Welcome to the May 2020 Edition of Everybody Out

PUBLIC TRANSPORT INDUSTRIAL RELATIONS NEWS

The information contained within this Edition is developed within the Bus and Coach Industry. It is not intended that the information should be relied upon without the reader first seeking their own expert advice.

Wayne Patch, Chairperson

In this issue:

MEMBERS NEWS

- **Meeting with the Transport Workers Meeting**

APTIA has met on a regular basis with representatives of the Transport Workers Union. Those representatives include Nimrod Nyols, NSW branch, Mike McInnes, Victorian branch and James Wilkinson, Queensland branch.

The purpose of the meetings was to explore those areas of mutual agreement which will allow APTIA members to better handle the impacts of the pandemic upon its workforce. The meeting have been constructive and have allowed for better dialogue between Operators and the TWU in their respective areas.

The Transport Workers Union has strongly advocated for a paid pandemic leave to be introduced by the Federal Government to cover those drivers who are forced to be off work because they have either contracted the virus, come in contact with someone who has or who are just at risk because of an existing medical condition or even their age.

The Transport Workers Union advocates rear door loading, except where disable or elderly are not able to rear door load. The TWU also seeks to have cleaning registers placed in buses so that members of the public using the buses are able to see the cleaning regime in place.

Meetings with the TWU are ongoing given the recent announcements of the Prime Minister regarding the establishment of working groups to consider major industrial relations reform over the next months.

- **Industrial Working Group Meeting**

The Bus Industry Confederation's Industrial Working Group met on 13 May 2020 to discuss issues surrounding the Covid-19 pandemic and its implications for public transport as each State sought to remove restrictions on movement in their respective State.

The following APTIA members contributed to a survey which asked many questions about how they were dealing with the pandemic and its ongoing issues.

* Buslines Group * Tassielink * Comfort Delgro Corporation *Dyson Group * Clark's Logan City Bus Service *Trasndev *Warrnambool Bus Lines *Moreland Group * Keolis Downer * Premier Motor Service *Busways Group * We Are Kinetic (Surfside and TAG) * Kangaroo Bus Lines * Pulitano GroupGreyhound Australia * The Entrance Redbus *Interline Bus Service * Port Stephens Coaches * Rover Motors * Vic Touring

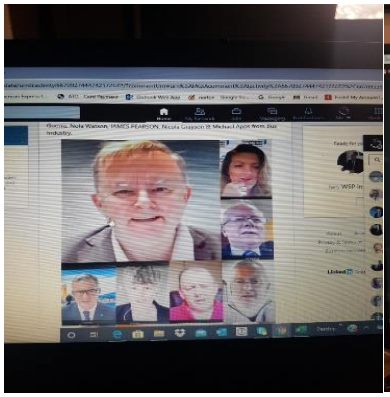
Safety Measures

Results of the survey indicated a majority support for the following:

(i) Permission for drivers to wear masks and gloves if they requested them.
(ii) The provision of sanitisers on all buses.
(iii) Removal of the requirement to collect cash fares.
(iv) Practice distancing on the buses for the passengers.
(v) Relaxation of the practice once restrictions are removed and passenger numbers increase.
(vi) The seat behind the driver to be left vacant.
(vii) No standees to be allowed.
(viii) Reduced capacity as approved by the State regulator.
(ix) Such restrictions on capacity to be gradually removed as confidence grows in dealing with the pandemic.
(x) Provision for temparature checks on arrival at depots.
(xi) Encouragement to drivers to get tested if they are showing symptoms.
(xii) The provision of flu injections for drivers.
(xiii) The regular and comprehensive cleaning of the buses with disinfectants, after each shift.
(xiv) To practice distancing in the depots by limiting numbers in the staff rooms.
(xv) Agreement to stagger start and finish times if approved by the State regulator.

Other issues that were discussed included providing separate facilities for drivers who do not return to the depot for their breaks, rear door loading and the types of leave available to drivers who show signs of the virus, are considered in a risk category or have come into contact with a person who has the virus causing them to isolate.

- **BIC Online**



Michael Apps and I are regular attendees at video conferences provided by the Australian Chamber of Commerce, Industry or the Institute of Transport and Logistic Studies and various other bodies.

We both agree that BIC has probalby never had better access to industry leaders as it has now and our roles are to ensure our member's interests are recognised.

Set out below is a series of questions we have asked over the last month which has relevance to BIC's members.

To: WILL HODGEMAN, Chair of Australian Business growth Fund (former Premier of Tasmania)

"You have personal experience as Tasmanian Premier to establish bus manufacturing and benefit from the associated training, skills and jobs in the NW of Tasmania. What are your thoughts about the opportunities for the Australian Business Growth Fund to look at how we support and grow the Australian bus manufacturing sector and the heavy vehicle automotive manufacturing industry more generally?" (Michael Apps)

To: ANDREW LIVERIS, Special Advisor to the NCCC

"How do you engage NCCC to promote growth in an industry, in this case, the bus manufacturing sector and get the strategic industry policy and programs aligned between the Federal government and State and Territory Governments, when it comes to procurement of buses (biggest customer are Governments), support the trade and skill set and promote and explore export opportunities. This sector has seen extremely poor national coordination of the bus manufacturing sector where huge opportunities exist, but it is been largely laid bare to the expectation that globalism and the global market place would see it inevitably wither on the vine like car manufacturing. This has not happened, without any subsidy or propping up required, and now we may find that the impact of COVID might

just be bus manufactures (and the heavy vehicle automotive sector more generally) time to shine? What do you reckon? What and how do we make this happen? (Michael Apps)

To: PROFESSOR DAVID HENSHER, Institute of Transport and Logistic Studies, Sydney University

"State regulators are advising bus operators that distancing within the National Health Guidelines must be maintained once schools restart. But they are also abrogating the risk back to the operator by requiring them to meet the guidelines whilst at the same time saying that no child must be left behind. How does a bus operator reconcile this contradiction? (Ian MacDonald)

To: HON GREG COMBET AM, NCCC Commissioner

"I am seeking guidance from the National Covid-19 Coordination Commission, more specifically from the Industrial Working Group, as to how employers should reconcile their obligations to Safe Work Australia to minimise the risk of exposure to COVID-19 with contradictions within the policies settings from various State regulators.

For example: In the regulated passenger transport industry, buses specifically, there is a call for distancing and reduced capacity on the buses. The regulators have also indicated that any person with the sniffles should not get on a bus or if they are a bus driver simply isolate themselves and not come to work.

The problem being that a lot of school bus drivers are casuals and would not be entitled to any leave should they need to isolate and even if they were part time or permanent drivers they may not have any paid leave left to cover such an isolation.

Just as concerning is the issue of who will patrol these buses to ensure proper distancing or no one with the sniffles gets on. Should the responsibility simply be left to the passengers? If more buses are needed where are we getting them from and who is paying?

Finally, in NSW and most states there is an important State policy which states; 'No child is left behind', a reference to the Daniel Morcombe case in Queensland." (Ian MacDonald)

To: HON ANTHONY ALBANESE MP, Leader of the Opposition
"I am sure you noticed the renaming of the Federal Dept of Infrastructure recently that removed Cities from its title. At the same time, the portfolio held by Mr Alan Tudge, "Population, Cities and Urban Infrastructure" will shortly see, I believe, cities dropped off, as well. This is mainly because the Cities portfolio has become more about reducing traffic congestion by reducing immigration and that reduces population – A very sophisticated policy THAT. The fact is, I think, it is getting too hard for them with the Federal- State planning and land use issues and they are "wimping out"
Where is the ALP with a Cities portfolio and the great ideas you had as Minister, such as 30-minute cities and public transport as part of the solution to some the challenges our cities face? (Michael Apps)

INDUSTRY NEWS – What you need to know

- **Corona Virus and the Bus and Coach Industry – Question and Answers**

Set out below are some of the questions received over the last month which have concerned members.

APTIA is a direct point of contact for the industry members to inquire about employment issues that you are confronting each day with their workforce.

BIC has developed a Covid-19 Industry Hub at www.ozebus.com.au/covid

The Industry Hub provides updated information from an industry perspective and is a valuable tool for BIC and APTIA member during this time.

This section of 'Everybody Out' details some of those regular questions that are concerning you and my response from an industry perspective as to how you should handle the problems you face.

Remember my advice is not legal advice and should not be relied upon without your obtaining your own separate legal advice.

Q: If I introduce temperature checks and a driver shows a high temperature can I ask the driver to take leave and get checked for the virus? Do I have to pay the driver for time off if the driver tests negative?

It is probably better if a driver has a temperature to get them Covid 19 tested. I am sure there will be a local testing area. I think it takes about 2 days to get a result, maybe less.

The driver should be stood down pending the test result. This might be a case where you consider covering their wages during the testing time, particularly as it is your direction that causes the driver to be off work.

If I make a driver redundant because I have no work and pay the entitlements what happens if I reinstate him within three months. Do the entitlements start from when I reinstate the driver or from the original commencement date?

Provided the redundancy is genuine it is possible to re-instate an employee at any time. If redundancy payments and other entitlements are paid then they cannot be reclaimed by an employer. Issues may arise with long service leave as to whether the service is in fact continuous due to the short period off work. Similarly leave entitlements might be challenged if the time off is short. If a person has been made redundant it is wise to allow a reasonable period of time before reinstatement i.e. at least 6 months.

Can I require my driver to undertake other work than driving a bus?

If you are a business in receipt of the Job Keeper allowance, then section 789GE of the Fair Work Act applies to your business. This section allows you to temporarily change the duties of an employee which can temporarily override the Award or an Enterprise Agreement and the original job description of the employee. The work must be within the competency levels of the employee and the employee's wages must not reduce.

- **Tranche 2 Modern Awards commence 29 May 2020**

The Fair Work Commission is extensively varying existing awards as a result of the 4-yearly review of modern awards. The modern awards will be varied in 3 tranches during 2020.

The technical and drafting matters for the second tranche of awards have been completed. The varied awards were published in advance and the next group commenced operation on 29 May 2020.

These Awards included the"

- Manufacturing and Associated Industries and Occupations Award 2020
- Vehicle Repair, Services and Retail Award 2020
- Clerks – Private Sector Award 2020

All of these Awards can be found in the members section of the APTIA website at www.aptia.com.au along with the Passenger Vehicle Transportation Award 2020.

- **The Decision in Rossato's case (What is a firm advance commitment?)**

(Summary provided by the Federal Court)

"Between 28 July 2014 and 9 April 2018, the applicant (WorkPac) employed the respondent (Mr Rossato) and supplied his labour to companies within the Glencore Group. Mr Rossato was employed under six consecutive contracts during this period.

In these proceedings, WorkPac sought declarations that Mr Rossato could not make claims with respect to paid annual leave, personal/carer's leave, and compassionate leave entitlements under the National Employment Standards because he was a casual employee within the meaning of ss 86, 95 and 106 of the *Fair Work Act 2009* (Cth) (the FW Act) or, as a casual employee, claim payment for public holidays under s 116 of that Act. It also sought declarations that Mr Rossato could not claim corresponding entitlements under the applicable enterprise agreement (the 2012 EA) because he was a "Casual Field Team Member" (casual FTM).

In the event that the Court found, contrary to WorkPac's submissions, that Mr Rossato was not a casual employee and not a casual FTM, WorkPac sought declarations that it was entitled to restitution of the casual loading which it claimed was included in the hourly rate it had paid to Mr Rossato. It sought that restitution on the basis of mistake and/or partial failure of consideration.

In the further alternative, WorkPac claimed that in assessing the entitlements that Mr Rossato claimed, it was entitled to bring into account the payments of remuneration that it had made to Mr Rossato on the basis that he was a casual employee.

The proceedings had a number of unusual features which are identified in the reasons of White J at [276].

The Court had, less than three months before WorkPac commenced its application, delivered judgment with respect to the claim of an employee of WorkPac, Mr Skene, employed in circumstances which were similar to, but not identical with, those of Mr Rossato: ***WorkPac Pty Ltd v Skene*** **[2018] FCAFC 131; (2018) 264 FCR 536 (***Skene*). Mr Skene had been found not to be a casual employee within the meaning of s 85 of the FW Act or a casual FTM under the enterprise agreement which preceded the 2012 EA. WorkPac submitted that aspects of the decision in *Skene* were in error.

WorkPac advanced its claim that Mr Rossato was a casual employee on the basis that a person is a casual when there is an absence of a "firm advance commitment as to the duration of the employee's employment or the days/ hours the employee will work." It argued that the presence or absence of such a commitment was to be determined by reference to the terms of the parties' written contract of employment and without reference to other materials, including evidence of the way in which the contract was performed in practice. Some of its submissions were to the effect that the commitment had to be found expressly in the contract.

The Court has found that the presence or absence of the "firm advance commitment" may be assessed by regard to the employment contract as a whole, including by considering whether it provided for the employment to be regular or intermittent, whether it permitted the employer to elect whether to offer employment on a particular day, whether it permitted the employee to elect whether to work, and the duration of the employment. It has also found that the description given by the parties as to the nature of their relationship is relevant, but not a conclusive consideration.

All members of the Court have found that, even taking WorkPac's case at its highest, Mr Rossato was not a casual employee for the purposes of the FW Act and for the purposes of the 2012 EA. The Court has found that the parties had agreed on employment of indefinite duration which was stable, regular, and predictable such that the postulated firm advance commitment was evident in each of his six contracts.

All members of the Court have also found that Mr Rossato was not a casual FTM under the 2012 EA, noting that the circumstances of his employment could not be distinguished in a material way from those of *Skene*.

All members of the Court have found that WorkPac is not entitled to restitution of the casual loading which it claimed was included in the hourly rate it had paid to Mr Rossato. The members of the Court have found that there was no relevant mistake, and no failure of consideration such as would support restitutionary relief.

All members of the Court have found that WorkPac is not entitled to bring into account the payments of remuneration that it had made to Mr Rossato on the basis that he was a casual employee. That is because the purposes of the payments of remuneration did not have a close correlation to the entitlements that Mr Rossato seeks. All members of the Court have found that WorkPac's reliance on reg 2.03A of the *Fair Work Regulations 2009* (Cth) was misplaced. By sub regulation (d), the regulation can apply only when the person makes a claim to be paid an amount *in lieu* of one or more of the relevant NES entitlements. That is not this case as Mr Rossato seeks payment of the NES entitlements, not payments in lieu.

In summary the Court has concluded that:

a) in his employment under each of the contracts, Mr Rossato was other than a casual employee for the purposes of the FW Act and not a casual FTM under the 2012 EA.

b) Mr Rossato is entitled to the entitlements that he claimed under the FW Act and the 2012 EA with respect to paid annual leave, paid personal/carer's leave paid compassionate leave and payment for public holidays; and

c) WorkPac is not entitled to either restitution or to "set off" against its liabilities any of the payments made under the six contracts of employment."

- **The Government's response to Rossato**

The Attorney General has given a doorstop interview following the decision and made the following comments.

"We have been waiting on the decision because whichever way the decision went it was going to have a very serious and significant impact on Australian business and on Australian employment.

It was always our intention that as soon as the decision was made that we would be consulting on what may or may not need to occur as a result of the decision.

Now that consultation will occur necessarily very quickly, because there are some surprising elements to this decision which could have a very, very significant impact on business, and that consultation obviously is going to have to occur on a relatively urgent basis.

But one point I would make is that a path forward won't be determined instantaneously inside 24 hours and we want to embark on a genuine process of consultation with employers and employees to best understand the impact of the decision and we won't be engaging in an old style rule-in rule-out policy path forward inside 24 hours of the decision being made.

The other point is that obviously that consultation is going to have to occur in the context of the COVID-19 pandemic. Business probably faces its greatest challenges and employment faces its greatest challenges perhaps in our nation's history. So, the timing of this decision clearly is not ideal

and we will have an urgent consultative and cooperative response to try and work out what is the best path forward.

But as I say that will not be a rule-in rule-out exercise.

There's a couple of points about the decision that should be made from the outset.

- The first is that it would be wrong, I think, to characterise the decision as an argument about entitlements. Everyone accepts whether you're employees, employers, the government, I presume the opposition, everyone accepts that if you're a full time or part-time permanent employee you must be paid your proper entitlements sick leave, long service leave and things of that nature. If you are not a permanent employee, you must be paid the significant increase in loading in lieu of those things. And there is no argument that people should be paid either the entitlements of permanent employment or significant compensatory repayments if they are a casual employee. There should not be any argument about that particular issue, so we do not conceive this as an argument about entitlements.
- The second point is that there is a great imperative and value on certainty at the moment. During the COVID-19 challenge we obviously face enormous hurdles going forward to regrow employment and this decision is unfortunately a driver of uncertainty into the employment market. And I'd add to that that the fact that we even need a decision which in effect redefines the long-accepted nature and basis for engaging individuals as either permanent or casual employees and how they'll be paid inside one structure or another structure; the fact that we have a decision that needs to clarify that and has, in effect, produced very substantial changes in the middle of the COVID-19 pandemic when Australian business, particularly small business, probably faces its greatest-ever challenge in Australian history indicates that there are some very significant shortcomings in Australia's industrial relations system and that it's been operating with a degree of uncertainty for some time. And obviously part of the Government's response is going to be to consult with unions and employer groups to try and drive certainty into the system.

- The third point is that finding that path forward has to be about genuine consultation and I think negotiation between employer and employee groups.

- The fourth and final thing is that part of that consultation negotiation has to be around what is known as casual conversion. Now, for many casuals. There is a right, if they have been in the same position for a considerable period of time to request a conversion from casual to permanency - but that right is not universal. And it seems clear to the Government without anticipating any particular result inside 24 hours of the decision - that part of the negotiations and consultations that have to now occur on an urgent basis with employers and employees is around the issue of casual conversion and a greater clarity and certainty and universality to that right of request.

IMPORTANT DECISIONS

- **What is a 'fair advance commitment' for non-casual employment?**

WorkPac Pty Ltd v Rossato [2020] FCAFC 84 (20 May 2020)

In a crucial ruling in the wake of the *Skene judgment*, a full Federal Court has ruled that coal mining worker Robert Rossato is a Workpac employee with leave entitlements.

Justices Mordy Bromberg, Richard White and Michael Wheelahan ruled in a 175-page judgment that the driver, during his engagement on six consecutive employment contracts over almost four years to April 2018, was a permanent Workpac employee entitled to paid annual, personal/carers and compassionate leave, plus payments for public holidays during Christmas shutdowns.

Labour hire company Workpac launched the Rossato case after it decided against appealing the landmark *Workpac v Skene* ruling.

The full court reserved its decision in May last year (see Related Article), after the labour supplier sought a declaration that Rossato was a casual and therefore not owed additional leave entitlements in October 2018.

It filed the application soon after Justices Richard Tracey, Mordy Bromberg and Darryl Rangiah upheld Federal Circuit Court Judge Michael Jarrett's 2016 ruling that mine driver Paul Skene was an employee, despite Workpac engaging him as a casual.

It confirmed that although Workpac's offer of casual employment gave Skene "the status of 'casual FTM'" with no annual leave entitlement under its agreement, his regular predictable working arrangements meant he was an employee entitled to benefits under s86 of the Fair Work Act.

Employers at the time warned of a "massive liability" due to potential "double-dipping", with Ai Group foreshadowing that with at least 1.6 million casuals working on a regular, ongoing basis, back pay claims for annual leave could reach $8 billion (see Related Article).

Some also questioned Workpac's decision to launch its case against Rossato, testing the same issues regarding the definition of a casual worker, instead of appealing the full court decision in *Skene*.

Adero Law argued it was an abuse of process in that it sought to re-agitate issues already dealt with.

Adero last February filed a class action against Workpac seeking up to $84 million on behalf of lead applicant Matthew Petersen and between 7000 and 10,000 other casuals working for at least three months on regular and systematic rosters at black coal mines.

The CFMMEU filed a self-funded class action against Workpac last August, pursuing at least $12 million in unpaid annual leave entitlements on behalf of lead applicant Ben Renyard and about 600 "misclassified" casuals.

Justice Bromberg in September last year placed the two class actions on hold until after the full Federal Court hands down its judgement in the *Rossato* case (see Related Article).

The Federal Court also called pens down on other Adero class actions challenging Hays and Stellar Recruitment's use of casual mineworkers in the black coal industry until the outcome in *Rossato* is known.

- **Refusal to take leave a breach of Job Keeper legislation**

Ms Leonie McCreedy v Village Roadshow Theme Parks Pty Ltd [2020] FWC 2480 (13 May 2020)

A stood down part-time employee receiving double her usual wage on the JobKeeper scheme unreasonably refused a request to use up one day's annual leave each week over 16 weeks, the FWC has found.

In what is believed to be the first published ruling in the JobKeeper dispute jurisdiction – an appeal against a ruling on jurisdiction is set to be heard on Monday (see Related Article) – Commissioner Jennifer Hunt determined under the Fair Work Act's Part 6-4C coronavirus economic response provisions that the Village Roadshow Theme Parks' worker had no justification for spurning the request.

Concluding she could rely on s789GV(4)(d), empowering the tribunal to "deal with a dispute about the operation of [Part 6-4C . . . by making] any other order that the FWC considers appropriate", the

commissioner ordered the staff services department worker "not to continue to refuse the request made by her employer".

Commissioner Hunt reached her decision after hearing evidence that after 22 years with the company, typically working two days a week, VRTP stood the employee down on March 23 and issued her a JobKeeper-enabling direction not to attend work.

With accrued annual leave of almost 10 weeks and nine weeks' long service leave, she was subsequently asked to take one day a week annual leave until September 27, when the coronavirus provisions cease to take effect, or her leave balance had reduced to four days.

In bringing the matter before the Commission, the worker said she did not believe the legislation was intended to assist large employers such as VRTP use employees' annual leave accruals to set-off against the federal government's JobKeeper payments.

She also argued that the policy unfairly hit long-serving employees who had accrued significant leave.

In her case, the leave balance had already been calculated as underpinning planned holidays, including a six-week trip to Europe in 2021.

In a letter to VRTP, the worker cited the additional factor of a medical condition and said the request had caused her "a great deal of angst in these already challenging and anxious times".

In response, the company's HR manager informed the worker that senior management had reviewed her request "and unfortunately it has been denied, as it does not meet our guidelines to unreasonably refuse our request to take leave".

Noting at the outset that the worker was currently receiving $750 a week in JobKeeper payments when she was typically paid $375, Commissioner Hunt accepted also that she had not yet been granted approval for her planned holidays.

"I have had regard to the leave policy of VRTP, cautioning employees not to book trips or make payments prior to the leave being approved as it is not guaranteed," she said.

"VRTP has stated its intention to request of all relevant employees that they take annual leave of up to 2.5 days per week while in receipt of the JobKeeper payment.

"This is permitted, and in [the worker's] case, she is requested to take annual leave at the rate of one day per week.

"The Act requires that she must consider the request and must not unreasonably refuse the request.

"I do not accept [her] submission that the requests made by VRTP to its relevant employees is unreasonable, or that the provisions are or should only be available to smaller employers, and not employers the size of VRTP.

"The Explanatory Memorandum does not support such a submission."

Instead, Commissioner Hunt said, she considered the worker had in the evidence made "incredibly unsympathetic, and in my view, belligerent and unwarranted attacks on VRTP, despite the JobKeeper provisions being available for all eligible employers, small or large".

"The test is not, however whether VRTP has acted reasonably or unreasonably; it is whether [the worker] has unreasonably refused the request of VRTP.

"In all the circumstances and noting that [the worker] anticipates requiring only four days' annual leave for her proposed holidays in September and October 2020, I consider that her refusal of VRTP's request is unreasonable."

The commissioner observed that in light of "stinging criticism" she had seen on VRTP's closed employee Facebook page; it was up to the company "to decide for how long it needs to make requests of eligible employees".

"The damage to the relationship with some of its employees opposed to VRTP's request to relevant employees is for VRTP to consider and manage."

Finally, said Commissioner Hunt, "for the sake of clarity", she had not considered in reaching her conclusion the disparity between the worker's usual wage and her JobKeeper payment.

- **No sick leave payable after stand downs**

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited [2020] FCA 656 (18 May 2020)

Unions are calling on Qantas to permit sick workers to continue accessing paid personal leave entitlements while stood down due to the coronavirus, despite the Federal Court ruling today that it is not obliged to do so.

Justice Geoffrey Flick dismissed two applications by the TWU and the Qantas Engineering Alliance – comprising the AMWU, AWU and CEPU – that argued the airline had to keep paying sick leave, carers' leave and compassionate leave.

Thousands of Qantas workers stood down due to a downturn in work caused by the COVID-19 pandemic are able to draw down on accrued annual, long service leave, leave without pay, leave at half pay and parental leave.

But the airline said that because it has no work to be performed, it did not need to keep paying personal (sick) leave, carers' leave or compassionate leave to those who had been receiving it.

The unions pointed to s525 of the Fair Work Act, in which a worker is not taken to be stood down while taking paid or unpaid leave that is "authorised to be absent from his or her employment" by an employer.

They said it meant employers could stop paying wages during a stand down, but not sick, carers' and compassionate leave.

The unions further maintained that agreement clauses inferred workers held an entitlement to continue receiving these payments.

Concluding today that employees could not access the payments while stood down, Justice Flick said it concerned an "entitlement on the part of the employee to take leave from otherwise performing the work they are required to perform".
"It is the very characterisation of the leave entitlement conferred by s96 as a 'form of income protection' which presupposes that an employee is in receipt of income," he said.

If there is no work available to be performed, Justice Flick said there is "no income and no protection against that which has not been lost".

Conversely, he said making employers pay the entitlements after lawfully standing down workers would defeat its principal purpose, "namely, to protect the employer against such claims".

"As Qantas has repeatedly submitted, and correctly so, '"income" is not being protected if there is no available or required work from which to derive income in the first place'."

Justice Flick said the carve-out under s525(b), in which workers are not taken to be stood down while they are "otherwise authorised to be absent", "leads to no different conclusion".

Rather it is directed to "circumstances in which provisions of the Fair Work Act themselves 'authorise' or 'entitle' the employee to be absent", he said, such as eligible community service activities, jury service and public holidays.

Satisfied that the agreement clauses were also consistent with the Fair Work Act provisions, Justice Flick dismissed the applications.

The Qantas Engineers Alliance Unions today expressed disappointment in the judgment, saying it will prevent thousands of stood down workers from accessing sick, carers, or compassionate leave.
However, AMWU assistant national secretary Glenn Thompson said it "doesn't prohibit Qantas from choosing to allow their workers to access their personal leave".

"We are calling on Qantas to rethink their cruel approach and allow workers to access their personal leave immediately."

The TWU said it is looking to appeal the ruling.

"This is about justice and the fact that workers who are battling serious illnesses should be allowed to draw down the significant sick leave they have accrued through years of hard work at Qantas," TWU national secretary Michael Kaine said.

He said workers involved in the action included a man battling cancer and another awaiting a triple bypass, both with more than 30 years tenure.

"The ruling is bitterly disappointing for Qantas workers battling serious illnesses and their families, who are enduring worries about their finances at a difficult time in their lives."

A Qantas spokesperson has commented*:*

"Unfortunately, the Coronavirus has meant the majority of our employees have been stood down and not receiving their regular income".

"The court has confirmed that employees who are stood down are not eligible to receive paid sick leave because there is no work to be absent from.

"Employees can still access annual leave, long service leave and other support including the Government's JobKeeper payments."

- **Guidance on stand downs and what constitutes useful work**

Michael Marson v Coral Princess Cruises (N.Q.) Pty Ltd T/A Coral Expeditions [2020] FWC 2721 (25 May 2020)

In a significant decision examining how employers can lawfully assess "useful work" when standing down employees, the FWC has ruled a pandemic-affected cruise operator acted "upon proper principles" when transferring some of a superintendent's duties to others.

The marine superintendent claimed Coral Expeditions breached the Fair Work Act's s524 when he was included among 107 employees stood down as a result of the government-mandated suspension of its business.

Arguing that there was still work he could do, and that some of his ordinary duties were now being performed by others, the superintendent sought to be re-engaged by Coral Expeditions.

In considering his application, Deputy President Nicholas Lake observed that three "primary criteria" must be satisfied for a stand down to be lawful under s524(1).

"First, the employee must be stood down during a time in which they cannot be usefully employed," he said.

"Second, one of the three sub-criteria must be present . . . In the present case, s524(1)(c) has been argued: a stoppage of work for which the employer cannot be held responsible.

"The third criteria dictates that the employee cannot be usefully employed *because* of the stoppage."

There has not been much "judicial commentary" on what constitutes a work stoppage, noted the deputy president.

Having rejected a "mere reduction" in available work as satisfying the statutory requirement, he said there still remained a question as to whether a genuine stoppage of work occurs "when an employer's business is not trading, but there still exists some limited functions that can be performed".

"This is not a question of whether there is a stoppage of work: a stoppage exists where there is a cessation of trade," the deputy president continued.

"'Work', according to the dictionary definition applies to the 'activity' of the business, which in this case relates to the carriage of passengers on various cruise holidays.

"This activity has entirely halted and should, therefore, be properly characterised as a stoppage of work.

"This continues to be the case regardless of whether some administrative or caretaker functions of the business continue to be required [as] these functions do not properly represent the 'activity' of the business."

Having concluded that s524(1)(c) would be satisfied when a business's activity is ceased as a consequence of factors outside its control, Deputy President Lake determined that any question about whether a worker can be stood down related to whether they could be usefully employed, "not whether there has been a stoppage".

"Ultimately, this interpretation best fulfils the legislative intent of this section and is the most appropriate interpretation when considering the ordinary meaning," he said.

"If a cessation of trade was not considered a genuine stoppage of work, then there would be numerous situations in which an employer would be unable to stand down an employee who cannot be usefully employed, only because certain ancillary facets of their business have not entirely ceased to operate.

"These more administrative roles do not constitute the activity of the business."

Finding that there was a genuine stoppage of work "owing to [Coral Expeditions'] inability . . . to engage in its primary function", the deputy president turned to the question of useful employment and former FWC Vice President Graeme Watson's 2011 *AMWU v McCain* decision in which he cited a 1983 Federal Court judgment, Townsend v General Motors-Holden's Ltd.

"VP Watson's extract from *Townsend* primarily stipulates that 'useful employment' is a question of fact and that necessarily in determining the factual matrix, one must give consideration to the conduct of the employer," he said.

"If the employer has acted in good faith, this will be a factual consideration in favour of the employer.

"Often the employer is acting in an emerging and transient environment – comprising a strike action, a sudden breakage of machinery or in this case, an evolving regulatory framework resulting in a total loss of trade.

"It is extremely difficult for an employer in these circumstances to be able to act upon all the facts in a reasoned and deliberate way and it is because of this that the conduct of the employer must be assessed against more general notions of fairness and good faith.

"Where the employer is acting out of self-preservation, it is difficult to contemplate how their actions would be outside the realms of good faith or fairness.

"The approach . . . [of the Australian Industrial Court in 1971's] Re Carpenters stipulates as a general rule that where there is a category of work available to be performed, no single employee cannot be usefully employed.

"However, the ambit of useful employment is then limited to the amount of useful work available to be performed.

"Where the available useful work does not extend to all employees, those remaining employees cannot be deemed to be capable of useful employment."

Hence, Deputy President Lake concluded, the test of useful employment could be comprised of "two parts".

"First, an assessment of the work available: it must be determined if there is useful work and then the number of employees required to perform that useful work."

"Second, a more general analysis of the conduct of the employer against notions of good faith and fairness must be undertaken."

Noting that Coral Expeditions had stood down half its workforce, the deputy president said such a drastic response helped ameliorate any concerns their actions were targeted at particular employees.

"The fact that the stand down was widespread, impacting employees from all facets of the company – as well as another employee from the Marine Department – further indicates that the actions taken were fair and considered," he said.

"The [superintendent] contends that because the work that he performs continues, his role is automatically considered 'useful' to the Respondent.

"This appears to be an incorrect construction of the law around useful employment, as a role can be considered useful, but not a particular individual, as stated in *Re Carpenters*

"On the evidence of [Coral Expeditions], the marine team, of which the marine superintendent is part, is capable of reallocating the work to other individuals within the department.

"The particular tasks being performed by the marine superintendent, due to COVID-19 have largely diminished in size.

"The ship has half as many employees, reducing the HR tasks; large portions of maintenance, except routine work, have been postponed and attendance with regulatory bodies is currently minimal.

"In this environment, the role of the marine superintendent can be performed by the other currently retained employees.

"Given the shift in available work I am not persuaded that there is sufficient useful work for [him] to perform."

When further taking the "economic consequences on the employer" into account, said the deputy president, retaining the marine superintendent would produce no net benefit, given that his reduced asks could be performed by others.

"[Coral Expeditions] has allocated the useful work accordingly and that allocation appears to be reasonable."

"I consider that the numerous measures [Coral Expeditions] has taken to preserve itself, including a widely implemented stand down, indicate that the action was not one targeted at the [superintendent].

"The evidence provided shows that the decision to stand down was not one made without due consideration and I conclude that [Coral Expeditions] acted upon proper principles and in good faith."

Summing up, Deputy President Lake said the case involved a cruise line that had no choice but to suspend operations.

"Coral Expeditions has stood down its employees in an attempt to stay afloat."

"Australia, and the rest of the world, continues to sail through the uncharted waters of a pandemic not seen for 102 years and [Coral Expeditions] has made a genuine attempt to salvage their operation against crushing financial conditions.

"To eschew economic considerations in a time such as this would be contrary to both the case law and notions of fairness.

"In these circumstances, I find that the [superintendent] is not capable of useful employment and the claim is therefore dismissed."

IMPORTANT DATES (Save the dates)

BIC IWG Seminar – Friday 12 June 2020 at 10.30am (Details to be advised)

APTIA BREAKFAST – Sydney (23 September 2019) Note that it is likely to be postponed.

BIC NATIONAL CONFERENCE Cancelled

Dates for the BIC and APTIA Annual General Meetings will be advised.

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