What changes are needed in your workplace to ensure that you now comply with the new sex discrimination laws.*



Presentation by Tamsin Lawrence, Deputy Director of the Workplace Relations Team - Australian Chamber of Commerce (ACCI)

15:10pm *Navigating the new APTIA website*

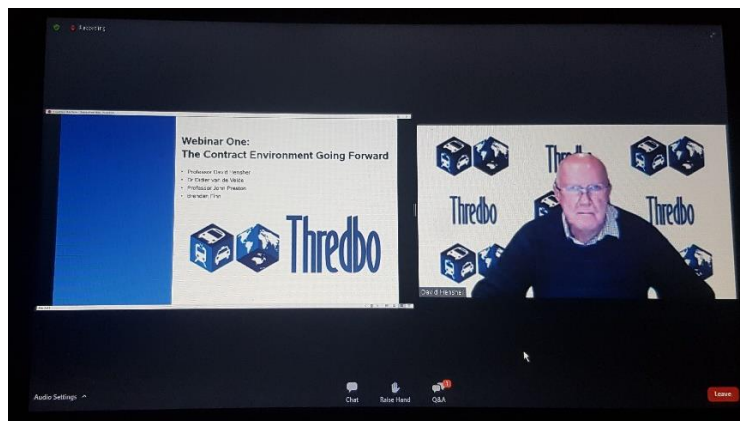


Presentation by Ian MacDonald, National IR Manager – Bus Industry Confederation

15:15pm *Summit Close*

Register for this event by email: imacdonald@bic.asn.au by Friday 12 November 2021. After registration is received you will be sent a Zoom invitation. This mini seminar will follow the APTIA AGM.

Industry Participation



Thredbo 17 has been postponed in 2020 and 2021 and was due to be held in Kobe, Japan last year.

Undaunted by these postponements, Thredbo 17 is scheduled for Kobe in 2022.

In the meantime, Professor David Hensher, chaired two quality webinars, over two nights as a shortened version of the Thredbo conference with speakers from the UK, Netherlands, Germany, and Norway.

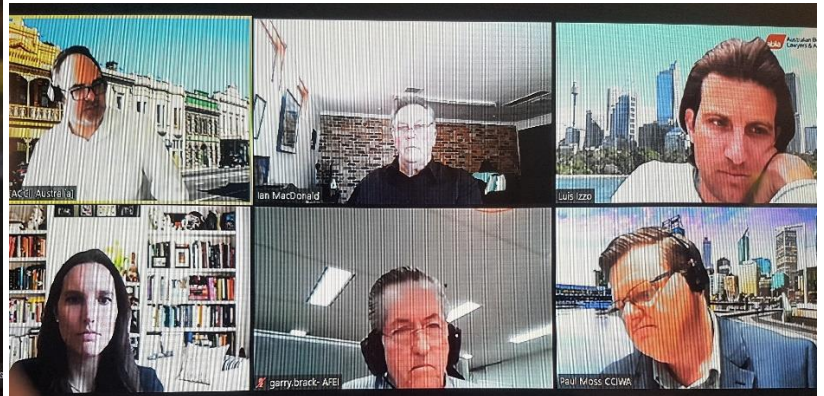
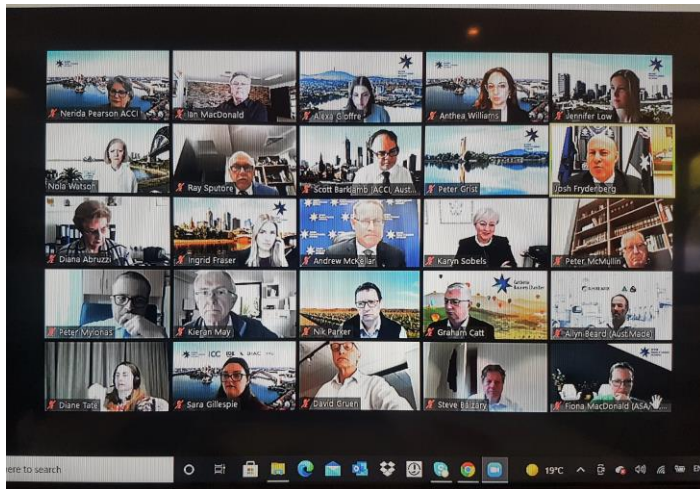
The topics included “The contract environment going forward’ and “Sustainability Challenges for public transport.”

As part of BIC’s commitment to ensure its policies resonate with both the Government and the Opposition APTIA, recently met with the Attorney General and Minister for Industrial Relations, Senator the Hon Michaelia Cash to discuss the recent report on ‘Insecure Employment’ released from the Senate and chaired by former National Secretary of the TWU, Senator Tony Sheldon.

The following statistics were provided by the Attorney General’s office.

- (i) The rate of **casual employees** has remained stable at around 25 per cent for more than two decades leading into the pandemic.
- (ii) Currently at **22.5 per cent** in August 2021, this is lower than it was before COVID hit (24.1 per cent), lower than 2013 (23.7 per cent in 2013) and even lower than in 1996, when it was 24.4 per cent.
- (iii) In fact, the greatest increase in casual employment on record took place between 1988 and 1996, from 18.2 per cent to 24.4 per cent.
- (iv) The rate of **independent contractors** has remained broadly stable over the last decade at **8-9 per cent**.
- (v) The record high was **9.8 per cent** recorded in 2010.
- (vi) In 2020, there were around 1 million independent contractors. Independent contractors as a proportion of employed persons has decreased over recent years, from 8.7 per cent in 2016 to 8.2 per cent in 2020.
- (vii) The rate of **fixed-term contractors** has been stable at around **4 per cent** since 2004.
- (viii) In 2011 the rate of fixed-term contractors rose from 3.7 per cent to a peak of **4.2 per cent**.
- (ix) The rate of **labour hire workers** has been stable at less than 2 per cent over the last decade. Of the nearly 13 million employed Australians, less than 115,000 were employees paid by a labour hire firm – that is only **1.1 per cent** of all employees.
- (x) The record high was **1.5 per cent** recorded in both 2008 and 2011.
- (xi) The Australian labour market is diverse – it provides various forms of work for people at different circumstances or with different needs. Many workers choose particular forms of work because they value the freedom and flexibility that this type of work offers.
- (xii) The economic policies the Government has implemented has seen significant recovery in the labour market following the economic impacts of the pandemic. Under the Coalition’s sound economic management, unemployment is now, at **4.6 per cent** and we have supported the creation of over **1.5 million** jobs to nearly **13 million** employed Australians.

ACCI's Activities



The Australian Chamber of Commerce and Industry (ACCI), of which BIC is a member, has been very active over the last month, holding its Business Leaders Forum, usually in Canberra, but online, due to restrictions in the ACT.

ACCI secured both the Treasurer, the Hon Josh Frydenberg, MP and Dr Jim Chalmers the Shadow Treasurer to put each Party's economic credentials to the meeting.

Chief Executive of ACCI, Andrew McKellar used the Leaders Forum to launch ACCI's "Better Australia" policy document, titled, "Securing the foundation for a stronger and smarter future."

At the same APTIA has been working with the ACCI Workplace Relations Policy Group to settle on ACCI's industry policy positions in relation to a number of IR issues, including, "Job Security", "Employment Protection" and "Trade Unions and Registered Organisations." ACCI will use these developed policies as part of an approach to the major political parties in the lead up to the next election in 2022.

INDUSTRY NEWS – What you need to know?

Reimagining the Workforce



IT'S TIME TO REIMAGINE THE WORKPLACE, TO SUPPORT AND ENCOURAGE RETURN TO WORK AFTER FREEDOM DAY – An article by Nikki Britt

Those of us just out of lockdown in NSW and still in lockdown in VIC are starting to see what our lives will look like in the new COVID normal world after “Freedom Day”. As we saw yesterday in Sydney it involves visiting our families, having a haircut, and meeting friends for a drink or dinner. But very few of us understand what a return to the workplace post lockdown could look like. We all rationally understand that it will need to look different, but have we thought through how different?

There was a very sobering report released last week from the Australian Government Productivity Commission (AGPC) that supports a 2020 global study by EY on the future of work post lockdown. Both pieces of research clearly define that Australian workplace need to fundamentally adapt and change for them to succeed post lockdown

The EY “Work Reimagined Employee Survey” (Aug 2020) of 16,000 workers clearly articulates the global pandemic has reset the workforce experience, shifting from “return to the office” to “reimagining work”. That is, employees are not expecting that post “Freedom Day” their workplaces will revert to pre-2020. There is an expectation of a fundamental shift.

Further, the September 2021 Australian Productivity Commission “Working from Home” research shows that a third of Australians post “Freedom Day” want to work from home 3 days a week and 20 % would like to work from home full time. Prior to the pandemic, only 8 % of Australian workers had formal Working from Home arrangements. As a result, the Australian Productivity Commission believe that a hybrid model of working from home and coming into the office on reduced days will become the new normal.

The 2020 EY study found that more than half (54%) of employees surveyed from around the world would consider leaving their job post-COVID-19 pandemic if they are not afforded some form of flexibilities. Attitudes to job retention differ by age, with millennials twice as likely as baby boomers to quit. As a result of the current talent squeeze across most industries in Australia, employees now have greater power & options to seek out roles that match their desired or ideal hybrid work model.

Liz Fealy, EY Global People Advisory Services Deputy Leader and EY Global Workforce Advisory and Solutions Leader, says: “Employees’ willingness to change jobs in the current economic environment is a game-changer. The COVID-19 pandemic has shown that flexibility can work for both employees and employers, and flexible working is the new currency for attracting and retaining top talent. Employers who want to keep the best people now and in the next normal will need to put flexible working front and centre of their talent strategy.”

However, it is not as easy as just providing flexible working arrangements. Employers, building owners and building managers will need to consider if any new COVID workplace design aligns with research that addresses the Health Benefits of Good Work, the omnipresent psychosocial risks within workplaces and our ageing workforce.

Issues such as loneliness and disconnection have been common themes across employees during stay-at-home orders. Workplace design and return to work will need to address these psychosocial factors and consider strategies to assist employees to reconnect with work colleagues/managers and customers and return to work with regard to their physical and psychological safety.

A significant reset is therefore required across the key determinants of a successful hybrid model that supports the employee experience whilst accelerating organisation agility and reducing costs.

Unfortunately, “Freedom Day” does not free us from the health impacts of COVID 19. I am not an epidemiologist, and the aim of this paper is not to explain chains of transmission. However, The Doherty Institute report outlines how the 70-80% vaccination rates will decrease the health impacts of COVID 19 infections. We will however continue to have infections within our friends, family, customers, and workmates and therefore require a structured way forward that supports health certainty at work.

I am currently working with KINNECT who have developed an excellent software solution and suite of health services that build and support health certainty within workplaces. I am particularly impressed with their latest initiative, Carelever Comply – an online tool that enables workplaces to capture their employee’s COVID-19 vaccination status, verify and track it throughout their employment. Vaccination rates are a critical strategy in preventing the spread of COVID-19 in the community and in the workplace. Many employers are introducing COVID-19 vaccination policies and as such will need to implement ways to capture and verify their workforce’s vaccination status.

Employers, building owners and building managers need to find a hybrid model that supports and ensures:

- (i) Regulatory (Health Orders) requirements are implemented in a systemic way
- (ii) Workers feel safe and are attracted to return to the office
- (iii) Psychosocial risks associated with a pandemic across personal, social and productivity are addressed in a supportive and open way
- (iv) Return to work post infections/close contacts is supported and normalised
- (v) Close to home/hub office options are considered.

These problems are multifactorial and require a broad team of experts to create innovative and safe solutions. As a result, I am currently working with The Place Agency to collaborate on the planning for the future of the workplace and safe work practices that support employers to reimagine their workspaces in a way that supports and recreates connection with their people and their built environment.

Whilst I rely on my learnings as a health practitioner and workplace wellness specialist in supporting the physical and psychological needs of employers and employees, The Place Agency uses its expertise in place experience, and activation to design workplace culture that attracts and supports interactions, of course, all in a COVID safe way.

Australia has well-established, forward-thinking workplace specialists who by sharing ideas, concepts & strategies can address and resolve the current challenges. Through joining together of strategic partners such as KINNECT and The Place Agency with diverse workplace knowledge employers, building owners and building managers will have a road map on how to attract, support and maintain employees to succeed in this new hybrid workplace.

I would encourage you to reach out to me Navigate Health, The Place Agency or KINNECT if you would like more information.

Note:

Nikki Britt is Managing Director of Navigate Health and a Workplace Engagement Specialist.

Vaccinations



Vaccinations – Mandated?

The biggest vaccination questions facing passenger transport operators, at the moment, are:

- (i) Can I mandate, that my drivers, are all double vaccinated, before they can come to work?
- (ii) What do I do with those few drivers who refuse, do not wish or can't, for a valid reason, receive the Vaccinations?
- (iii) In providing a safe workplace for both my drivers and passengers on their buses and for persons who come onto the depots, what risk assessments should an operator consider?
- (iv) Is public transport a potential high-risk transmitter of Covid – 19?

Answers to these questions are, generally, commented on, on a daily basis, by medical persons, bureaucrats, politicians, the judiciary, employers, and employees. A number of State and Territory Governments have assisted in providing public health orders.

Set out below is a summary of the current situation and also examples of the specific approach of APTIA members.

Public Health Orders

You may be aware that the Victorian Government has made a number of significant health orders in recent weeks, which require employees to be double vaccinated, before they can work in selected industries. These orders require:

1. A first vaccination dose deadline by 22 October 2021.
2. An employer cannot allow a worker into the workplace from 15 October 2021, if they do not provide proof of at least a first dose or confirm a booking for the first dose by 22 October 2021.
3. An employer cannot allow a worker into the workforce from 26 November 2021 unless they have provided proof of two doses of a vaccine.

There are some exceptions.

The workers direction applies to employers of specific types and includes transport workers.

Similar public health orders apply to public transport operators in both the Northern Territory and the ACT.

From the 1 December 2021

It is not anticipated that the NSW or QLD Governments will make similar orders.

Legal Challenges

Victoria:

An application has been made in Victoria's Supreme Court to challenge mandatory COVID-19 vaccinations with more than 100 health and construction workers. The lawyers representing the parties claim that the primary difference to other vaccination challenges is a claim the Victorian Government's mandate for authorised workers breaches the State's Charter of Human Rights and Responsibilities.

New South Wales:

The NSW Supreme Court Justice Robert Beech-Jones made the comments in a ruling recently handed down in which he dismissed two challenges to the State Government's use of Public Health Orders to make COVID-19 vaccinations mandatory for certain categories of workers.

Noting it is not the court's function to determine which pandemic response is best, conclude which vaccines are most effective or assess the merits of State Health Minister Brad Hazzard's decision to issue the orders.

The judge further observed that one group of plaintiffs had leaned heavily on FWC Deputy President Lyndall Dean's recent dissenting judgment in *Jennifer Kimber v Sapphire Coast Community Aged Care*.

In that decision, Vice President Adam Hatcher and Commissioner Bernie Riordan backed Commissioner Donna McKenna's ruling that the receptionist had not been unfairly dismissed for refusing a mandated flu shot on the basis of a previous allergic reaction.

In a lengthy dissenting opinion, Deputy President Dean said the receptionist had been dealt a "serious injustice" that denied her the Fair Work Act's protections, partly because of an inference that she held a "general anti-vaccination

position". One group of plaintiffs cited at length in its arguments the deputy president's claims that "vaccine mandates" in various COVID-19 public health responses amounted to a form of coercion that violated a person's right to bodily integrity, Justice Beech-Jones observed.

Queensland:

Queensland police officers have failed to convince a Queensland IRC full bench that the Police Commissioner failed to consult them on a COVID-19 vaccine workforce mandate or lacked power to issue it, but the State's Supreme Court has opened the way for another challenge.

Police officers and employees sought that the tribunal declare Police Commissioner Katarina Carroll's inoculation direction inconsistent with the State's Public Service Administration Act and therefore of no effect.

They also sought a declaration that the direction was "beyond power, invalid and of no effect" as it purported to "unilaterally" vary the terms and conditions of their employment.

The bench found the applicants also "misconceived" in contending the Police Commissioner lacked power to mandate vaccinations, as it varied their employment terms where the requirement was not contained in their awards or agreements.

Justice Davis, Vice President O'Connor and Deputy President Merrell said a "direction given to an employee does not, without more, become a term or condition of employment".

"This is made clear in the management prerogative cases," the bench continued.

"Where a directive is within the scope of employment and it is not contrary to the employment contract, the award or any certified agreement, the direction must be obeyed provided compliance does not involve illegality and the directive is reasonable."

Western Australia

Has decided to introduce a phased in approach to mandatory COVID-19 vaccination policy, which means critical workers will not be allowed into a workplace in the event of lockdowns or other such restrictions. Public transport workers are required to have their first dose by 31 December 2021 and their second dose by 31 January 2022.

Members' Positions

Members of APTIA recently responded to a survey which sought to understand how the broad membership was dealing with those issues raised in this paper.

The following questions were asked:

- (i) What are the current mandated vaccination orders, if any, that relate to bus drivers in your State? Do you anticipate Government intervention?
- (ii) Has your State Transport Authority intervened with directions to drivers that impact upon a driver authority for instance?
- (iii) Are you advising your managers/members to stand down unvaccinated drivers? If so, could you provide to me a copy of any of those advices?
- (iv) Has the TWU been involved with you in any of the decisions to deal with non-vaccinated drivers? Do they support standing down non-vaccinated drivers?
- (v) Do you consider that an industry approach to the issue of non-vaccinated drivers, would be useful?
- (vi) Have you or are you aware of any challenges from the TWU or drivers to being stood down or refused work because of non-vaccinations?

The following outcomes were identified by APTIA members and State Bus and Coach Associations, who are also members of APTIA.

- (i) Where vaccinations have been mandated operators are adhering to the orders by suggesting to non-vaccinated drivers to take leave or stand down and eventually lead to termination.

- (ii) In circumstances where an operator provides services across State or Territory borders the requirement for mandated vaccinations would prevent drivers from working in that circumstance.
- (iii) Concern was expressed that a potential 10% loss in the workforce because of non-vaccinations could lead to reduced services.
- (iv) The position of the TWU was not known specifically because little or no contact had been made to discuss their position. It was known that the TWU strongly supported driver members getting vaccination. The TWU did not support members losing their jobs, however, if they were not vaccinated.
- (v) Whilst some members considered that a national transport workers approach to vaccinations would be useful, caution was raised that, in the absence of any mandated health notices or direct guidelines from Work Safe Australia, a one size fits all policy might not be sustainable.
- (vi) Members raised issues surrounding their responsibilities in circumstances where a driver contacts Covid-19 and the issues surrounding prevention, contact tracing and other obligations to provide a safe place to work.
- (vii) There was a suggestion that APTIA seeks further support from Government to assist employers who received claims of discrimination or suffered from outbreaks which caused closedown of the operations.

Note:

Jennifer Lowe and Tamsin Lawrence will provide a comprehensive presentation on the issue of vaccinations, including all updates, on Thursday 25 November 2021 at 2.15pm.
See Membership News.

Annual Reports– Fair Work Commission and Office of the Fair Work Ombudsman



The Fair Work Commission and the Office of Fair Work Ombudsman has this month tabled in the Federal Parliament their Annual Reports for the Year 2020/2021.

Summarised below are some relevant comments and statistics provided by Justice Iain Ross, AO, President of the FWC and from Sandra Parker , the current Fair Work Ombudsman.

Fair Work Ombudsman

The Fair Work Ombudsman increased its use of compliance notices by 113% in 2020-21, as it sought to quickly rectify underpayments instead of taking action in the courts, while it has nevertheless ramped up its legal action by more than 40% and set up a dedicated branch to pursue corporate misconduct.

The watchdog's annual report, tabled in Federal Parliament, says it recovered a record \$148.4 million for 69,735 underpaid workers, up 20% on 2019-20 and nearly five times its recoveries in 2017-18.

As previously flagged by Ombudsman Sandra Parker, most of the recoveries in the last two years came from self-reporting major corporates.

The annual report says the FWO entered into 19 enforceable undertakings with businesses in 2020-21, with 17 involving self-reported non-compliance from large employers.

Employers backpaid more than \$81.7 million following extensive investigations and EUs negotiated with the FWO, which also secured more than \$3.16 million in "contrition payments" from companies during the year.

Parker said in a statement after the report's release that all employers, especially large corporate entities, needed to place a much high priority on investing in payroll and IR systems and expertise to ensure they are paying workers their lawful entitlements.

Parker said in the annual report that COVID-19 has "significantly changed the industrial relations landscape" and supporting businesses and workers through the pandemic was the FWO's overarching priority in 2020–21.

Fair Work Commission

COVID-19 drove the FWC to conduct almost 70% of its proceedings remotely in 2020-21 and to convene a working group with similar institutions to advance virtual proceedings and develop a justice-friendly version of Microsoft Teams, according to the umpire's annual report, which also notes a further improvement in agreement approval times.

The report, tabled in Federal Parliament, says that the tribunal held 69% of hearings and conferences by videoconference or phone, up from 48% in 2019-20, which took in the first three months of the coronavirus pandemic.

The tribunal's President, Iain Ross, says in his overview that due to the "benefits both in efficiency and access to justice, remote hearings will remain a standard service option for the Commission in the future".

The tribunal's members decided 20% of matters – mainly enterprise agreement approvals – "on the papers", without a hearing or conference.

Justice Ross also pointed to improvements in median processing times for agreements that didn't require undertakings, down from 17 days in 2019-20, 34 days in 2018-19 and 32 days in 2017-18 to 14 days in the reporting period.

Meanwhile, the Commission mediated unfair dismissal cases within a median time of 21 days (down from 34 days in 2019-20).

The Commission says case volumes returned to more normal levels in 2020-21 after an early COVID-19 spike.

It received 13281 unfair dismissal cases under s.394, down from 16558 in 2019-20 but more in line with the 2018-19 and 2017-18 lodgements of 13928 and 13595 respectively.

The pandemic appears to have driven a significant rise in s.526 stand down disputes, with the Commission handling 247 in 2020-21, up from 183 in 2019-20, 10 in 2018-19 and nine in 2017-18.

It also coincided with a substantial drop in s.418 applications to stop industrial action, which fell to 23 in 2020-21, down slightly on the 27 in 2019-20, but a big reduction on the 47 in 2018-19 and 54 in 2017-18.

It found itself unable to substantiate 44 complaints, up from 15 in 2019-20.

During the reporting period, the Commission expanded its Workplace Advice Service, which provides *pro bono* assistance to unrepresented applicants, to all states and territories.

The WAS aided some 3406 clients – up 42% – while the number of "partner organisations" grew by 50%, from 60 to 90.

The Commission also outlined its response to the High Court accepting that former judge Dyson Heydon sexually harassed six associates.

It said that in August last year the AHRC, Comcare and the FWC began an OHS "collaboration project" that aims to "equip organisations characterised by high power imbalances with the tools and support to provide positive workplace cultures and harassment-free workplaces".

"The Commission is determined to ensure our workplace is as free from inappropriate behaviours such as bullying and sexual harassment as possible, and that it reflect best practice when performing its functions."

Professor Andrew Stewart on vaccinations



Professor Andrew Stewart is an expert in industrial relations and is well sought after as a speaker at many events. Professor Stewart, who is the Dean of Law at Adelaide University is also a consultant to Piper Alderman solicitors, who are strategic allies of APTIA. Professor Stewart recently gave an address which is summarised below, relating to vaccinations.

Employers are generally on "solid ground" in suspending or dismissing workers who refuse reasonable directions to be vaccinated to perform their jobs but face a range of practical difficulties if they take such action, according to Adelaide University Professor of Law, Andrew Stewart.

He told the ALERA national conference on Friday that it is "relatively easy to construct arguments for employers in this situation as to giving a direction that results ultimately in dismissal or suspension without pay on the basis . . . of lack of readiness and willingness to, or the ability to, work".

"The problem is that every employee that does that is inviting . . . a whole range of litigation," he said.

Stewart said, "the first employers to [litigate] know that they could be facing – as we've seen in a number of instances recently – highly well-funded resistance campaigns, with all kinds of crowdfunding, all kinds of social media support coming in to support the workers who are affected by these directions".

"That right now is the main issue."

He continued that "right now I'm actually less interested in the legal niceties around 'no work, no pay', stand down, lawful and reasonable direction.

"Because where you've got these directions in place, the employer is clearly on solid legal ground [in] taking some action.

"The problem is the practical one of what is that going to mean.

"The trouble is that even if the employer is on solid legal ground in taking the action, that doesn't necessarily mean that they can ultimately defend an unfair dismissal claim, which will be decided on broader grounds than just a valid reason."

Speaking on a labour law panel alongside Assistant Victorian Government solicitor for workplace relations and OHS, Frances Anderson, and Monash University's Professor Marilyn Pittard, Stewart continued those other issues would arise when dealing with workers who refuse inoculations, including those outlined by Anderson, such as "the question of availability of other work", along with consideration of other alternatives and "procedurally, was the decision handled in a good way?"

He said an employer in such a situation might also face the "spectre" of discrimination claims, particularly on the grounds of political opinion.

Stewart said that "what is very, very badly needed right here is leadership on this issue; it's an appallingly difficult policy question".

He continued that "there's clearly a clash between personal freedoms and decision-making, and public health needs", noting that it is the government's responsibility to balance those needs.

"And at the moment, we have a complete absence of leadership."

"The state governments who are issuing, or the health authorities responsible for issuing these public health directions, are at least doing something to try and make it a little easier for employers to handle these issues."

He said, "it would be far easier if we had much clearer guidelines in place, and they should be national, they shouldn't respond to the different electoral positions of the states".

"So, this should be a national matter", involving "clear guidelines that address some of these issues and ultimately say to an employer that 'look, if you've got solid grounds to give a direction, and there are no reasonable alternatives that you could explore, then you do have the basis for either suspending or dismissing a worker'".

He accepted, though, that "it's reasonable to respond to different COVID situations".

"I'm speaking from South Australia [where] the practical situation [of no active COVID-19 cases in the community] is hugely different to . . . the one that you guys are dealing with in Melbourne [with more than 2000 daily cases in Victoria as Stewart spoke]."

Family and Domestic Violence Leave

Family and domestic violence leave review 2021 (AM2021/55)

The Fair Work Commission reviewing the issue of family and domestic violence leave has issued a further statement putting back the ultimate decision on whether paid family and domestic violence leave will be introduced.

The FWC has flagged that a survey will be sent out to employers, asking questions around the frequency of such leave.

The survey is to be completed, by 3 December 2021 with the results table by 10 December 2021.

The FWC thereafter gave directions indicating the party's interests as follows:

1. The ACTU and parties supporting the ACTU's proposed variation to awards are to file any revised or further submissions and evidence in light of completion of the Commission's research program by 4pm on 22 December 2021.
2. Any party opposing proposed variations to modern awards is to file their evidence and written submissions by 4.00 pm on Friday 5 November 2021 4.00 pm (AEDT) on 4 February 2022.
3. Submissions and evidence in reply are to be filed by 4.00 pm on Friday 19 November 2021 4.00 pm on Friday 18 February 2022.
4. The matter will be listed for Mention at 9.30 am (AEDT) on Wednesday 24 November 2021 9.30 am (AEDT) on Wednesday 23 February 2022. The parties are to have informed each other of the witnesses required for cross-examination prior to the mention and Ai Group, ACCI and the ACTU are to have prepared and filed a joint hearing plan addressing the order of witnesses prior to the mention.
5. The matter will be listed for hearing on 29 November 2021 28 February and 1 to 4 March 2022.
6. By no later than 4.00 pm on 11 March 2022, the parties are to file and exchange final written submissions addressing only the conclusions to be drawn from the evidence and limited to 15 pages.
7. The matter is listed for final oral submissions on 17 March 2022 with an estimate of one day

Job Security Inquiry

A Labor/Greens-majority secure work Senate inquiry is calling on the Morrison Government to require federally funded entities, including universities, aged care, and disability services, to give preference to direct, permanent jobs.

The "Insecurity in publicly-funded jobs" report makes 38 recommendations, including that funding recipients "prefer the direct, permanent employment of staff, rather than indirect arrangements including outsourced service providers or labour hire firms or temporary arrangements including casual or fixed-term employment, wherever practical".

It recommends attaching the requirements to funding for the Australian Public Service, government business enterprises, and private organisations "including but not limited to aged and disability care providers, universities, construction firms and service providers engaged to deliver public infrastructure projects such as the National Broadband Network".

The Select Committee on Job Security's second interim report says the policy should recognise there is a legitimate role for contracting and subcontracting in government supply chains, but that workers engaged under these arrangements are entitled to the same pay and conditions as employees.

The Federal Government should also eliminate its use of long-term casual employment across the public service for roles "which are not irregular or intermittent in nature, unless genuinely preferred by the employee", according to the report.

The committee, which is chaired by ALP Senator, Tony Sheldon, is calling on the Federal Government to facilitate and "play a central role" in bargaining for a sector-wide care industry agreement to "support fair wages and secure employment conditions".

Accusing for-profit aged care providers of "spectacular robbing of the public purse", it says that while individual employers "could be doing more to increase job security at the facility or service level, we agree that the sector cannot resolve these issues without leadership from the Australian Government" as the sector's primary funder.

The report says aged and disability care workers have been "locked out" of bargaining and that negotiations in these sectors "cannot be conducted in a meaningful way unless government, providers, workers and unions, and sector peak bodies, are all at the table".

The FWC should meanwhile be "provided with the power to require the participation of relevant government/s as the economic employer/s in the sector", it says.

The report further recommends strengthening the FWC's powers so it "may order pay increases for workers to rectify gender-based under valuation, including establishing a statutory Equal Remuneration Principle".

It says this should in part provide "guiding principles making it clear that a male comparator is not required to assess whether workers in an industry are receiving equal pay for work of equal or comparable value".

Coalition senators issued a dissenting report, with the deputy chair, Nationals Senator Matt Canavan, accusing the Labor and Greens senators of cherry-picking data and "negative politicking to build a political campaign for the upcoming Federal election".

IMPORTANT DECISIONS

Supreme Court in NSW upholds Government power to mandate vaccinations

Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320 (15 October 2021)

The NSW Supreme Court has backed the State government's use of Public Health Orders to make COVID-19 vaccinations mandatory for certain categories of workers, dismissing arguments that the directions compromised objectors' "right" to choose what they put in their bodies.

In two proceedings brought against NSW Health Minister Brad Hazzard, Chief Medical Officer, Dr Kerry Chant, and the State of NSW by a total of 10 workers in health, aged care, construction and education, the plaintiffs –

all of whom said their refusal to be vaccinated was based on informed choice – held the orders made under s7(2) of NSW's Public Health Act were invalid.

In a judgment handed down before a live-stream audience of more than 40,000 on Friday, Justice Robert Beech-Jones said it was "important to note that it is not the Court's function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the Court to choose between plausible responses to the risks to the public health posed by the Delta variant".

"It is also not the Court's function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines, especially their capacity to inhibit the spread of the disease.

"Instead, the Court's only function is to determine the legal validity of the impugned orders which includes considering whether it has been shown that no Minister acting reasonably could have considered them necessary to deal with the identified risk to public health and its possible consequences."

The judge observed that one of the central themes in both cases was the effect of the orders "on the rights and freedoms" of those choosing not to be vaccinated, "especially their 'freedom' or 'right' to their own bodily integrity".

Noting in passing that Australia does not have a bill of rights, Justice Beech-Jones said that "although it was contended that the impugned orders interfere with a person's right to bodily integrity and a host of other freedoms, when all is said and done the proper analysis is that the impugned orders curtail freedom of movement which in turn affects a person's ability to work (and socialise)".

"So far as the right to bodily integrity is concerned, it is not violated as the impugned orders do not authorise the involuntary vaccination of anyone.

"So far as the impairment of freedom of movement is concerned, the degree of impairment differs depending on whether a person is vaccinated or unvaccinated.

"Curtailling the free movement of persons including their movement to and at work are the very type of restrictions that the PHA clearly authorises."

By contrast, continued Justice Beech-Jones, orders, and directions under the PHA that interfered with freedom of movement on "arbitrary grounds" such as race, gender, or political opinion "would be at severe risk of being held to be invalid as unreasonable".

"However, the differential treatment of people according to their vaccination status is not arbitrary."

"Instead, it applies a discrimen, namely vaccination status, that on the evidence and the approach taken by the Minister is very much consistent with the objects of the PHA.

"Accordingly . . . this aspect of both challenges fails."

The *Henry* and *Hassam* cases are among a number seeking to challenge mandatory vaccinations for workers and listed on the Supreme Court's web page.

Lawyers acting for Henry last month failed to subpoena former NSW Premier Gladys Berejiklian for access to documents she relied on when she stated it was "not in our power" to mandate vaccinations.

Employer whacked \$18K for dodging underpayment notice

Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd [2021] FCAFC 188 (27 October 2021)

In a ruling reinforcing the wisdom of heeding FWO compliance notices, an online directory and its director have despite pleas they would be "crippled" been fined more than \$18,000 for failing to rectify underpayments on time.

The Federal Circuit and Family Court imposed penalties of \$15,120 and \$3024 respectively on PEBS Group Pty Ltd and its sole director after agreeing on the need to send a signal to underpaying employers that choose to ignore the Ombudsman's offer to make redress without recourse to the court.

The PEBS Group and its director were in February last year given a month to pay more than \$8000 found to have been owed to five workers selling advertising on the Rainbow Flag directory.

As Federal Circuit and Family Court judge Heather Riley heard, it ultimately took another 10 months and the commencement of court proceedings before the workers saw their money.

With the FWO seeking penalties for non-compliance, the director told the court that a "massive" penalty of the order sought would "cripple" him financially.

Noting the lack of evidence underpinning the director's claim, however, Judge Riley accepted the FWO's recommendation on "appropriate and proportionate" penalties.

The penalties reflected that the respondents "deliberately" failed to comply with the compliance notice for 10 months, ignored the FWO's attempts to pursue the matter, and obliged it to commence the court case, the judge said.

"The respondents eventually complied with the compliance notice and rectified the underlying underpayments (with the exception of about \$120, which was occasioned by the Ombudsman's typographical error)," continued Judge Riley.

"Penalties need to be set at a level that ensures that employers generally do not treat penalties as a trifling 'cost of doing business'."

Flexible arrangement ultimately untenable for employer

Ms Dee Sinclair v Sunwise Constructions Pty Ltd [2021] FWC 5994 (28 September 2021)

The FWC has upheld a construction company's dismissal of a receptionist who juggled work with caring for a grandson with special needs, finding the small business was "exceptionally flexible and considerate" but the situation became untenable.

The tribunal heard the full-time receptionist was unable to work her full hours at Sunwise Constructions Pty Ltd for much of her five-year tenure, due to caring responsibilities for her grandson and her need to take him to specialists and support services appointments.

Contending she averaged less than 30 hours a week in the six months before her dismissal, sunwise said it provided a "lot of leeway in consideration of her family life, allowing time off, altered work hours, children in the office" and diverting calls to her mobile when caring for the boy at home.

But it claimed a marked decline in the receptionist's hours and reliability had a "significant negative impact" on the business which, in combination with recent financial strain, meant her irregular hours and attendance were "no longer sustainable".

Sunwise told her in April that unless she could commit to performing all her work in the office, during set hours, it would need to employ someone else.

Although the receptionist initially said she would do everything she could to make it work, the employer said her hours soon dropped back again.

The receptionist proposed changing and reducing some of her hours to allow her to take her grandson to therapies, but when the employer refused, she sought to take between four- and six-months unpaid leave to "put everything in place" for him.

Within the same email, sent at 6pm on a Sunday, the receptionist said she would be on annual leave for the whole week due to stress and anxiety.

When Sunwise told her on Monday it could not approve the leave, the receptionist provided a medical certificate and said she was "currently on medical leave and believe that I am able to use annual leave to cover short failings in sick leave".

Sunwise dismissed her the same day, telling the FWC it was not prompted by the leave request or sick leave but due to "capacity" as she "could not work full time and couldn't work part time in a way that worked for the business".

Commissioner Bernadette O'Neill said she had no doubt the receptionist was "doing the best she could", sometimes coming to work at 4am to attend to tasks and "trying very hard to balance and meet the competing demands on her time".

But from the employer's perspective, the commissioner said many of her duties "required her to be on-site during business hours and not all work could be performed at odd times of the day and night".

While Sunwise had been "exceptionally flexible and considerate", Commissioner O'Neill said there "came a point where for the sake of the business and everyone's employment, the situation became untenable".

Although it was "unfortunate", the commissioner said Sunwise acted "entirely reasonably" and the dismissal was consistent with the Small Business Fair Dismissal Code.

She said Sunwise gave the receptionist notice they were going to discuss her employment, told her why her job was at risk, gave her a couple for days to consider whether she could and would commit to working full-time and dismissed her because they could not come to a suitable agreement.

Even if she had not found the dismissal consistent with the code, Commissioner O'Neill said she would not have found it to be harsh, unjust, or unreasonable.

IMPORTANT DATES

- **APTIA Annual General Meeting – Thursday 25 November 2021 (Virtual)**
- **Industrial Relations Seminar (Vaccinations and Sexual Harassment) – Thursday 25 November 2021 (Virtual)**
- **BIC AGM – 28 February 2022 (Canberra)**
- **APTIA Council meeting – 9 February 2022**
- **BIC Industry Summit incorporating a National IR Seminar – 1 & 2 March 2022**



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