

Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association
▶ *Industrial arm of the Bus Industry Confederation*

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.

Welcome to the July 2019 edition of Everybody Out

- ▶ Membership News
- ▶ Industry News
- ▶ Important Decisions
- ▶ Important Dates



Wayne Patch
Chairperson, APTIA

Membership News

- 2019 Bus Expo and Maintenance Conference
- APTIA breakfasts – Sydney 17 September 2019
- BusNSW Conference 2019

2019 Bus Expo and Maintenance Conference



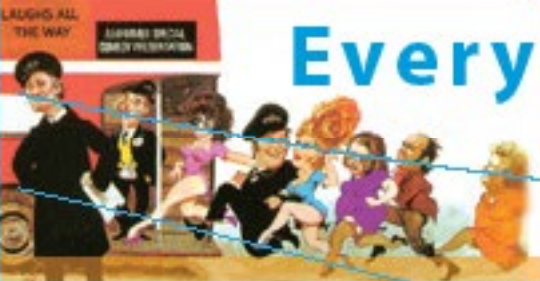
Registrations for the
**2019 BusVic Bus
Expo & Maintenance
Conference** are now
open!
www.busvic.asn.au

You are encouraged to register now for this spectacular event being held at the Melbourne Convention and Exhibition Centre on Tuesday 1st and Wednesday 2nd October 2019. Strong demand from industry suppliers has the exhibition nearly at capacity. This event is the only bus and coach expo being held in Australia in 2019 and will deliver unprecedented quality and value for attendees.

The draft program will be available in April and will focus on matters currently confronting the industry and delegates will be able to take away learnings from the sessions and apply them to their workplace.

KEY EVENT FEATURES:

- 10,500m² of vehicle and equipment exhibition space as well as trade exhibition booths
- Technical & management conference sessions delivered within the exhibit. Topics include:



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ *Industrial arm of the Bus Industry Confederation*

- (i) Technical - Panel Maintenance & Replacement, Air Conditioning, Collision Avoidance, Fuel, Retrofitting, Fire Suppression, Tyres, Graffiti.
- (ii) Management - The Changing Mobility Landscape, Maximising Technology and Connected Buses, Managing an Ageing Workforce, Casual Employees.
- (iii) 1400 strong industry gala dinner on Tuesday 1st October in the Melbourne Room at Melbourne Exhibition and Convention Centre. Entertainment includes The Voices supergroup and comedian.
- (iv) Drinks and canapés on Wednesday 2nd October at Munich Brauhaus, South Wharf.
- (v) Keynote speakers – former Prime Minister, the Hon John Howard will be the keynote speaker on Tuesday 1st October and cricket legend Steve Waugh will be the keynote speaker on Wednesday 2nd October.

APTIA Breakfasts - Sydney 17 September 2019



For all NSW bus and coach IR nerds put the date, Tuesday, 17 September 2019, into your diary.

APTIA's third breakfast for the year will take place as guests of Keolis Downer at the Courtyard Marriott Hotel on 7-11 Talavera Road, North Ryde.

Note the change of date and venue.

Invitations will be sent out shortly and the topic remains:

“Can we or should we still employ casuals?”

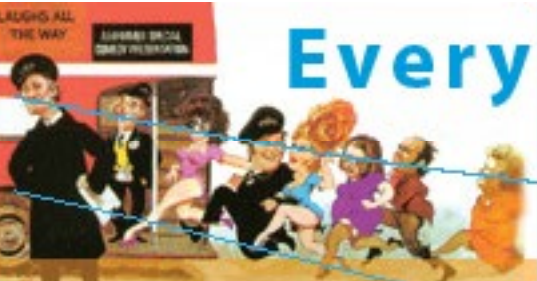
At the previous two breakfasts in Brisbane and Melbourne there was much discussion about all the issues surrounding casual employment including the impact of Skene's case, casual conversion and what to pay casuals who work overtime and on weekends.

BusNSW Conference 2019



BusNSW held its annual conference at the idyllic Fairmont Resort in the Blue Mountains on 18 and 19 July 2019. It was very well attended by bus and coach operators and manufacturers along with NSW officials and politicians.

Maria Capati from Piper Alderman, solicitors, provided a summary of the Chain of Responsibility and WHS obligations for operators on the first day of the Conference whilst APTIA was represented on an industry panel on the second day.



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ *Industrial arm of the Bus Industry Confederation*



The highlight of the Conference was the standing ovation given to Paralympian Kurt Fearnley AO after he had taken the delegates through some of his many triumphs, including his gold medal win in the marathon T54 at the 2008 Beijing Paralympics and his incredible trek up and across the Kokoda track some 96 kilometres in 2009. He was inspiring.



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association
Industrial arm of the Bus Industry Confederation

Industry News - what you need to know

- Four Yearly Review of the PVTa
- Whistle blower legislation changes from 1 July 2019
- Where is the Government Heading?
- Increases to the super guarantee charge

Four Year Review of the PVTa

There are three issues that remain outstanding from the 4-yearly review of the modern awards, which includes the Passenger Vehicle Transportation Award 2010, and which are:

- Finalisation of the issue of overtime for casuals
- Finalisation of the exposure draft of the PVTa
- Payment of wages on termination

APTIA has recently represented the industry in the Fair Work Commission regarding the issue of overtime for casuals which has prompted the following update.

Overtime for Casuals

The OFWO had previously identified that the PVTa was not clear as to whether overtime would apply for casuals. Vice President Hatcher, who headed the Casual Full Bench gave directions on 15 March 2019 that both APTIA and the TWU provide a joint advice to the FWC about the issue of overtime for casuals.

Following a negotiated outcome APTIA and the TWU advised the FWC that the PVTa Exposure draft should include a clause (cl. 8.1 (e)) which stated that "ordinary hours for a casual employee will be up to 38 hours a week."

More importantly APTIA deferred to the position in the PVTa Exposure draft (cl.6.5 (c)) which stated that the casual loading of 25% would only apply to ordinary hours and not to overtime.

This position was accepted today by the FWC. This means that no casual loading (25%) is payable to a casual who may work hours in excess of 38 hours a week as overtime.

Exposure draft

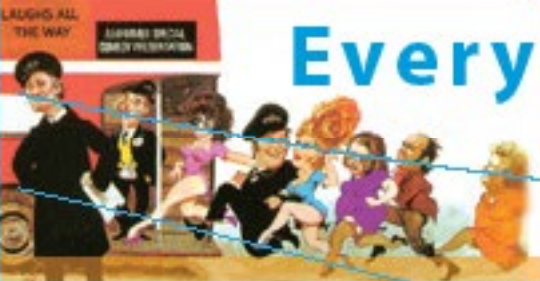
It has always been the intention of the FWC to publish a new set of modern awards. Currently the current 122 modern Awards have been the subject of a number of Exposure drafts.

As the process is concluding the FWC has indicated that they propose to publish a final draft of the PVTa Exposure draft in August 2019 and provide a month for comment with a view to publishing a new PVTa in October 2019.

Payment of Wages

There is an application by the Australian Business Limited to reform the standard 'payment of wages' clause in the PVTa, along with other modern awards which has been opposed by the Transport Workers Union. APTIA has not entered the discussion on the issue as members do not see any need for change as the current clause is accepted.

In a recent decision the Fair Work Commission has decided to make the following change to the PVTa 'Payment on termination of employment' clause.



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ Industrial arm of the Bus Industry Confederation

19.3 Payment on termination of employment

(a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:

(i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and

(ii) all other amounts that are due to the employee under this award and the NES.

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under this clause. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under s.120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

Note: The current PVTa clause 19.3 states:

"Notwithstanding anything contained within this clause, the employer must pay to an employee who leaves or is dismissed all moneys due to the employee within two working days."

It is not sure that these timelines will be met but as far as the PVTa is concerned the process is concluded and at some stage prior to the end of the year an entirely new Award will be released.

Whistle blower legislation changes from 1 July 2019

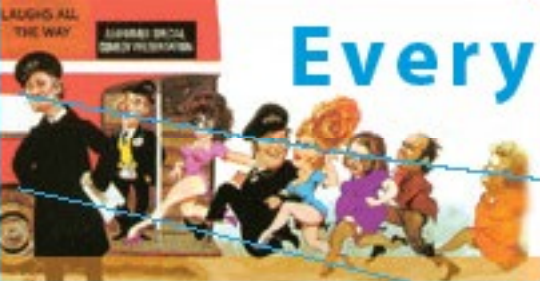
The Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 aims to encourage ethical whistleblowing and discourage white collar crime, while holding employers accountable for protecting eligible whistleblowers.

From 1 July 2019, Australia will have a new whistleblower protection regime covering the corporate, financial and tax sectors. The Act makes important changes to the Corporations Act 2001 (Cth) and the Taxation Administration Act 1953 (Cth) affecting almost all companies, including foreign corporations, trading or financial corporations formed within the limits of the Commonwealth, ADIs, NOHCs, super funds, and insurers.

This means thousands of Australian employers will need to rapidly change their approach to whistleblowing.

Key reforms include:

- Protected disclosures may relate to matters beyond criminal breaches, including breaches of tax laws, ASIC laws and APRA laws. Conduct that is not illegal but indicates systemic issues will also be disclosable. However, the protections will not extend to disclosures about personal employment or workplace grievances such as interpersonal conflicts, transfer, promotion, or disciplinary decisions.



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ *Industrial arm of the Bus Industry Confederation*

- More people can be 'eligible whistleblowers', including anyone who has ever been in a relationship with a company (such as former employees, contractors, employees of contractors, associates, and relatives of such individuals).
- More people can be 'eligible recipients' of disclosures, including senior managers, directors and auditors; and in certain circumstances, even journalists and politicians.
- Stronger protections for whistleblowers including anonymity, increased immunities against prosecution, and protection against detriment through victimisation.
- Whistleblowers are no longer required to act in good faith to be protected (although they need to have reasonable grounds to suspect misconduct).

Severe civil and criminal penalties (\$1.05million for individuals and \$10.5million for companies) will apply to employers who breach those protections, and courts are empowered to make orders for relief against a company if they fail to fulfil a duty of care to protect a whistleblowing employee from detriment.

Companies and entities (i.e. public companies, large companies with any two of the following; more than 100 employees, \$50million in gross revenue or \$25Million in consolidated gross assets) must develop whistleblower policies by 1 July 2019 which deals with protections for whistleblowers, how investigation will occur once notice is given and fair treatment for parties mentioned by whistleblowers.

Most commentary surrounding the new laws is for large companies to initiate training for their staff so that they understand fully the new policies that are in place to deal with whistleblowing.

Where is the Government heading?

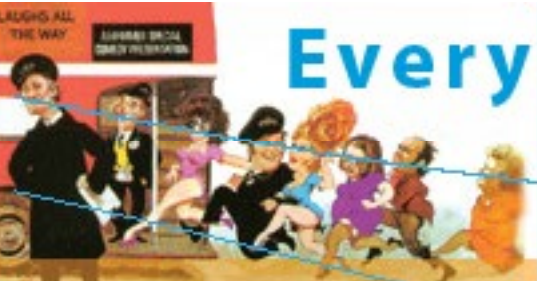


The Morrison government's new industrial relations minister Christian Porter has launched a major review of the nation's workplace laws, seizing upon the Coalition's electoral victory as a mandate for reform. The strategies can be summarised as follows:

1. The reintroduction of two previous Bills i.e. "Ensuring Integrity" and "Proper Use of Workers Benefits" Bills.
2. Consideration of three major IR issues
 - (i) Enterprise Bargaining
 - (ii) Casual employment
 - (iii) Labour Hire
3. Dealing with wage theft

The minister, who is also the Attorney-General, will consider submissions about the definition of a casual employee - which business leaders and unions had told him caused "frustrations" amid disputes over workers' "double dipping" claims - as part of the review.

While Porter has not committed to legislating an objective test, as promised by the ALP ahead of last month's federal election, Porter acknowledged that "there is a view that there is a lack of clarity" under the current law. Everyone benefits from having clarity in the system," he stated recently.



Everybody Out

**PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS**

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

Mr Porter said he would seek submissions over the next six to nine months, vowing only to make changes that were "evidence based" and would benefit both workers and employers. "First of all, I want to be convinced that there is sufficient uncertainty that it's actually creating a problem," he said. "What I don't want to do is assume problems based on advocacy." Employers have been concerned about the casual issue since the Federal Court ruled that a former truck driver who worked for Rio Tinto through a labour hire company was a permanent employee owed annual leave and other entitlements, despite having been hired as a casual. The case has sparked a number of class action lawsuits in the mining industry, with retail and hospitality employers fearing they could be next.

A government regulation enacted by former minister Kelly O'Dwyer last term aims to stop workers from "double dipping" on entitlements and the casual loadings that are supposed to compensate for them, but is yet to be tested in court. The review will also examine the enterprise bargaining system and "better off overall" test, which enterprise agreements must meet before the Fair Work Commission approves them and consider if changes can be made to speed up approvals. The Shadow IR Minister, Tony Burke has called upon the Morrison Government to spell out the terms of its IR review and whether it extends to changing unfair dismissal laws. Burke claimed that Porter had consulted with business and announced his intention to review the IR system, despite the Coalition failing to pledge major changes during the election campaign. Burke claimed further that Government MPs are "giving interviews, specifically talking about wanting to make it easier to fire people."

"Now what people want with their jobs is to make sure that their jobs are reliable. "They want their jobs to be secure."

"And what people are finding at the moment is they have a Government that wants them to be paid less and wants their jobs to be less secure. "Now it's for the Government to put forward exactly what these industrial relations changes will involve."

Burke said the Coalition took the same stance at the 2004 election when it also won control of the Senate and "that landed us with Work Choices." "We'll see what they do this time."

Increases to the super guarantee charge

Unions have welcomed the Morrison Government ruling out any change to the timetable for raising employer super contributions to 12%. The current 9.5% contribution is set to rise to 10% in July 2021, before reaching 12% in 2025 by annual increments of 0.5%. The ALP used the resumption of Federal Parliament to quiz the Coalition about its commitment to the legislated timetable, in the wake of a group of Coalition MPs arguing against increasing the SGC while a think-tank, the Grattan Institute says that increases in compulsory super come at the expense of wage increases that most workers would lose in the compulsory super trade-off.

In the Senate the ALP asked Finance Minister Mathias Cormann if he would rule out any changes to the timeline and he replied in the affirmative. The ACTU said the proposed Super Guarantee Contribution increase would mean that a worker paid \$60,000 per year will increase their retirement savings from \$299,000 to \$368,000, with a corresponding increase in retirement income from \$38,900 year to \$40,950.

The peak body's president, Michele O'Neil, said the freeze in the SGC had also exacerbated the gender gap on super which stands at 47% per cent at retirement. "The current rate was frozen five years ago and we welcome Minister Cormann's commitment to the established timetable, which will see increased contributions from 2021/2022," O'Neil said.

"Increasing the superannuation guarantee will mean thousands of dollars more in retirement income for someone on the median wage, this is a real difference in quality of life" she said.



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

Important Decisions

- Business efficiencies not relevant to redundancies
- Authority of the OFWO overturned
- Sacking by Text not acceptable
- Allowances also docked for partial strike action

Business efficiencies not relevant to redundancies

Mr. Brian Broudou v Eurolinx Pty Ltd [2019] FWC 4469 (8 July 2019)

The FWC has rejected a service manager's attempt to establish that his dismissal did not constitute a genuine redundancy, finding the employer was under no obligation to address its business efficiency issues when it put him off. In handing down his decision on the unfair dismissal application, FWC Deputy President Gerard Boyce has given a clear-eyed description of the employer's managerial discretion in the context of a purported genuine redundancy. The Commission heard that Eurolinx Pty Ltd restructured its business after a 15% drop in sales and 16% decline in service activity and had redistributed the service manager's duties among four other employees.

The company told the FWC it made the decision with "the commercial challenges at hand and sustainability of the business in mind". The employee, dismissed in February this year, argued that Eurolinx would have had no need to make his job redundant if it had addressed efficiency issues across the business. However, Deputy President Boyce said Eurolinx was entitled to structure its business as it saw fit. "It is worth noting the [employee] was critical of the employer's management of the business in general," Deputy President Boyce said. "The [employee] submitted that there were issues with efficiency across the business, which he suggested should have been dealt in order to save on costs.

"The [employee] claims there would have been no need to make his job redundant had those issues been addressed.

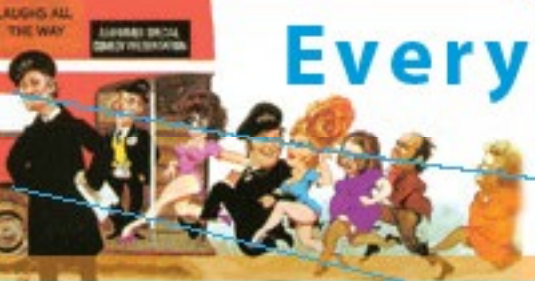
"While [Eurolinx] conceded there may be efficiency issues in the business, this argument is not to the point. "The law more-or-less permits an employer to structure their business as they see fit. "In this instance, the Fair Work Commission can take no recourse against what is clearly within the bounds of managerial discretion."

The service manager also claimed his redundancy could not be genuine as Eurolinx allocated some of his duties to an employee hired after he had been dismissed. However, Deputy President Boyce said even if some of the employee's duties were still required, his job ceased to exist. "The [employee's] argument is untenable.

"Section 389 of the Act is not concerned with whether duties survive. "The section is concerned with whether the job previously performed by the applicant still exists. "[Eurolinx] reacted to a downturn in business by redistributing duties among employees. "Those duties were the [employee's] duties. "Following that redistribution, it became apparent that there were no substantive duties left for the [employee] to perform. "Stated in the language of the Act, there was a change in the operational requirements of the [Eurolinx] enterprise and, as a result, no one was required to perform the [employee's] job."

Deputy President Boyce also accepted that Eurolinx complied with its redeployment obligations and that there was no longer a suitable job for the service manager to perform within the business. "As aggrieved as [the employee] is by [Eurolinx] decision to make the role redundant, I have determined on the evidence before me that decision was not made contrary to the Act."

Finding the redundancy genuine, Commissioner Boyce rejected the service manager's unfair dismissal application.



Authority of the OFWO overturned

Leigh Alan Jorgensen v Fair Work Ombudsman [2019] FCAFC 113 (8 July 2019).

A landmark contempt finding and accompanying jail sentence hailed as proof of the FWO's commitment to justice has been overturned by a full Federal Court that found the ruling judge's "open" hostility to the underpaying employer compromised his ability to consider the evidence. When Federal Circuit Court Judge Salvatore Vasta in May last year held Cairns owner-operator Leigh Jorgensen in contempt for defying a court order freezing his assets, then-Ombudsman Natalie James tweeted "here's our response" in reference to Jorgensen's claim that workers at Trek North Tours would "not see a cent" of their outstanding wages. James later added that "we will use every lever open to us to ensure the integrity of the administration of justice and compliance with court orders. . . [including] unprecedented new actions. . . such as this one".

Jorgensen spent a night in prison near Cairns after Judge Vasta imposed an immediate 12-month sentence for contempt, ruling that he would be released in 10 days, on payment of \$84,956.75 he owed to the FWO. Jorgensen the following day won a stay order pending the result of his appeal, on the basis that he surrender his passport, reside at his home in Cairns, remain in Queensland and report to police twice a week.

The contempt charge flowed from a 2015 Federal Circuit Court judgment in which the FWO obtained fines of \$55,000 and \$12,000 against Trek North and sole shareholder and director Jorgensen respectively for ignoring compliance notices in underpaying five workers who acted as tour desk agents. Noting that Jorgensen had told a Fair Work inspector that "the Fair Work Act reeks of fascism and I will never pay any of the money", Judge Michael Jarrett also ordered Trek North to back-pay \$29,956 to the workers, who had arrived on 417 working holiday visas from Hong Kong, the Netherlands, Italy and Taiwan and worked at three of the company's offices for up to four months.

While Jorgensen subsequently paid his \$12,000 fine, freeing up his personal account, Judge Jarrett's orders freezing company assets remained in force for the outstanding \$84,956.75. It was his breach of those orders in transferring \$41,035 out of two company accounts to a family trust in August 2015 that led to the FWO in November 2017 initiating its first contempt of court application. Justices Peter Greenwood, John Reeves and Michael Wigney yesterday set aside Jorgensen's convictions and ordered a retrial with a different judge after finding Judge Vasta's "dismissive" attitude represented a substantial miscarriage of justice. "[Judge Vasta's] interventions both undermined the proper presentation of Mr Jorgensen's case and represented such an egregious departure from the role of judge presiding over an adversarial trial that it unduly compromised his honour's capacity to objectively evaluate the evidence," the bench said.

"[Judge Vasta's] aggressive and, at times, unfair questioning appeared on occasion to confuse Mr Jorgensen and cause him to make concessions he may not otherwise have made. "His honour also frequently cut Mr Jorgensen off while he was endeavouring to explain critical aspects of his case, in particular his belief that the impugned transfers fell within the 'ordinary and proper course of business' exception.

"Not only did his honour conduct much of the cross-examination, he also appeared openly hostile to Mr Jorgensen, was at times disparaging and sarcastic, commented on the evidence while it was being given and, not only belittled the case advanced in Mr Jorgensen's defence, but made 'obvious to all his profound disbelief in the defence being advanced'." The bench noted that "the error or irregularity in question here was unquestionably serious and fundamental". "The denial of procedural fairness occasioned by the primary judge's excessive and unwarranted interventions were such as to 'strike at the validity and acceptability of the trial and its outcome'. "Mr Jorgensen did not have a proper trial and there has accordingly been a substantial miscarriage of justice."



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

The appeal bench also threw out the FWO's cross-claim seeking costs refused by Judge Vasta after he concluded that "sending you to prison and having you lose your business [as a consequence of awarding costs] seems to me to be too harsh a punishment, and not what the community expects in a matter such as this". In a statement, the FWO said that "as this matter is now back before the Federal Circuit Court the Fair Work Ombudsman has no further comment". Jorgensen's win in court comes two weeks after the Australian Securities and Investments Commission disqualified him from managing companies for the maximum period of five years for his involvement in three failed companies (North Trek Tours, Cairns Tour Bookings and Tudoods).

The three companies were placed into liquidation between April 2012 and January 2017, owing about \$1.1m to creditors. His disqualification comes after an earlier ASIC case in which, after being tipped-off by the FWO, it charged Jorgensen in early 2017 with breaching s1308 of the Corporations Act by providing a false or misleading statement to it when in February 2016 he sought to deregister Trek North Tours while still owing \$55,000 to the Federal Government. Jorgensen had in March 2016 ceased acting as a director of Trek North, four months before the appointment of a liquidator to the company. While ASIC in February last year won a conviction and \$2000 fine against Jorgensen in Cairns Magistrates Court – bringing an automatic five-year disqualification from managing a company – the judgment was overturned in Cairns District Court six months later, despite the charge of providing a false or misleading statement being proved. As a result, Jorgensen's conviction for breaching s1308 was quashed and he lodged \$2000 as security on a two-year good behaviour bond, under the supervision of a probation officer.

Sacking by Text not acceptable

Van-Son Thai v Email Ventilation Pty Lt [2019] FWC 4116 (27 June 2019)

A senior FWC member has reiterated that no employer should dismiss a worker by electronic means, finding the sacking of a supervisor via text message "disgraceful and grossly unfair". Deputy President Peter Sams rebuked Email Ventilation Pty Ltd's sole director for his "hopeless manner" in dismissing a supervisor in July last year after he refused to work the same hours for 22% less pay. The deputy president found the director's lack of IR expertise and the size of his roof ventilation supplies business "does not wash" as an excuse for denying the supervisor fair procedures. The Commission heard that the director told the supervisor, who worked 38 to 40 hours a week, that his rate of pay would be cut from \$31.78 an hour to \$25.

After refusing the lower rate and leaving the workplace, the supervisor received a text from the director saying: "Effective immediately I give notice of termination of your employment, please note you are required to work your notice period" and adding that "note that [you] are entitled to 4 to 5 weeks employment termination notice period". The supervisor, who had worked at Email Ventilation for 12 years, served out his notice, but the employer failed to pay his full entitlements and superannuation balance. He took his concerns to the AMWU, which filed an unfair dismissal application in September, but the director failed to attend the two conciliations the Commission scheduled in October and December.

When the matter went to a hearing, the director told the tribunal he rejected the supervisor's claim that he had a good employment record. Under cross-examination, the director told the Commission he had spoken to the supervisor many times about his conduct and performance, which included blocking other employees from using machinery and abusing new workers. However, the director acknowledged the supervisor had never been issued with a written warning and conceded he might have made a mistake when calculating his outstanding entitlements.

Deputy President Sams considered the director's evidence, which included a two-page document he described as "a potpourri submission and commentary, conjecture and opinions" that provided no valid reason for the supervisor's employment to be terminated. "In my view there can be no room to doubt that the reasons for the dismissal were not only capricious and fanciful but were contradictory and irreconcilable," he said. Deputy President Sams saved his most scathing observations for the "deliberate and calculated" manner in which the director notified the supervisor he had been dismissed.

"It was disgraceful and grossly unfair."



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association
Industrial arm of the Bus Industry Confederation

"Although I accept the [employer's company] is a small business and has no dedicated human resource management expertise about procedures to be followed when effecting an employee's dismissal, it must be bluntly said that no employer with any sense of common decency, would have effected a dismissal in the hopeless manner admitted to in this case particularly given the applicant's value to the business and his long period of service. "It was disgraceful and grossly unfair."

Deputy President Sams said only rare cases warranted termination of employment other than in person. "It is not the first time I have had cause to point out that informing an employee of their dismissal by phone, text or email is an inappropriate means of conveying a decision, which has such serious ramifications for an employee." Deputy President Sams said the entire procedure was "breathtaking in its complete disregard for any modicum of natural justice, particularly given the applicant's considerable period of service of 12 years.

Ruling against reinstating the supervisor, he asked both parties for more evidence and submissions on compensation. In another unfair dismissal case before the FWC recently, a long-serving member took aim at an employer's claim that summarily sacking a worker by text was a "generational thing", describing the method as "unconscionably undignified" while insisting that dismissals should always be conducted face-to-face.

Allowances also docked for partial strike action

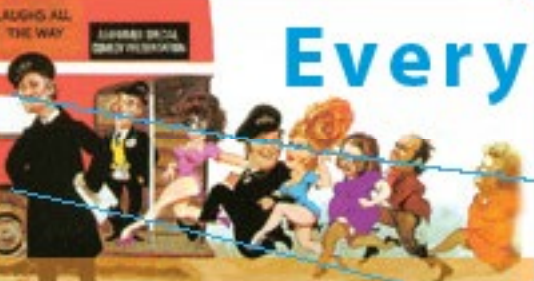
CPSU, the Community and Public Sector Union v Commonwealth of Australia [2019] FCA 975 (21 June 2019)

The CPSU has failed in its bid to claw back allowances in full for border protection employees who went on a series of strikes over a three-year period. The marine border force employees had their Sea-Going Commuted Allowance partially docked for the occasions on which they took protected industrial action between 2015 and 2017 as part of a protracted dispute over a new deal with the Department of Home Affairs (previously the Department of Immigration and Border Protection).

Under the terms of the Australian Customs and Border Protection Enterprise Agreement 2011-2014, the commuted allowance was paid in recognition of "special duties" and in lieu of any overtime, shift penalty, restricted duty and disability allowance provisions. . . "which would otherwise be payable in respect of up to 191 duty days per financial year". The Federal Court heard the department relied on ss470 and 471 of the Fair Work Act to reduce the allowances paid during the work bans. The union argued, however, that the High Court's 2013 decision in *Mammoet* confirmed that s470 only prohibits payments that depend on the actual performance of services, and no other payments such as accommodation allowances.

"Like s470," said the union, "the reference to payments in s471 must be understood as referring only to payments which 'depend on the actual performance of services'." Considering *Mammoet*, Justice David O'Callaghan said the provision of accommodation in that case "was, as the High Court found, neither a payment, nor was it provided in relation to the non-performance of work during a period of industrial action". "So, the facts are far removed from this case."

He said, instead, that the purpose of ss470 and 471, as outlined in *Mammoet*, "is to prohibit strike pay, that is, payments by an employer to make up, in whole or in part, wages not earned by the employee during the period of industrial action". "The allowance in this case was obviously a payment. "And if it had been paid during the period of industrial action it would have been a payment to make up wages not earned. "Those payments were thus proscribed."



Everybody Out

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ Industrial arm of the Bus Industry Confederation

Important Dates

APTIA Breakfasts

- Sydney (17 September 2019) – Courtyard Marriott Hotel, 7-11 Talavera Road, North Ryde, NSW



2019 Bus Expo & Maintenance Conference

- Melbourne (1 & 2 October 2019) – Convention and Exhibition Centre



BIC National Conference

- Canberra (17 November 2019) – BIC and APTIA Annual General Meetings
- Canberra (18 – 20 November 2019) BIC National Conference at the National Convention Centre



Ian MacDonald

National Industrial Relations Manager Australian
Public Transport Industrial Association

Phone	+61 9907 6372
Fax	+61 9932 7132
Mobile	+61 427 206 326
Email	imacdonald@bic.asn.au
Address	PO Box 1047 Manly NSW 1655