



JULY 2022  
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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- Australasian Bus and Coach Expo, Sydney – Wednesday, 5 & Thursday, 6 October 2022.
- APTIA AGM – Sunday 13 November 2022 (Brisbane)
- BIC National Conference – Monday 14 November 2022 to Wednesday 16 November 2022.

## MEMBERSHIP NEWS

### APTIA IR Breakfast – Tuesday 4 October 2022



NAVIGATE WORK

APTIA will hold its final IR breakfast for the year, on Tuesday 4 October 2022. The breakfast will be hosted in the offices of Piper Alderman, solicitors, in Sydney and will be sponsored by Navigate at Work, a business founded by Nikki Britt and James Mitchell with the mantra to help businesses transform their thinking to connect workplace health, brand, and place into a simple cohesive vision to ensure they attract and retain the best employees.

Nikki Britt is well known to our industry having consulted to the Bus Industry Confederation, the Bus and Coach Association of NSW and various bus and coach operators. Nikki has also presented at a number of conferences and seminars for APTIA.

Invitations will shortly be sent to members of APTIA to attend the breakfast, which will provide a great opportunity for participants to discuss, in an informal, friendly environment, mutual issues, such as covid management, recruitment and retention and handling potential changes to IR laws such as a new definition of casual employment and how to eliminate sexual harassment from the workplace.

### Peter Dwyer, solicitor



July 1 saw the retirement of Peter Dwyer as a senior partner from Piper Alderman, solicitors. Peter is not lost to the legal profession as he will stay on as a consultant for a period of time. Peter has represented many bus and coach operators, since the late 90's and has actively assisted and provided expert transport advice to a number of State Bus and Coach Associations over this period.

Peter was actively involved in the legal support during the deliberations for new bus transport contracts which we, all had to endure, during the noughties in Queensland, New South Wales, Tasmania, and South Australia. Peter helped bus operators get through difficult changes and ensured that the interests of bus operators were always protected. Peter also acted for many bus operators either buying or selling bus businesses.

Peter and Piper Alderman have been great supporters of the industry, over this time, through their support of conferences, in providing sponsorships and expert speakers.

Peter has handed over the baton to his protégé, Maria Capati some time ago and Maria has carried on the excellent representation for the industry.

APTIA thanks Peter Dwyer for his friendship and support over the many years and wishes him well for his future.

## Geoffrey Lewis

Best wishes for a job well done



The Hobart Mercury 30/07/2022

## BusVic Maintenance Conference and Trade Show



In July APTIA member, the Bus Association of Victoria held its annual Maintenance Conference and Trade Show at the Melbourne Showground. This well attended trade show highlighted the changing industry with a number of technical sessions provided by BIC members, including Scania, Denso, Thermo-King, and Express Coach Builders.

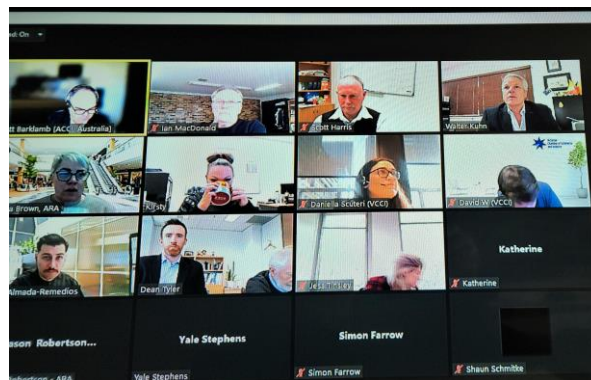
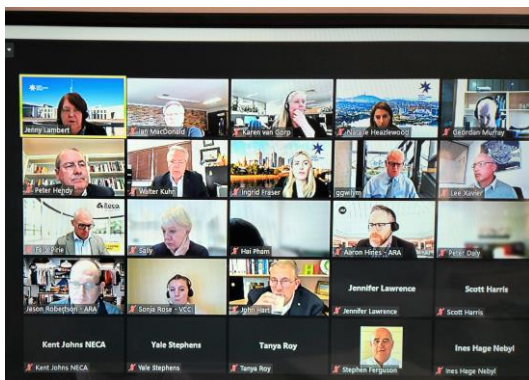
APTIA provided an Industrial Relations update for attendees, following the recent change of Government.

The highlight was keynote speaker Dr Richard Harris SC OAM, who is an anaesthesia and aeromedical retrieval medic. He has expertise in diving, wilderness, and remote area health. He has a professional and voluntary interest in search and rescue operations, establishing the first sump rescue (deep, scary caves) training course in Australasia.

Dr Harris international fame was on display during the 2018 Thailand Cave Rescue which captivate the entire world and was as an opportunity to put this training to work.

He is the 2019 Australian of the Year for South Australia and the joint 2019 Australian of the Year with his dive partner Craig Challen, who was also involved in the cave rescue.

## Membership to the Australian Chamber of Commerce and Industry



BIC is a member of ACCI which provides the industry with access to the Federal Issues which impact upon BIC and APTIA members.

ACCI has a seat at the national industry advisory group which specifically provides feedback in a consultative way to the Government on issues of business.

ACCI will also have a seat at the upcoming Employment Industry Summit in Canberra, set down for 1 & 2 September 2022. At this summit the participants are projected to develop terms of reference for a Treasury inquiry into secure employment which was the cornerstone of the newly elected Government's industrial relations policies that it took to the recent elections. A Treasury 'White Paper' will establish future employment policies on a range of issues affecting our industry, most importantly how we will employ our casual school bus drivers in the future.

The Summit is also seeking to address the issue of recruitment and retention of the workforce considering issues such a 'same job, same pay', 'same job, same employment entitlements' and ensuring secure employment.

BIC/ APTIA is looking to ensure that the specific issues affecting the bus and coach industry are also ventilated before Government at the political and bureaucratic levels.

BIC is a member of ACCI's Workplace Relations Policy Committee and ACCI's Employment and Skills Committee. Both of these ACCI Committees allow BIC/ APTIA to advocate the issues which are specific to the bus and coach industry at a higher level.

Last month the ACCI Employment and Skills Committee met to discuss those issues that would be advocated by ACCI at the Employment Summit. BIC advocated strongly its position relating to the issues of visa relaxation to allow international bus drivers to gain visas to enter the Country and also the need to allow older Australian on the pension to continue to work without disadvantaging their pensions or superannuation.

Last month the ACCI Workplace Policy Committee also met and considered the likelihood of proposed legislative changes following the new Government's 'Securing Australian Jobs' policy positions. Policy positions upon the Government's 'secure employment' proposals were discussed.

## **INDUSTRY NEWS – What you need to know?**

### **Wage Rates**

Consumer price inflation has surged again, rising to 6.1% annually in the June quarter, well ahead of private sector wage growth of 2.4% a year, which remains near historic lows.

Annual inflation increased from 5.1% in the March quarter to 6.1% in June, while the RBA's preferred measures of underlying inflation, the trimmed mean, and the weighted median, grew by 4.9% (up from 3.7% in March) and 4.2% (3.2%) respectively, according to the ABS.

The Bureau said in a statement today that the annual CPI rise is the largest since the introduction of the GST in 2000, while the quarterly increase of 1.8% is the second highest since the introduction of the GST in 2000 (with last quarter's 2.1% rise the highest).

Wage rises are now way behind headline CPI, with the best measure, the WPI, growing by 2.4% annually in the private sector in the March quarter.

The June quarter WPI figures, which will allow a direct comparison with today's CPI, are set to be released on August 17.

RBA Governor Philip Lowe said last month that he expects the CPI to reach 7% by the end of the year.

After years of calling for larger wage rises, he has more recently expressed concerns about the wage-price spiral and suggested that increases greater than 4% would not be sustainable and that a "steady state" rise would be 3.5%.

ACTU secretary Sally McManus, however, described wage-price spiral fears as "a total boomer fantasy".

Treasurer Jim Chalmers says that inflation is likely to peak at 7.75% in the December quarter then decline over the next two years, while real wage rises will return next financial year, but the ACTU says the forecast only "deepens" the pay crisis, with the resumption of growth in mid-2024 meaning workers will have suffered four years of going backwards.

Treasury expected headline inflation of 5.25% by the middle of next year, 3.5% by the end of next year and 2.75% by the middle of 2024 – back inside the RBA's target range.

**Table 1: Major economic parameters<sup>(a)</sup>**

	Outcome	Forecasts									
	2020-21	2021-22		2022-23		2023-24		2024-25		2025-26	
		PEFO	Update	PEFO	Update	PEFO	Update	PEFO	Update	PEFO	Update
Real GDP	1.6	4 1/4	3 3/4	3 1/2	3	2 1/2	2	2 1/2	2 1/4	2 1/2	2 1/2
Employment	6.5	2 3/4	3.2	1 1/2	1 1/2	1 1/2	1 1/4	1	1	1	3/4
Unemployment rate	5.2	4	3.8	3 3/4	3 3/4	3 3/4	4	3 3/4	4 1/4	4	4 1/4
Consumer price index	3.8	4 1/4	6.1	3	5 1/2	2 3/4	2 3/4	2 3/4	2 1/2	2 1/2	2 1/2
Wage price index	1.7	2 3/4	2 3/4	3 1/4	3 3/4	3 1/4	3 3/4	3 1/2	3 3/4	3 1/2	3 1/2
Nominal GDP	4.4	10 3/4	11	1/2	5 1/4	3	1/4	5 1/4	4 1/2	5	5

(a) Real GDP and Nominal GDP are percentage change on preceding year. The consumer price index, employment, and the wage price index are through the year growth to the June quarter. The unemployment rate is the rate for the June quarter. Employment, the unemployment rate and the consumer price index are outcomes for 2021-22.

Note: Key commodity prices are assumed to decline from current elevated levels by the end of the December quarter 2022: the iron ore spot price is assumed to decline to US\$55/tonne free on board (FOB); the metallurgical coal spot price is assumed to decline to US\$130/tonne FOB; the thermal coal spot price is assumed to decline to US\$60/tonne FOB; and oil prices (TAPIS) are assumed to decline to around US\$100/barrel. The exchange rate is assumed to remain around its recent average level – a trade weighted index of around 63 and a \$US exchange rate of around 71 US cents. Interest rates are assumed to move in line with median market economist expectations.

Source: ABS Australian National Accounts: National Income, Expenditure and Product; Labour Force, Australia; Wage Price Index, Australia; Consumer Price Index, Australia and Treasury.

## Official agreements data showing rises of just 2.7% a year

The most recent official data on wage movements in enterprise agreements shows that those approved by the FWC in the March quarter of this year paid an average annualised rise of just 2.7%.

However, the measure is a lagging indicator, given it is released three months after the quarter.

Its lagging indicator status is also due to the time taken to finalise, lodge and win approval of deals.

Some high-profile bargaining claims are seeking 6%, such as the CPSU-MEAA log at the ABC and the FSU log served on major banks.

The unemployment rate dropped to 3.5% in the June quarter, the lowest level since February 1974, according to ABS data released today.

## The Government's Industrial Relations Agenda

The Government is moving rapidly to implement its Secure Australian Jobs Plan policy along with a small number of other changes to workplace relations legislation, such as implementing paid domestic violence leave.

The following below sets out a list of Government IR Policies taken to the election.

### **Making job security an object of the Fair Work Act**

Labor will enshrine secure work as an objective of the Fair Work Act. This means the Fair Work Commission will have to put job security at the heart of its decision-making.

The Fair Work Act currently requires the Commission to consider things like productivity and economic growth; the importance of work and family balance; and fairness at work; all very important considerations.

Adding job security strengthens our laws and ensures our main workplace legislation is relevant and fit for purpose.

When the Fair Work legislation was originally drafted over a decade ago it could not foresee the emergence or growth of new forms of insecure work, like gig work.

Including job security as an object of the Fair Work Act ensures the Fair Work Commission must consider job security in all of its decision-making.

### **A better deal for gig workers**

Labor will extend the powers of the Fair Work Commission to include “employee-like” forms of work, allowing it to better protect people in new forms of work from exploitation and dangerous working conditions.

This change will allow the Fair Work Commission to make orders for minimum standards for new forms of work, such as gig work.

This will ensure a greater number of Australian workers have access to entitlements and protections currently denied to them by the existing laws.

Labor would ensure the Fair Work Commission has the capacity and flexibility to include employee-like forms of work: that is, intervene or inquire into all forms of work and determine what rights and obligations may or may not apply.

It will give the Fair Work Commission enough flexibility to keep up with evolving and changing forms of work.

### **Standing up for casual workers**

Labor will legislate a fair, objective test to determine when a worker can be classified as casual, so people have clearer pathway to permanent work.

The meaning of casual employment has evolved and been upheld many times through common law. It has been characterised as the “absence of a firm advance commitment as to the duration of the employee’s employment or the days or hours the employees will work”.

The Morrison Government has ignored this and its recent changes to the Fair Work Act give employers the right to define someone as a casual, even if they work regular, predictable hours. This gives a green light to casualisation and makes the problem of insecure work worse.

Labor will amend this definition to restore the common law definition.

### **Same job, same pay**

A Labor government will uphold the principle that if you work the same job, you should get the same pay.

Labor will ensure that workers employed through labour hire companies receive no less than workers employed directly.

We have seen too many examples of companies across a variety of industries deliberately using labour hire to undercut the negotiated pay and conditions of workers who are employed directly.

For example, coal mine workers employed through labour hire being given full time 12-month rosters fixed in advance but employed as casuals on a fixed, all-inclusive hourly rate. They work side by side with directly employed permanent full-time workers, doing the same work for the same hours, on the same roster with the same skills – but being paid around 30-40 percent less.

As casuals doing the same work with the same qualifications, they should have been paid more – the same hourly rate plus the 25 percent casual loading.

Labor will ensure that workers employed through labour hire or other employment arrangements such as outsourcing will not receive less pay than workers employed directly.

### **Making wage theft a crime**

An Albanese Labor Government will legislate to make wage theft a criminal offence.

Labor has always stood for the protection of wages and conditions of workers in Australia and against their exploitation.

This includes wage theft which, since the exposure of the shameful practices of the 7-Eleven franchise nearly seven years ago, is being uncovered with such regularity and scale that it appears to have reached epidemic proportions.

Wage theft appears across a broad range of industries and disproportionately impacts young people, overseas students, migrant workers, and women.

A 2019 PwC report found that the underpayment of Australian workers' entitlements was estimated at \$1.35 billion per year.

The Morrison Government has known about this problem for a very long time, and despite repeated announcements that they would act, have still not delivered. They removed it from their own legislation.

Labor will consult with unions, States and Territories, and employer groups. Labor's federal wage theft laws will not override existing State and Territory laws where they currently operate.

### **A right to your super**

An Albanese Labor Government will legislate to include a right to superannuation within the National Employment Standards (NES), which will give Australian workers the power to pursue their unpaid superannuation as a workplace entitlement.

Individual employees currently don't have legal standing to pursue underpayment of superannuation unless it's specifically included in their employment contract or individual contract in particular terms. This means they need to rely on the ATO because of the way the superannuation guarantee charge works.

Including superannuation as an entitlement in the NES was a recommendation of the March 2022 Report from the Senate inquiry into unlawful underpayment of employees' remuneration.

This change will enable the Fair Work Ombudsman and other parties to pursue claims when workers have not received their full superannuation contributions and will improve the future financial security of workers—women in particular.

### **Limiting the use of fixed-term contracts**

Labor will limit the number of consecutive fixed-term contracts an employer can offer for the same role, with an overall cap of 24 months.

Fixed term contracts have a legitimate purpose. They allow employers to bring in staff to add skills and expertise required for a specific time period or project, or to manage an expected but temporary surge in work.

But back-to-back, fixed term contracts have become another form of insecure work. For employees on these contracts, the lack of permanency and security makes it harder for them to plan for their future, including securing a bank loan or mortgage.

Labor will amend the Fair Work Act to limit fixed term contracts for the same role to two consecutive contracts or a maximum duration, including renewals, of two years. There will be a mechanism for exceptions in limited circumstances.

### **Secure Australian Jobs Code**

Labor will introduce a Secure Australian Jobs Code to ensure that taxpayers' money being spent through government contracts is being used to support secure employment for Australian workers.

This Code will establish guidelines with respect to:

- The fair treatment of workers, including job security

- Fair and reasonable wages and conditions
- Ethical and sustainable practices such as ensuring environmentally sustainable outcomes
- Compliance with the Workplace Gender Equality Act 2012
- The consideration of local industry workforce capability and capacity, particularly in regional Australia.

### **Ensuring that government is a model employer**

A Labor Government would be a model employer and only utilise non-permanent employment where it is essential, and not as a way of simply minimising its permanent workforce numbers.

The Federal government employs nearly a quarter of a million people and can play a significant role in raising the standards around employment, but over the last eight years under the Liberals and Nationals has itself been a perpetrator when it comes to insecure work.

Labour hire, outsourcing and back-to-back fixed term contracts have become an all too familiar feature of the public sector.

### **Consultation on portable entitlement schemes for Australians in insecure work**

Labor will consult with state and territory governments, unions, and industry to develop, where it is practical, portable entitlement schemes for Australians in insecure work.

Variants of portable entitlement schemes have existed in different industries, such as construction, mining, and cleaning, for many years. Around the country, state and territory Labor and Liberal/National governments have introduced and administered these schemes.

Portable long service leave schemes for example, allow workers who move from project to project or job to job within a single industry to accumulate an entitlement to long service leave that would be denied to them because of the nature of their work.

Providing for portability of entitlements for workers in different industries and parts of the economy that are newer or emerging would also help ensure these workers have the same access to entitlements as workers in more stable or traditional industries. We will explore options through consultation with stakeholders to assess what and where it is practical.

### **A better deal for women**

Women are disproportionately impacted by insecure work. Nearly as many women as men work in Australia, but women are over-represented in casual and part-time work. Women are also over-represented in low-paid jobs which includes critical frontline work such as aged care.

An Albanese Labor Government will strengthen the ability and capacity of the Fair Work Commission to order pay increases for workers in low paid, female dominated industries.

Labor will fully implement all 55 recommendations of the Respect@Work Report and legislate the right to 10 days paid family and domestic violence leave as a national employment standard.

An Albanese Labor Government will also lead a national push to close the gender pay gap by legislating so companies with more than 250 employees will have to report their gender pay gap publicly, prohibit pay secrecy clauses and give employees the right to disclose their pay if they want to, and take action to address the gender pay gap in the Australian Public Service.

## **Abolishing the Registered Organisations Commission (ROC) and the Australian Building and Construction**

### **Commission (ABCC)**

The ROC and the ABCC were established by the LNP government in 2016. Since then, they have become politicised and discredited.

The ROC has been thoroughly discredited by its continued and costly pursuit of a political witch hunt against one particular union for matters going back to 2007. Around \$1.3 million taxpayer dollars was spent pursuing the union, only to be abandoned by the ROC in February 2022.

The ABCC relentlessly pursues union officials over minor infractions while doing little to stamp out wage theft or sham contracting in the construction industry or to address worksite safety and deaths.

Building and Construction workers should have the same rights as other workers.

### **What's next?**

ACCI anticipates a significant, multi-issue amendment Bill being introduced by the end of the parliamentary year, seeking to implement most of Labor's policy commitments in workplace relations. BIC/ APTIA through its Industrial Working Group (IWG) will take an active role in seeking to shape how changes are implemented and in the passage of amendments, for example by actively participating in any Senate inquiry into the amendments.

BIC/ APTIA will also have input through the ACCI Workplace Policy Committee.

## **Industry Employment Summit**

The Albanese Government will release discussion papers to guide its promised jobs and skills summit, to be held on September 1 and 2 in Canberra, it revealed today.

Addressing a joint media conference with Prime Minister Anthony Albanese, Treasurer Jim Chalmers said the Government will release an agenda "towards the end of this month", will issue invitations "most likely" at the

start of next month and publish discussion papers "to help guide the discussion that will be had at the forum itself".

He said workplace relations minister Tony Burke will lead the job security and wages "workstream", while women's minister Katy Gallagher will coordinate work on women's labour market experiences, home affairs minister Clare O'Neil migration, social services minister Amanda Rishworth barriers to employment, skills and training minister Brendan O'Connor skills and training, and industry and science minister Ed Husic renewables, digital and manufacturing "as well as the other industries where we have big opportunities before us".

The prime minister said he intends to bring together "about 100" invitees from business, unions, civil society groups and "other levels of government" for the summit.

He flagged that "we also need to have some real discussions about productivity and how we move it forward".

"We know that the way that you boost growth without putting pressure on inflation is to ensure that productivity is the real focus."

"That's a way to boost profits and boost wages whilst boosting the economy."

Albanese said the jobs and employment white paper Labor promised during the election campaign will be developed by Treasury, while the Treasurer said it would be published in about 12 months.

Chalmers said the Government had "deliberately chosen" to hold the summit before its October Budget "because there may be steps proposed and agreed at the summit which could be implemented quickly". The summit will look at:

- keeping unemployment low, boosting productivity and incomes
- delivering secure, well-paid jobs and strong, sustainable wages growth
- expanding employment opportunities for all Australians including the most disadvantaged
- addressing skills shortages and getting our skills mix right over the long term
- improving migration settings to support higher productivity and wages
- maximising jobs and opportunities from renewable energy, tackling climate change, the digital economy, the care economy, and a Future Made in Australia
- and ensuring women have equal opportunities and equal pay.

Albanese promised during the election campaign that if Labor won, he would commission a labour market white paper to foster "secure work and higher wages" and convene an employment summit to boost job security and bolster the ailing bargaining system.

Albanese said in a speech to ACCI in Sydney that one of his first acts would be to convene a summit to "bring employers and unions together to collaborate on secure work and to ensure enterprise bargaining works effectively".

The labour market white paper, he said, will "set out a plan for how we will promote secure work and higher wages".

Albanese said in a July 2021 address to the National Press Club that a Labor government would prepare a white paper on full employment, but it appears this proposal has shifted with the unemployment rate dropping to about 4% at that stage.

## Sexual harassment in the Workplace

The Albanese Government has the opportunity to take "bold and decisive action" to make workplaces safe and harassment-free, according to Attorney-General Mark Dreyfus QC.

In opening remarks today to a Respect@Work Council forum in Sydney, Dreyfus reiterated the Government's commitment to imposing a positive duty on employers to prevent sexual harassment in the workplace, via an amendment to the Sex Discrimination Act.

Sex Discrimination Commissioner Kate Jenkins recommended the reform in her Respect@Work report, but the former Morrison Coalition Government failed to legislate it, despite significant pressure from campaigners.

Dreyfus said the Government will also follow the Jenkins recommendations to amend the Fair Work Act to:

- explicitly prohibit sexual harassment.
- enable unions or other organisations to bring sex discrimination legal action on behalf of complainants; and
- establish cost protections for complainants.

He did not provide further details of the timing of the legislation but said the changes will improve workplace protections against sexual harassment and improve access to justice for those who experience unlawful sex discrimination.

The Government has also pledged to invest more than \$35 million over four years towards Respect@Work implementation, including \$24 million to "properly fund" working women's centres across Australia.

"This funding will also enable the Australian Human Rights Commission to establish a one-stop shop and put in place a disclosure process to assist those who have experienced sexual harassment, to hear and confidentially document their historical disclosures," Dreyfus said.

The funding aims to support the AHRC in identifying practical strategies to strengthen ways to prevent and respond to sexual harassment at work, as well as support those who have experienced it.

Dreyfus told the council today that sexual harassment is unacceptable and by no means inevitable.

"It is preventable," he said, echoing Jenkins' words in her report.

"And our government will work to ensure it is addressed.

"The evidence is clear – a safe and harassment-free workplace is also a more productive workplace."

## IMPORTANT DECISIONS

### No onus to engage with worker's investigator

#### Toni Mueller v The Real McCoy Snackfood Co Pty Limited [2022] FWC 1871 (19 July 2022)

The FWC has backed the dismissal of a medically unfit warehouse worker no longer able to fulfil the inherent requirements of his role, finding his employer had no obligation to engage with a private eye he hired to conduct a workplace investigation on his behalf.

The Real McCoy Snackfood Co Pty Limited (trading as Snack Brands Australia) dismissed the receivables forklift operator in October last year on the basis that health restrictions stopped him performing pre-injury duties were unlikely to change in the foreseeable future.

The 64-year-old operator, who worked for the company for almost 20 years, had a range of continuing health conditions including hypertension, high blood pressure, high cholesterol, coronary artery disease, an abdominal aortic aneurysm identified following heart surgery, arthritis in the knees, obstructive sleep apnoea, kidney problems and breathlessness that reduced his ability to physically exert himself or stand for long periods.

Real McCoy said his conditions prevented him from performing his pre-injury duties since at least December 2020 and had rostered an additional full-time employee on his shift to help complete his tasks since December 2019.

But the company contended this was no longer feasible, after an occupational physician last March found his restrictions unlikely to change in the foreseeable future and told him to avoid lifting weights greater than 5kg, squatting and kneeling, strenuous activities such as shovelling, carrying heavy loads upstairs, and repeatedly climbing up and down stepladders.

The operator in his unfair dismissal application claimed that Real McCoy did not reasonably attempt to find a suitable alternative role, and that some duties included in his fitness test could have been ameliorated by reasonable adjustments, or only had to be performed due to a lack of safe systems.

He accused the company of misleading the expert physician by supplying false information about the required duties and claimed that based on "excessive overtime" worked in the past, his position had always been a two-person role.

With the operator in April last year hiring a workplace investigator, he further contended that Real McCoy's failure to assist, engage with or respond to his workplace investigation was "wrong, improper, or gave rise to a denial of procedural fairness or natural justice, and/or inhibited" him from properly engaging with the show cause process.

Deputy President Gerard Boyce found it unnecessary to resolve allegations against Real McCoy that mostly appeared to "arise from or are connected to" the private investigator's activities and analysis.

These included harassment, victimisation, bullying, discrimination, general protections and employment contract breaches, privacy, policy and safety contraventions, misleading and deceptive conduct, and false evidence.

Noting the operator provided no alternative medical evidence or opinion to challenge the findings and conclusions of the expert medical report, the deputy president said many of the allegations were not properly before him to determine and some were "serious and/or scandalous, and absent the appropriate evidentiary foundation" to be made.

Deputy President Boyce chose not to rely upon, or give any weight to the investigator's evidence, which he said did not set out what facts he relied on as proven or assumed.

"Rather, [the investigator's] evidence appears to have sifted through facts, selectively chosen some of those facts, accepted them as primary facts, not articulated why or how such facts have been chosen or selected, made findings based upon opinion, and then (in some cases) made submissions or argument in support of the [operator's] case," he said.

Stating that the investigator was "not a fact finder for the purposes of these proceedings", the deputy president found his evidence of "no assistance or value in the resolution of the real issues for determination".

Turning to whether Real McCoy unreasonably refused to let the investigator have the assistance of a support person during dismissal-related discussions, Deputy President Boyce said there an employer has no obligation to allow an employee to have an "advocate" or "representative" present.

"In my view, there can be no suggestion that the commencement of a show cause process against an employee gives rise to a requirement upon an employer to engage with an external workplace investigation of the kind initiated by the [operator]," he said.

"Neither can there be any suggestion that a refusal by an employer to engage with such a process would give rise to a finding of an unreasonable refusal by an employer to allow the [operator] to have a support person present for discussions relating to his or her dismissal."

Deputy President Boyce continued that "assisting in discussions, by a support person, in relation to a proposed dismissal of an employee, does not extend to the conduct of a workplace investigation by an employee into his or her employer that seeks, requires or demands wide ranging discovery, document disclosure and document production, and answers to (for want of a better term) interrogatories".

Holding that the operator's restrictions genuinely prohibited him from safely carrying out the inherent requirements of his role, the deputy president said there will "always be potato spillage that requires shovelling, and squatting and kneeling", while another inherent task involved climbing up and down step ladders.

In a real and practical sense, he said the only way for the inherent requirements to be fulfilled in a way that accommodates the operator's restrictions, is for Real McCoy to continue engaging an additional employee to perform those tasks.

But the company's occasional use of other employees to help get the job done should not "remove or otherwise diminish" the inherent requirements of the operator's role on a standalone basis, he said.

Further rejecting the operator's claim that it would be reasonable to let him only drive a forklift, Deputy President Boyce found this to be just one aspect of his role and not "the" role.

Concluding Real McCoy had a valid reason to dismiss the operator based on his capacity and the absence of any reasonable modifications that could be made, while no evidence had been presented of another suitable available role, the deputy president dismissed the application.

## **Guidance for non-vaxxed unfair dismissal applicants**

### **Mrs Eileen Owens v I-Med Radiology Ltd [2022] FWC 1823 (12 July 2022)**

A FWC presidential member has issued a 10-point rebuttal of COVID-19-related arguments put by a sacked unvaccinated worker, to help her to consider whether to proceed with positions likely to be "irrelevant" in her unfair dismissal claim and that have been "emphatically rejected in numerous cases" before the tribunal and courts.

After accepting that the radiographer lodged her claim within time and didn't need an extension of time, Deputy President Ingrid Asbury said she had reached a stage where she could have the merits determined.

However, she noted the former I-Med Radiology Ltd worker had not yet lodged her "full case" as to why she had been unfairly dismissed.

The deputy president continued that she had reached the provisional view that the arguments already put would be unlikely to succeed when the matter is heard "and will likely be irrelevant to the question of whether her dismissal was unfair".

She said while she would not go "so far as to say the [radiographer's] case lacks reasonable prospects of success", the arguments she had canvassed, summarised in the deputy president's list below, "have been emphatically rejected in numerous cases before courts and the Commission".

The deputy president said the radiographer is entitled have her case heard, but "any expectation that such arguments will be entertained by the Commission is misconceived and it is improbable that a different decision will be made in respect of those arguments" (see [details](#) from the decision of some of demands the radiographer put to the company in a letter last year).

She said that to help the radiographer "make an informed decision about the future conduct of her case", she should note the following 10 points that apply to workplaces subject to Government COVID-19 directives:

- (i) "The Fair Work Commission is not a Court and has no power to make a binding declaration about the validity of State or federal legislation including health directives or orders made pursuant to State legislation.
- (ii) At the time of the Applicant's dismissal and to date, Australian Courts have upheld the validity of directives/mandates and public health orders issued by State Governments in response to the COVID-19 Pandemic including requirements that workers in particular settings are vaccinated.
- (iii) The argument that directives/mandates and public health orders issued by State Governments are inconsistent with federal law and are invalid because of s109 of the Constitution has been rejected by Australian Courts.
- (iv) At the point the Applicant was dismissed, she was subject to the requirements of a Public Health Order issued by the Queensland Government and the Respondent was prohibited by law from allowing her to attend the workplace unless she provided evidence of vaccination.
- (v) A requirement that the Applicant comply with the Public Health Order by receiving a vaccine, to continue to work for an employer, does not involve coercion or forcing the Applicant to participate in a medical trial.
- (vi) Incentives to encourage employees to be vaccinated are not coercion.
- (vii) The Applicant is entitled to her views about vaccination and to refuse to be vaccinated, but that is a choice and to decline to be vaccinated or provide proof of vaccination pursuant to legal requirements for entry to a workplace, will result in the employee being legally excluded from the workplace.
- (viii) While the choice may be difficult, it is nevertheless a choice.
- (ix) COVID-19 Vaccinations are approved for use in Australia pursuant to Commonwealth legislation and employers are not required to prove their safety or efficacy to employees or to the Fair Work Commission in the event of a dispute with an employee.
- (x) Employers are not required to lobby Governments to have directives revoked or amended before dismissing employees for non-compliance."

Deputy President Asbury found that the radiographer didn't need an extension of time because her employer could not provide a clear dismissal date.

I-Med Radiology dismissed her in December last year, after more than 13 years' service, for being unable to fulfil the inherent requirements of her role, due to her failure to comply with the company's COVID-19 vaccination policy and Queensland's mandatory vaccination public health orders.

The radiographer attended a December 17 meeting with a doctor and the company's HR business partner, who told her that I-Med could no longer continue her employment.

They said she would get paid five weeks in lieu of notice.

On December 21 the doctor sent the radiographer a letter terminating her employment.

It said that her last day of employment was December 17.

Deputy President Ingrid Asbury found that I-Med didn't tell the radiographer "In plain and ambiguous words" that it dismissed her on December 17.

She acknowledged that during the meeting on December 17, the company told the radiographer that the company had decided to dismiss her but said it did not definitively tell the worker that her dismissal would take effect on that date.

Deputy President Asbury highlighted that I-Med did not require the radiographer to return keys or property on that date.

She said that letter uses present tense such as "you are now unable to attend for and perform work".

The deputy president found that in that context, the statement in the letter that "your final day of employment was 17 December" was "confusing".

She found that I-Med dismissed the radiographer on December 21 and consequently she filed the application within the 21-day limit.

## IMPORTANT DATES

- **Australasian Bus and Coach Expo, Sydney – Wednesday, 5 & Thursday, 6 October 2022.**
- **APTIA AGM – Sunday 13 November 2022 (Brisbane)**
- **BIC National Conference – Monday 14 November 2022 to Wednesday 16 November 2022.**
- **APTIA breakfasts – Sydney (Tuesday 4 October 2022)**



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