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Senate Education and Employment Committee
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4 February 2021

By email: seniorclerk.committee.sen@aph.gov.au

Dear Committee Secretary

Subject: The Fair Work Amendment (Supporting Economic Recovery) Bill 2020

You have invited submissions with respect to the **Fair Work Amendment (Supporting Economic Recovery) Bill 2020**, currently before you.

(a) The Australian Public Transport Industrial Association

The Australian Public Transport Industrial Association (APTIA) is the industrial arm of the Bus Industry Confederation (BIC), which is the peak national body, representing bus and coach operators across the country, along with bus and coach chassis suppliers and bus and coach body manufacturers. There is an estimated forty thousand (40,000) employees who are employed by members of BIC or members of the respective State Associations.

APTIA has been a registered organisation since January 2011 and is subject to the Fair Work (Registered Organisations) Act 2009. APTIA has some 21 members comprising six State Bus and Coach associations, along with eight public transport and seven major urban transport operators. It is a small employer organisation and has a small secretariat. Its membership however stretches across the bus and coach industry within Australia.

Because a large proportion of APTIA's membership comprises rural school bus operators, a large proportion of its school bus drivers are casual employees. The industry is an aged industry with the average age of a bus driver being 56 years of age. Invariably bus and coach drivers are in a second or third career and at the end of their work life, which makes for some unique issues of health and safety and life choices that other industries, with a different demographic, might not have.

To this extent the undersigned appeared before an Attorney General Roundtable Meetings – Casuals and Fixed Term Employment, as an expert, to explain the role of casual school bus drivers in the bus and

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coach industry.

(b) Summary of APTIA's position

APTIA supports the passage of the "Supporting Economic Recovery" Bill as it will:

- i) Provide a needed definition of casual employment, whilst at the same time, ensuring conversion opportunities to casual employees, who wish to convert, and allow those casual employees to remain as casual employees to suit their purposes.
- ii) Prevent double dipping, should an employee, who has received the casual loading, be found not to be a casual, protecting the workforce from overpayments, which clearly discriminate against part time and permanent employees who would have undertaken the same work but have been paid up to 25% less.
- iii) Provide greater flexibility, in some modern Awards, to employers and employees during the COVID crisis to negotiate job protecting terms.
- iv) Make applications for approval of enterprise agreements less formal, which will encourage employers and employees to rediscover the benefits of negotiating such enterprise agreements.
- v) Allow employees to make claims for unpaid wages in a more simplistic way and enable both employers and employees to resolve small claims in a much less expensive way.

This submission provides examples of the position APTIA has espoused above. Along with specific suggestions for amendments to the Bill.

(c) Casual Employment (Schedule 1 – Casual Employment)

APTIA presented to the Attorney General's Roundtable Discussion on "Casual and Fixed Term Employment".

The presentation was designed to provide evidence that a section of the bus and coach industry relies upon casual employment and that its employee want to remain as casual employees because they work 20 to 30 hours a week and only 40 weeks a year.

The undersigned provided to the Working Group examples of the NSW school bus operator, Buslines Group, the nature of its employment of employees, and provided reasons why an aged workforce was happy to remain as casual employees.

Busways is another large rural school bus operator in NSW which also operates services in urban areas of Sydney.

I have attached copies of both Busways and Buslines Group employment figures. (ATTACHMENT A)

Example: (Make up of workforce)

(Buslines Group):

- Operates town and school bus services through some 13 regional centres in New South Wales.
- The total workforce is some 403 employees.
- Over 95% of their workforce is casual employees.

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- Over 89% are 45 years of age or older. In fact, 58% are over 60 years of age.

(Busways)

- Operates town and school bus services across 11 regional areas in New South Wales, metropolitan route and school services in 5 urban areas in or around Sydney, and 2 urban route and school services in Adelaide, South Australia.
- The total workforce is some 1634 employees
- In the rural school bus service regions 75% of all employees are casual employees. In the non-urban areas casual only make up about 25% of the Workforce.

The Bus and Coach Industry is made up of route and school services, and what was a vibrant long-distance tourist coach (LDTA) industry. The LDTA industry has been decimated by COVID and relies on casual employment and the flexible working arrangements it provides, to survive.

Bus and Coach Passenger Transport is recognised as an aged workforce and rural school bus drivers usually work between 20 to 30 hours a week for 40 weeks a year during school terms. These employees do not want to take permanent work as invariably they are holding down second jobs, protecting pensions or just want the freedom that comes with casual employment.

APTIA contends that the Bill does not properly recognise these types of seasonal employees.

In essence, they are however able to enjoy a firm advance commitment of work but as casual employees. In Victoria, bus operators pay an additional loading above the casual loading as an annual leave allowance.

It is an unnecessary duplication for the right to convert to be considered each year. Once an employee decides that they do not wish to convert or cannot convert, they should not be afforded an unlimited opportunity to convert.

Example (Double Dipping)

An example of how double dipping discriminates against a permanent or casual bus and coach employees.

- Grade 3 school bus drivers under the Passenger Vehicle Transportation Award receives \$28.96 an hour.
- Double dipping allows a former casual bus driver to claim \$28.96 an hour along with all leave entitlements.
- A permanent or part time employee is entitled to the leave provisions but only receives \$23.17 an hour.
- A casual would receive at least 25% higher wages and benefits than a permanent or part time driver doing exactly the same type of work.

Recommendation:

1. APTIA seeks an amendment to section 15A (2), adding a subsection 15A (2) (e), to include the following words:

“whether the person is rostered for less than 52 weeks each year”

2. APTIA seeks an amendment to the Bill, by adding to Section 66C(2)(e) the following words:

“the employee is rostered for less than 52 weeks each year”

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- (i) APTIA seeks a further amendment to section 66F with the inclusion of section 66F(1)(d) to read the following words:

“the request has not previously been made on more than two occasions.”

(d) Flexibility (Schedule 2 – Modern Awards)

The Passenger Vehicle Transportation Award 2020 currently determines the terms and conditions of bus and coach employees in the passenger transport industry.

The LDTC industry, which is approximately 10% of the total bus and coach industry, has been decimated by COVID 19, which has seen, with closed borders, none, or limited, interstate travel.

With the closure of the international borders there has been no inbound tourism. Similarly, with school deciding to postpone or cancel school excursions there has been significant loss of employment, and the industry has only survived, in part, because it has been supported by the current variations to the Fair Work Act 2009 allowing for flexible employment arrangements.

The LDTC industry is only part of the bus and coach industry, and therefore the Passenger Vehicle Transportation Award 2020 does not need to be broadly amended. It only needs to be amended to support this part of the bus industry which has been significantly affected by COVID 19.

There should be a mechanism whereby sections of an industry are able to apply for the flexible arrangements to apply to them. This could easily be achieved by the Fair Work Commission acting as an adjudicator of such change. Whilst this is possible under current laws, the Bill presents an opportunity to provide some details behind what a successful application to amend an Award would look like.

Recommendation:

1. APTIA advocates that section 168M(3)(m) is amended to read:

“or those specific employees with coverage in an Award so prescribed by the regulations.”

(e) Enterprise Agreements (Schedule 3 – Enterprise Agreements)

APTIA strongly supports the amendments set out in sections 180(2) and 180(3) relating to provision to provide the workforce with the certain information and agreement documents, and the repeal of sections 180(5) and 180(6) to allow a more liberal view of how far an employer is required to go to explain the terms of an enterprise agreement, especially when a trade union, bargaining agents is involved in the bargaining process.

Given the bus and coach industries relationship to long term casual school bus drivers APTIA welcomes the definition of when a casual employee has the right to vote for an agreement.

APTIA’s frustration with the bargaining process is not from the process itself because in most instances the various State Bus and Coach Associations reach agreements with the local branches of the Transport Workers Union and a template agreement is used across the networks.

This has relevance for the State based operations as 90% of the bus services are funded by the State Government, and it is important for funding purposes to have some uniformity in rates of pay and terms and conditions.

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The problem the industry faces arises in respect of the FWC agreement approval process, where different requisitions come in from different FWC sources relating to the same agreement, which given it is often based on a template agreement, has previously been approved.

Set out below are examples of repeated requisitions relating to the rights of casual employees to vote in a ballot and the duplication that exists with trying to convince the Fair Work Commission that employees have had an agreement adequately explained to them, which is an agreement which is a template agreement in its second or third cycle.

The Bill will clear up the basis upon which a casual is able to vote in a ballot and makes it simpler to seek approval in satisfying the Commission that employees have understood the agreement.

Examples Applications by Buslines Group

FWC Requisition (Matter No. AG2019/4901)

Majority vote—It is noted that 29 out of 30 employees covered by the agreement are casual employees. The Deputy President seeks confirmation that these employees were eligible to vote at the time of the vote.

Response from Applicant – Casual Employees

1. The Applicant operates route and school bus services under a long-term contract with Transport for NSW.
2. The Applicant's obligation, for which it is funded, is to run school services for no less than 40 weeks a year during the school terms.
3. Outside of school terms the Applicant continues to operate route services across the 52 weeks of the year.
4. The Applicant employs casual employees who are regularly and consistently employed to carry out this contracted work.
5. Most of the casual employees have been employed for more than 5 years, in some instances for up to 10 years.
6. On the day of the vote, 6 December 2019, it was a school day, and all the services were operating, and the drivers were fully employed. All casuals were employed whilst the sole permanent employee was on leave.

FWC Requisition (Matter No. AG2020/3744)

Casual Workforce – The Deputy President refers to the fact that the employees of the Applicant are casual employees and following the “Swinburne University” case further clarification may be required.

Response - The Applicant at paragraph 4 of the Form F17 made the following comments:

“Note that the drivers are all employed as casual employees as most of the work is school bus work which is limited to school terms. The drivers are long term employees who work during school terms and all were scheduled to work during the access period and on the day of the ballot.”

As indicated in the Form F16 Application the Applicant is slowly undertaking negotiations for an agreement with each region.

As at the date of this application the following agreements had been approved by the Fair Work

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Commission.

- Buslines Group Bus Drivers (Lithgow) Enterprise Agreement 2019 – AG2019/4910 (Deputy President Cross, 1 April 2020) AE507656; PR718011
- Buslines Group Bus Drivers Ulladulla Enterprise Agreement 2019 – AG2020/1084 (Deputy President Saunders, 18 May 2020) AE508067; PR719435
- Wingham A Pty Ltd Bus Drivers (Dubbo) Enterprise Agreement 2019 – AG2020/3347 (Commissioner Johns, 18 November 2020) AE 509563; PR724686
- REO Investments Pty Limited Bus Drivers (Forster) Enterprise Agreement 2019 – AG2020/3454 (Deputy President Young, 25 November 2020) AE509629; PR724895

All of these approved applications have the same terms and conditions as the current application, and all relate to a significant casual workforce.

Since the Application, the following further agreement has been approved on the same terms and conditions.

- Buslines Group Pty Limited Bus Drivers (Bathurst) Enterprise Agreement 2019 – AG2020/3661 (Deputy President Cross, 15 December 2020) AE509830; PR725455

FWC Requisition (Matter No. AG2020/3744)

Explaining the terms to employees - You seek further information as to how the terms and effects of the agreement were explained to the employees in accordance with your obligation under s.180(5).

Response – In this regard the applicant relies upon the Application, more specifically:

- Paragraph 21 noted on 12 November 2020

“Two meetings, on the same day, were called for all drivers who were provided with a hard copy of the agreement, given the opportunity to ask questions and consider any variations to the agreement. A presentation of some of the relevant terms and conditions were provided to each driver on the night. All drivers accessed these meetings. See attachment marked C.”

- Paragraph 22 further noted on 12 November 2020

“The explanatory notes were provided, and our drivers asked questions including the rates and allowances, the method of payment, the timing of the payments and what wage increases might occur over the life of the agreement. Most of the drivers were employed at the time the previous agreement was made and they were familiar with the various clauses.”

I would submit that this process has been accepted by the Fair Work Commission over at least 6 other applications relating to the same type of business and as such the FWC can be satisfied that the requirement of section 185 (5) have been met.

Part 5 – Better Off Overall test

APTIA also supports the proposed changes to the better off overall test as set out in Part 5 of the Bill with



reference to subsections 189(2) and 193.

Section 193 allows for relevant and irrelevant matters to be considered, when considering the BOOT for agreements in circumstances where non-monetary consideration may occur.

APTIA is mindful of the concerns about loss of pay or conditions and suggests a compromise position which might be the limiting of such an agreement to the COVID 19 period only to ensure that the take home pay for the agreed work is not less than it would have been but for the change of hours of work, types of employment and location.

Recommendation:

1. APTIA advocates the inclusion of section 189(2)(1A)(v) to read:

“the reduction, if any, of the take home pay of the employees, taking into account the proposed change of employment terms.”

(f) Unpaid wages (Schedule 5 – Compliance and enforcement)

Part 2 – Small Claims procedure

APTIA supports the proposed amendment to section 548 of the Act to allow for small claims to be made up to \$50,000.00, and to allow the Fair Work Commission to deal with the claim.

In this regard, APTIA considers that the process of small claims proceedings as set out in the Bill is a less expensive process, and that the Fair Work Bench is more appropriate and experienced in Award definitions to deal efficiently with such claims.

Whilst section 548 (1)(c) remains however the effect of the changes will be negligible, because the right to choose a small claim is in the hands of the plaintiff.

If a plaintiff decides to exercise the discretion that section 548(1)(c) provides, which is to opt out of the jurisdiction of the Fair Work Commission and head for the Federal Court, the impact of the amendments will be meaningless.

The current process of pursuing underpayment of wages is a costly legal process usually prosecuted in a Federal Court and at times without industry representatives who do not have an automatic right of appearance in the Federal Courts, as they do in the Fair Work Commission. The Union movement has called for a more efficient and less expensive approach to small claims. APTIA supports this call.

Recommendation:

APTIA recommends that section 548(1)(c) is repealed.

Part 5 – Criminalising underpayments

APTIA’s view is that a clear distinction needs to be made when considering criminalisation of wage underpayments between innocent or even ignorant mistakes and systematic, deliberate underpayments.

APTIA does not favour the criminalisation of wage theft unless it can be shown that such underpayments are of a criminal nature which would amount to a crime under the current Federal or State laws and most certainly are defined by the onus of proof for such criminality.

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In circumstances where an employer has either taken an incorrect view as to an interpretation of a particular Award or has omitted to ensure that their payroll staff are fully appraised of the correct payments, notwithstanding that this might amount to gross negligence or a direct breach of their obligations to their employees, nevertheless it is APTIA's view that such a breach does not warrant a penal sanction.

It is APTIA's view that the Office of Fair Work Ombudsman should continue to provide explanatory tools to enable isolated operators to keep up to date with changes to the various Awards including wage rates.

These submissions are provided after significant consultation with the industry and the undersigned is available to the Committee to assist if required, more specifically at its hearing in Canberra on Friday, 19 February 2021.

Yours faithfully



Ian MacDonald, National Industrial Relations Manager

Attachments

Buslines Group employment profile

Busways employment profile

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