



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

## Welcome to the September Quarter 2019 edition of Everybody Out



Wayne Patch, Chair Person

### Membership News

- APTIA welcomes Comfort DelGro Corporation
- APTIA in the field
- BIC National Conference

### APTIA welcomes Comfort DelGro Corporation



Nick Yap, Chief Executive Comfort DelGro

**ComfortDelGro Australia** has joined APTIA as an Urban Transport member and brings with it bus and coach operations in New South Wales in metropolitan, outer metropolitan and rural areas, bus and coach operations in Victoria, the Northern Territory, Queensland and the ACT.

Founded in October 2005 as ComfortDelGro Cabcharge, a joint venture between Singapore-based ComfortDelGro and Australian owned Company Cabcharge Ltd, today CDC is a wholly owned subsidiary of ComfortDelGro.



# Everybody Out

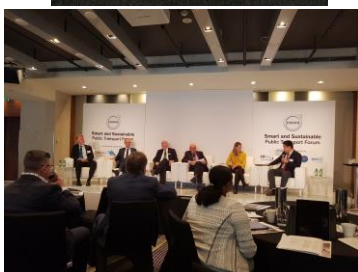
PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

The Chief Executive Nick Yap is well known to the industry having worked for CDC in both NSW and Victoria since the introduction of Comfort DelGro into Australia. Nick is supported by Wayne Jeffs in NSW, Steve Bushby in the ACT and Tony Hopkins in Queensland.

The membership of CDC with APTIA ensures that, as an organisation, APTIA has its widest possible representation in the Fair Work Commission and with Government when advocating or responding to changes to IR laws, which, at the moment, are coming thick and fast.

## APTIA in the Field



Five major events dominated APTIA's field trips in August/ September. They included:

- The final APTIA breakfast for the year was hosted by Keolis Downer at the Courtyard Marriot Hotel in North Ryde. The two major issues of the day i.e. Skene's case and Mondelez's case were well ventilated by over 20 Operators who were fortunate to have the benefit of the attendance of Senior IR partner at Piper Alderman, Tim Capelin to provide a legal overview on the next steps forwards.
- Thredbo 16 – An international conference on competition and ownership in land transport was conducted at the Nanyang Technology University in Singapore over 4 days at which APTIA was represented at the Conference which was also attended by members of APTIA including Matt Threlkeld and Philip Whipp from BusNSW, Chris Lowe from BusVIC and John King from Premier Motor Services. Michael Apps, the Executive Director of BIC was also present. APTIA delivered a paper titled



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

“The Introduction of Autonomous Vehicles” which can be accessed on the website in Industry News  
[www.aptia.com.au](http://www.aptia.com.au)

- BusNSW conducted a very successful Young Leaders Forum at the Park Royal Hotel in Darling Harbour, at which APTIA made a presentation titled, “Managing People and Building a High-Performance Culture.” The event was sponsored by Volvo Bus Australia.
- Volvo Bus Australia also initiated a Smart and Sustainable Transport Forum at the Hilton Hotel in Sydney and with the Hon Gareth Ward, Minister for Social Services opening the forum and followed up by the key note address by Leon Daniels, the former chief executive of London Buses the forum had a very international flavour. The forum was well attended by the Volvo’s operator clients and was a terrific initiative by Lauren Downs and David Meade. Added to the international flavour was the fact that the President of Volvo Bus Corporation, Hakan Agnevail was also in attendance.
- Finally, rounding off the big five events, BusVic staged the 2019 BusVic Bus Expo and Maintenance Conference at the start of October in the Melbourne Convention and Exhibition Centre. There were many highlights to this event including presentations by the Hon John Howard and former Australian cricket captain Steve Waugh. The real winners were the providers to the industry who went the extra yard to ensure that their products were on full display.

## BIC National Conference



The full program is now available, and registrations can still be made on the Ozebus website at  
[www.ozebus.com.au](http://www.ozebus.com.au).





# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ Industrial arm of the Bus Industry Confederation

Industrial Relations will prominently figure in the Conference and has been allocated Wednesday 20 November 2019 between 8.30am and 10am to discuss all of the latest developments in industrial relations.

The session is sponsored by APTIA's strategic partner Piper Alderman, solicitors and will be chaired by senior partner, Peter Dwyer.

Scott Barklamb, the director of Workplace Relations at the Australian Chamber of Commerce and Industry will provide an update of where IR is heading under the Morrison Government.

APTIA will then moderate a Q & A session with an expert panel comprising;

- Marcelle Davis the General Manager, People and Culture at CDC,
- Steve Schofield, the Group Head of Human Resources and Industrial Relations at Downer Group,
- Paul Harris, the Workplace Relations Manager at Transit Australia Group, and
- Tim Capelin, senior IR partner at Piper Alderman.

The Q& A will concentrate on the two significant decisions surrounding casual employment and allocating personal leave and the expectation of the panellists as to where IR is heading for employers.

## Industry News - what you need to know

- Legislation to change Paid Parental Leave
- The Religious Discrimination Bill 2019
- Private Sector Pay Growth Steady at 2.3% a Year
- Government Approach to IR
- An Update on Skene (Rossato) and Mondelez's cases
- Changes to Right of Entry Rules

### Legislation to change Paid Parental Leave

The government has also introduced the Paid Parental Leave Amendment (Work Test) Bill 2019 to lower the hurdle currently in place to receive such leave.

The current scheme provides eligible working parents with 18 weeks of payment at a rate based on the national minimum wage, currently \$740.60 per week – a total of \$13,330.80 over 18 weeks. To meet the current paid parental leave work test, a parent must have worked 330 hours in 10 of the 13 months before the child's birth.



# Everybody Out

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

A parent can have a break of up to eight weeks between two working days in this period and will satisfy the present work test.

The government argues that some jobs, such as casual teaching, may routinely have a longer break between two workdays, which prevents mothers from accessing parental leave pay, despite having a legitimate attachment to the workforce.

The legislation will increase the break between two working days from eight to 12 weeks. The work test rules will also be modified to cover cases where women work in jobs, such as jockeys and miners, where it would be unsafe for them to continue working during their pregnancy.

Under the new rules, the work test would begin 392 days immediately before the day on which the mother ceased work because of the hazards in her job. If passed, the new PPL measures will come into force from 1 January 2020.

## Religious Discrimination Bill 2019

The Religious Discrimination Bill will make it unlawful to discriminate on the basis of religious belief or activity in key areas of public life, including employment. Under the Bill an employee will be entitled to make a complaint to the Human Rights Commission alleging they have been subject to unlawful discrimination on the basis of their religious belief or activity if:

- (i) The employee has or engages in a religious belief or activity
- (ii) The employee has been subject to direct or indirect discrimination on the basis of their religious belief or activity
- (iii) The discrimination has occurred in their employment (including partnership, qualifying bodies, registered organisations and employment agencies)
- (iv) The conduct is covered by the Bill, such that an exception does not apply.

Religious belief or activity is defined under the Bill very broadly as:

- (i) Holding or not holding a religious belief; or
- (ii) Engaging or not engaging or refusing to engage in lawful religious activity
- (iii) The accompanying explanation gives some further insight by stating that belief may include:
  - Beliefs associated with major faith traditions (e.g. Christianity, Islam, Judaism)
  - Beliefs of smaller and emerging faith traditions.

Activity may include:

- Participating in religious observances (e.g. prayers, fasting, holidays)



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

- Wearing religious dress (e.g. hijab, kippah or kirpan)
- Not engaging in certain conduct in accordance with religious belief (e.g. not eating meat or drinking alcohol)
- Expressing religious beliefs, such as through evangelising

Discrimination under the Bill includes:

- (i) Direct and indirect discrimination on the basis of past, present or presumed religious belief or activity; or
- (ii) Characteristics associated with particular religious beliefs or activities.
- (iii) Employment condition, requirements or practices and indirect discrimination
- (iv) In the case of a large business (over \$50M in revenue) imposes an additional restrictions such as standards of dress, appearance or behaviour which have the effect of restricting or preventing employees from making statements of religious belief outside of work, unless compliance with the standard is demonstrated to be necessary for the business to avoid unjustifiable financial hardship.

The following conduct is not discrimination on the basis of religious belief or activity for the purposes of the Bill:

- (i) Conduct engaged in by religious bodies (including religious education institutions, charities or other religious bodies) in good faith that reasonably conforms to the doctrines, tenets, beliefs or teaching of their religion
- (ii) Conduct intended to meet a need arising out of a person or group's religious belief or activity or to reduce a disadvantage experienced by a person or group on the basis of religious belief or activity (e.g. providing prayer rooms, flexible scheduling or uniform requirements)
- (iii) Discrimination on the basis that a person is unable to carry out the inherent requirements of a job because of religious belief or activity (e.g. it would not be unlawful for an employer to not hire a prospective employee because they could not abide by workplace health and safety requirements due to their religious dress).

Note: The Australian Human Rights Commission will be given the power to grant temporary exemptions from the legislation for up to 5 years.

## Private Sector Pay Growth Steady at 2.3% a Year

Growth in private sector rates of pay excluding bonuses is increasing at 2.3% a year, unchanged from the annual rise recorded in the previous two quarters, according to most recent ABS data.



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

The June quarter Wage Price Index shows that the 2.3% annual trend growth is nevertheless not far above the historic low of 1.8% achieved in the March quarter of 2017 and the December quarter of 2016. The private sector WPI has now been not exceeded 2.3% since the December quarter of 2014, when it was at a then historic low of 2.4%. In the public sector, rates excluding bonuses grew by 2.5% annually on a trend basis, unchanged from the three previous quarters.

Across the economy, rates, excluding bonuses, increased by 2.3% a year, also unchanged from the previous three quarters.

Consumer prices increased by 1.6% in the year to the June quarter, according to the ABS Consumer Price Index (see Related Article), so wage growth remains comfortably clear of inflation.

The RBA has projected that the current pattern of "unusually" slow wage growth will likely continue until at least 2021, Governor Philip Lowe reminding a parliamentary committee that any pick-up was "both affordable and desirable".

Appearing before the House of Representatives Economic Committee this morning, Lowe said the central bank's recent downward revision of annual growth in the economy largely reflected a drop-off in consumption, itself a reflection of suppressed wage growth. While the RBA had previously calculated that a tightening labour market would spark wages, Lowe said the unemployment rate had risen to 5.2% "despite employment growth having been stronger than we had expected".

## The Government's Approach to Industrial Relations

IR Minister Christian Porter has unveiled a broad workplace reform agenda that includes the laws covering casual employment and unfair dismissal.

The insight into the government's workplace agenda came as Porter today released discussion papers on introducing criminal penalties for the worst cases of wage theft and extending the life of greenfield projects. The Coalition made few policy pledges on IR during this year's election campaign, while Labor promised major changes.

Porter revealed that an "initial tranche" of discussion papers would cover casual employment, the small business dismissal code, "several aspects" of enterprise bargaining and the Commonwealth construction code. Porter said that he would focus on what changes were most important to the economy and what changes could attract enough support to be approved by the Federal Parliament. He argued that Labor's unsuccessful attempt in the Senate to disallow regulations to shield employees from "double dipping" on entitlements showed the "contestability of issues in the industrial relations space".

Porter argued that Australia's IR system was "far from terrible", with common ground on having:

- a single national Industrial relations system for the vast majority of workplaces;
- the system being changed from one based on arbitration to being based on agreement making at the workplace level;



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

- "little legal tolerance" for industrial action outside the enterprise bargaining process;
- an independently set minimum wage which the OECD says is the highest in the world;
- a simplified system of 122 awards;
- a safety net in the 10 national employment standards and the relevant industry award; and
- freedom of association and remedies for discrimination and unfair dismissal.

Porter argued the "ACTU/Labor" policy platform at the last election was radical and sought to replace a system that Labor itself introduced.

Porter said Prime Minister Scott Morrison had set three key criteria for future IR changes: that they create jobs and put "upwards pressure" on wages; that they helped business to boost productivity; and that they demonstrated they would help the overall economy to grow. These criteria would "hopefully develop a consensus for change", while the discussion papers would target areas where change would have the most impact.

## Update on Skene (Casuals) and Mondelez (Leave entitlements) cases

### Skene's case

- Was the decision in which a casual employee was deemed not be a casual in view of the regular and consistent work he was undertaking and as such was able to claim NES entitlements such as annual leave.
- Whilst Skene's case was not appealed Workpac, the employer, commenced a similar proceeding in Rossato's case which will review the decision in Skene.
- The Federal Government has intervened in this case as has the CFMMEU and a solicitor purporting to act for a class action. The case will come on in the new year no doubt.
- The Government's **Fair Work Amendment (Casual Loading Offset) Regulation 2018** was reinforced in the Senate this week when the Senate voted down an attempt by the ALP to lapse the regulation. This regulation affords the ability to at least seek set offs if a casual is deemed to be a part time employee or a permanent employee.

### Mondelez's case

- The decision determined that personal leave should be taken in days rather than hours i.e. if an employee takes leave on a day they would have worked 10 hours then the payment for the day would be 10 hours and the employee would then be entitled to 9 further days rather than 66 hours as leave entitlements.





# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

- Mondelez's case did not determine whether this would also apply to annual leave entitlements.
- Mondelez has appealed the decision to the High Court and the Government has sought to intervene on the basis that common practice has been to reduce the entitlements in hours rather than days.
- The OFWO has amended its Information Statement, which must be made available to all new employees, to reflect the decision in Mondelez.

## What to do next?

- (i) It is important that employers make sure each employed casual understands that they are paid a loading which covers entitlements to which permanent or part time employees receive by reflecting it in their pay slips, employment letters and agreements.
- (ii) Employers should also review the casuals they employ and where possible discuss with them their attitude to conversion to part time or permanent employment.
- (iii) Any casual who works regularly or consistently over 38 hours a week should be considered for conversion where it is reasonable on business grounds to do so.
- (iv) Given that the Mondelez case is now under Appeal and may be overturned and the cost of changes to payroll systems is high, Employers should make provisions for Mondelez's case being upheld but also should consider the amount of hours worked by permanent and part time employees over and above their 38 hours or agreed hours.

APTIA will continue to monitor both cases and is across the Government's desire to reform incrementally the IR system.

## Changes to Right of Entry Rules

Earlier today, the Fair Work Commission advised subscribers of changes to the *Fair Work Commission Rules 2013* as a result of the registration of the *Fair Work Commission Amendment (Entry Permits and Other Measures) Rules 2019*.

This information can also be found on the Fair Work Commission's [website](#).

The following new provisions may potentially have an impact on the manner in which the Fair Work Commission processes an application for an entry permit made under s. 512 of the *Fair Work Act 2009*:

- Sub-rule 51(1A) – this provides that the Fair Work Commission may require the official for whom a permit is sought to provide:
  - (i) a current National Police Certificate (an NPC); or
  - (ii) an authorisation signed by the relevant official authorising the Fair Work Commission to obtain an NPC;



# Everybody Out

Australian Public Transport Industrial Association

➤ *Industrial arm of the Bus Industry Confederation*

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

- Sub-rule 51(1B) – this provides that the Fair Work Commission may publish information regarding an application for an entry permit on its website (including the name of the organisation that applied for the entry permit and the official for whom the entry permit is sought) and that, within a specified time, submissions made be made as to whether the relevant official is a fit and proper person to be issued with an entry permit.

Regarding sub-rule 51(1A), the Registered Organisations Section wishes to advise that this will only potentially apply to an application for an entry permit which has been referred to a Commission Member and the power to require an NPC or an authorisation to obtain an NPC will only be exercised by a Commission Member. The Fair Work Commission will not require every application for an entry permit to be accompanied by an NPC or authorisation to obtain an NPC as a matter of course. In short, this new provision will not entail any change to the way in which applications for an entry permit are currently made and lodged. Further, new sub-rule 51(1A) will only potentially apply to the small minority of applications which are referred to a Commission Member for determination. Finally, it should be noted that s. 590 of the *Fair Work Act 2009* currently provides that Commission Members may inform themselves in such manner as they consider appropriate.

Regarding sub-rule 51(1B), the Registered Organisations Section wishes to advise that it does not intend to give effect to this provision immediately or in the short term. The implementation of the process envisaged by this sub-rule will mean the establishment of a dedicated webpage on the Fair Work Commission's website. The Fair Work Commission will consult with organisations regarding the creation of such a webpage before it is established.

## Important Decisions

### ➤ Federal Court rules on Leave Test Case

#### **Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138 (21 August 2019)**

A full Federal Court has ruled today that a pair of 12-hour shift workers at a Cadbury chocolate factory are entitled to 10 calendar days of paid personal/carer's leave, rather than a lesser amount argued by their employer and the Federal IR Minister.

Justices Mordy Bromberg, Darryl Rangi and David O'Callaghan accepted the AMWU's interpretation of the NES entitlement at s96(1), which provides that employees are entitled to 10 days of personal/carers leave per year of service.

The union said in a statement today that the NES mandates a minimum of 10 days of such leave and with the employees working 12-hour shifts, this should give them an entitlement to 120 hours of paid time off, whereas the company argued they were due 10 shifts of 7.6 hours each, or 76 hours.

"If you need to take a sick day, you should be paid for your normal hours of work, it's as simple as that.



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

"And you should be able to take ten sick days paid at your normal hours of work," AMWU Tasmanian branch secretary John Short said.

While the full court agreed that it should reject the application by the company for a declaration that under the agreement for the Claremont site in Tasmania, when the employees are absent from a 12-hour shift, then 12 hours should be deducted from their personal/carer's leave balance, it split on the second declaration the employer sought.

Justices Bromberg and Rangiah refused to declare that the entitlement to paid personal/carer's leave was "more beneficial" than that under the NES, while Justice O'Callaghan said he would have acceded to the employer's request.

The Australian Industry Group, which acted for Mondelez, seized on the dissenting view, saying that Justices Bromberg and Rangiah's ruling "is inconsistent with the widespread industry practice and will have substantial cost implications for a large number of employers, if the decision stands".

It continued in a statement that the Claremont agreement states that the 12-hour shift workers are entitled to 96 hours of personal/carer's leave a year.

"This is a lot more generous than the 76 hours that employees would have been entitled to under the Fair Work Act if the Act had been interpreted in the manner that aligns with the widespread industry practice."

ACTU secretary Sally McManus said the Coalition Government's intervention "on the side of a company that is trying to cut people's personal leave below the legal minimum is a disgrace".

Note:

In light of this decision, relevant consideration for businesses impacted may include the following:

- Those who currently express personal/carer's leave and/or annual leave entitlement in an enterprise agreement or an employment contract in terms of hours per annum may need to ensure that they have a mechanism for this leave entitlement to be 'topped up' for any shift workers who work in excess of 7.6 hour shifts.
- If using payroll systems to calculate leave entitlements employers should consider checking whether employees are accruing entitlements on an hourly or daily basis. If shift workers are accruing entitlements on an hourly-basis-adjustments may need to be made to ensure that workers are receiving their proper entitlements under the NES.
- Reviewing the accrual rate for part-time employees, as a potential implication of the decision may be that any part-time employee should be accruing a full 10 working days of personal/carer's leave per year, as opposed to a pro-rated amount based on a shorter working week.



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

Australian Public Transport Industrial Association

➤ Industrial arm of the Bus Industry Confederation

## ➤ High Court ruling to constrain expression of political views

### **Comcare v Banerji [2019] HCA 23, C12/2018 (7 August 2019)**

Academics are warning of a "chilling effect" on the ability of public servants to express their political views, following today's High Court finding that a government department lawfully dismissed a public affairs officer over a barrage of highly critical anonymous tweets.

Chief Justice Susan Kiefel and Justices Virginia Bell, Stephen Gageler, Patrick Keane, Geoffrey Nettle, Michelle Gordon and James Edelman today upheld an appeal against a finding that the Department of Immigration and Citizenship unlawfully sacked a worker who posted more than 9000 tweets using Twitter.

The department dismissed Michaela Banerji in 2013 over anonymous tweets that were critical of government and opposition immigration policies and parliamentarians and her direct supervisor, and secondly due to her failure to obtain approval for outside employment as a psychoanalyst.

In a reviewable decision, a Comcare officer in August 2014 denied her claim for compensation for a psychological condition allegedly aggravated by the dismissal, ruling it didn't constitute an injury because the DIPB undertook reasonable administrative action against her in a reasonable manner.

She appealed to the Administrative Appeals Tribunal, with a bench last year holding that the dismissal trespassed on her implied constitutional rights and failed the "reasonable administrative action" test, noting it bore "a discomfiting resemblance to George Orwell's thoughtcrime".

The AAT found that because s10(1), s13(11) and s15(1) of the Public Service Act imposed an unjustified burden on the implied freedom of political communication, her sacking for breaching the APS Code of Conduct was not reasonable administrative action taken in a reasonable manner.

However, the High Court today affirmed the Comcare officer's 2014 decision, holding that the "impugned provisions [at s10(1), s13(11) and s15(1)] did not impose an unjustified burden on the implied freedom of political communication" and that Banerji's dismissal was lawful.

The plurality – Chief Justice Kiefel and Justices Bell, Keane and Nettle – said in its judgment that it was "highly desirable if not essential to the proper functioning of the system of representative and responsible government" that governments of all complexions "have confidence in the ability of the APS to provide high quality, impartial, professional advice".

Governments also needed confidence "that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections", they said. Meanwhile, the implied freedom of political communication was "not a personal right of free speech" but rather a restriction on legislative power extending "only so far as is necessary to preserve and protect the system of representative and responsible government".

Regarding Banerji's argument that "anonymous" communications should be excluded from the provisions' scope, the majority said this "must be rejected" given their "risk of ceasing to be anonymous, and thereby damaging the integrity and good reputation of the APS as an apolitical and professional public service".





# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

Further, Chief Justice Kiefel and Justices Bell, Keane and Nettle said such communication "may damage the good reputation of the APS even while it remains anonymous".

"Consequently, if the impugned provisions were restricted in their operation to communications other than 'anonymous' communications, the impugned provisions would cease to operate as a deterrent against a significant potential source of damage to the integrity and good reputation of the APS."

Satisfied the provisions were reasonably appropriate and proportionate, without imposing an unjustified burden on the implied freedom of political communication, the bench set aside the AAT decision, affirmed Comcare's August 2014 decision, and concluded that Banerji should pay Comcare's appeal costs.

## ➤ Sacked for threatening to bring down the Managers

**Nicholas Ward v Great Southern Rail Pty Ltd T/A Great Southern Rail [2019] FWC 5064 (24 July 2019).**

The FWC has upheld Great Southern Rail's sacking of a hospitality worker for serious misconduct, finding he threatened two managers with repeated outbursts of verbal abuse that left them feeling "shaken and unsafe".

The luxury train operator summarily dismissed the hospitality worker in February this year for abusive behaviour that began soon after a drunk passenger's complaint about him while he was on [The Ghan](#) during a six-day return trip.

GSR's reasons for dismissing the employee included his failure to attend a disciplinary hearing to discuss eight misconduct allegations that included telling both managers they were "part of a cocaine club", that he was "taking them down" and they "should sleep with one eye open".

Deputy President Peter Anderson heard that the employee phoned the company's HR manager to report that he felt "bullied and victimised" after a drunk passenger wrongly accused him of making an inappropriate comment of a sexual nature, and that the train manager had refused to investigate the incident.

The tribunal also heard that the employee was stressed over damp carpet in the train, being away from his newborn baby, and having permission refused to take a tour during the trip. The Ghan was on a stopover in Alice Springs when the worker phoned GSR's HR manager and said he would not be getting back onboard and wanted a flight home to Adelaide at the employer's expense.

The HR manager told the employee his circumstances did not warrant a flight home, but he refused to re-board the train.

She asked the train manager to encourage the employee to re-board, and again he refused.

After several exchanges of calls and texts between the HR manager and the employee, she agreed to book him a night's accommodation at a nearby hotel. The employee's dissatisfaction with the accommodation and not being flown home by the company prompted a series of threatening calls, texts and abuse in person to the HR manager and her colleague, also a manager, over several days.



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

In a "plethora" of exchanges, he told the HR manager she was "terrible at her job", "nasty and rude", and the other employee that she was a "fucking shit manager" and that "you had better watch out". He also threatened to put the company's reputation at risk by creating a "media nightmare" with his complaints.

Deputy President Anderson described the employee's tirade as "erratic behaviour over a prolonged period" that left the two women feeling "threatened, shaken and unsafe." He also pointed out they were not isolated instances of abuse.

"There were many such moments of abuse over a 24-hour period (14 to 15 February)," Deputy President Anderson said. "They were not the product of a singular rush of blood. "They were the product of erratic behaviour over a prolonged period and a lashing out at the managers because [the employee] was not getting his way.

"[The employee] was recklessly indifferent to the manner in which he communicated with [the managers]."

The deputy president also noted that the employee's anger was unprovoked. "I find that [the managers] remained calm and professional, albeit firm," Deputy President Anderson said. "[The employee] interpreted the rejection of his request to be flown home at company expense as rude, and a direction by [the HR manager] that he re-board the train as nasty and rude.

"Objectively speaking it was not.

"A human resources manager indicating that consequences could arise for an employee not re-boarding a train as directed was stating an obvious fact, unpalatable as it was to hear," he said.

The deputy president also rejected the employee's claim that his demand to be flown home was reasonable due to his unwell baby. "[The employee] withheld that information from the managers, believing it was an unnecessary intrusion into his personal affairs to disclose this to head office managers," Deputy President Anderson said.

This prevented GSR from establishing whether a genuine emergency existed, potentially enabling the employee to be flown home at company expense, he said. But the deputy president pointed out that "reasonable criticism" could be levelled at the company's policy around emergency flights home for its workforce as it "was not in writing and not able to be clearly understood in advance by [the employee] or other employees".

He also said the employer should have quickly corrected the worker's misunderstanding that he had been fired several days before his actual dismissal. "However, in the context of the abusive communication and threats made on the platform and the [the HR manager] feeling unsafe in light of those threats this delay was understandable, if not excusable, Deputy President Anderson said.

"In any event, having regard to the overall investigation and consideration of the matter conducted by the employer, including the opportunity given to the employee to respond (which he refused), the employee was not denied a fair go all round.

"The procedures applied were generally fair and the decision to dismiss was not predetermined," he said.

In rejecting the employee's case, the deputy president said he had considered whether the dismissal was harsh due to "mitigating factors", "personal impacts on the employee" or "whether it was a disproportionate



# Everybody Out

PUBLIC TRANSPORT  
INDUSTRIAL RELATIONS NEWS

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

response". "I have concluded that these impacts, whilst real, do not render the dismissal unfair," Deputy President Anderson said.

"Nor was summary dismissal a disproportionate response," he said.

## ➤ **Bus driver resigned after caught taking "goodnight" calls**

**Steven Williamson v Path Transit [2019] FWC 6153 (11 September 2019)**

A bus driver who in breach of a strict no-phone policy took "goodnight" calls from his children while preparing to leave the depot was not forced to resign, the FWC has found.

Accepting employer Path Transit's argument that he lacked the jurisdiction to hear the matter, Commissioner Bruce Williams said it was the bus driver's choice to resign during a disciplinary meeting rather than be dismissed for serious misconduct.

In pursuing an unfair dismissal remedy, the bus driver told the commissioner he worked at Path Transit for six years with no prior disciplinary action before being found to have breached the company's device policy on three occasions in February and March this year.

The bus driver conceded he had used his mobile phone while driving – in one instance at more than twice the depot's 15km speed limit – but argued he was not on a public road, and unaware it was a dismissible offence.

The bus driver told the FWC he took the calls from his family to say "goodnight" to his two young boys.

Commissioner Williams noted that this was a different explanation to the one he offered during Path Transit's investigation of the policy breaches, when he said he "sometimes got calls from traffic controllers".

The bus driver's conduct, the commissioner said, "involved a breach of important safety requirements that bus drivers are unsurprisingly expected to comply with".

"He was fully aware of the prohibition of driving whilst using a mobile phone and that this was a dismissible offence."

In upholding Path Transit's jurisdictional objection, Commissioner Williams said the bus driver tendered a letter of resignation after making a "choice" to leave his job.

Path Transit said that during the disciplinary meeting, the bus driver was told "it wasn't looking good for him" by a supervisor.

Asking what the difference was between resigning and dismissal, the bus driver was told that "one might be better if he was applying for work but the other was better for Centrelink".

"It was very clear to [the bus driver] that [Path Transit] was likely to terminate his employment because of the three instances of misconduct which he did not deny, namely driving a bus whilst using a mobile phone," Commissioner Williams said. "However, before [Path Transit] finally made that decision it was [the bus driver] who asked for a break in the meeting so that he could speak to his wife on the phone."



# Everybody Out

Australian Public Transport Industrial Association

➤ Industrial arm of the Bus Industry Confederation

"When the meeting resumed, he verbally resigned.

"That was a choice [the bus driver] made, he was not forced to by [Path Transit]."

For completeness, the commissioner concluded that bus driver's misconduct was serious enough to warrant dismissal.

"If [Path Transit] had in fact dismissed [the bus driver] before he resigned then his dismissal was neither harsh nor unjust nor unreasonable," Commissioner Williams found.

"The bus driver was not unfairly dismissed."

## Important Dates

- BIC and APTIA Annual General Meetings – Sunday 17 November 2019
- BIC National Conference - Monday to Wednesday, 18 to 20 November 2019



Ian MacDonald, National Industrial Relations Manager Australian Public Transport Industrial Association

Phone: 02 9907 6372

Mobile: +61 427 206 326

Email: [imacdonald@bic.asn.au](mailto:imacdonald@bic.asn.au)

Mail Address: PO Box 1047 Manly NSW 1655