

15 September 2015

Workplace Relations Framework
Productivity Commission
GPO 1428
Canberra City, ACT 2601



APTIA
Suite 106
53 The Corso
MANLY NSW 2095

By email: workplace.relations@pc.gov.au

Dear Sirs

Subject: Workplace Relations Inquiry

The Australian Public Transport Industrial Association (APTIA) is the industrial arm of the Bus Industry Confederation, which is the peak national body and which represents bus and coach operators, bus and coach chassis suppliers, bus and coach body manufacturers and associated supplier groups to the industry.

APTIA made a submission to the APC on 13 March 2015 in which, referencing its terms of reference, summarised its submissions as:

- (i) (Items b) and c)) - The introduction of the Fair Work (Transfer of Business) Amendment Act in APTIA's submission has the unintended consequence of preventing Government from realising maximum value for money in considering privatisation of its assets and limits the opportunity of enabling private enterprise from achieving cost efficiency. The Act should be repealed.
- (ii) (Item g)) - APTIA calls upon the Productivity Commission to consider ways of reducing red tape for smaller organisations to meet their regulatory requirements and to provide greater flexibility to smaller organisations in meeting these requirements.
- (iii) (Item d)) - The Productivity Commission reinforces the previous review of the Fair Work Act 2009 and supports current legislation before the Parliament which removes the payment of leave loading on termination in Awards which have historically exempted the payment.
- (iv) (Item c); d); e); f)) - APTIA seeks that the word 'seriously' is added to the definition in Column 2 of section 342 (1); Item 1 of the Fair Work Act 2009.
- (v) (Item b), c), f), h)) - The Productivity Inquiry recognises the impacts that protracted protected industrial action has on the community in public transport by recognising it as an 'essential service' and lowers the bar for suspending protected or terminating protected action so that bus and coach operators would be able after a protracted period of strikes to have the option to call upon FWC to make a workplace determination pursuant to section 424 of the Fair Work Act 2009.
- (vi) (Items d); h)) - APTIA seeks to amend section 437 (5) of the Fair Work Act 2009 by removing subsection (b). In this way a vote for taking protected action would be a representative vote of all employees and would thereby meet the stated objectives of the Section as outlined above.

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APTIA seeks to respond to some of the draft recommendations released by the Australian Productivity Commission (APC) in August 2015.

(a) Draft Recommendation 4.3 - National Employment Standards

APTIA seeks to have section 90 (2) of the Fair Work Act 2009 amended to give effect to the historical exemption provided to the public transport industry through the Passenger Vehicle Transportation Award 2010 (MA00063), which exempts the payment of annual leave loading on termination (clause 24.3 PVTA).

APTIA in this regard supports the proposed amendments set out in the Fair Work Amendment Bill 2014, which sought to limit annual leave payments on termination to the base rate upon. (Refer paragraph 6.1 of APTIA's submission)

(b) Draft Recommendation 5.3 – Removal of reinstatement as a primary goal

APTIA supports this recommendation to remove reinstatement as a primary goal in unfair dismissal applications because it gives effect to an obvious conclusion that can be drawn from any dismissal, which is that the employer's confidence, trust and reliance upon the employee has been eroded and broken down.

There are sufficient financial penalties that can protect an aggrieved former employee without the necessity of creating further animosity, within the workplace, by reinstating the employee.

(c) Draft Recommendation 6.2 – The meaning and application of a workplace right

APTIA supports the recommendation that sections 341 and 342 of the Fair Work Act 2009 should better define the meaning and application of a workplace right.

APTIA provided in its submission examples which demonstrate how the definition of adverse action is too broad and has opened the door to vexatious claims, which are expensive and protracted. (Refer paragraph 6.2 of APTIA's submission).

(d) Draft Recommendation 12.1 – Four yearly review of modern awards

APTIA supports the removal of the requirement for four yearly reviews of the modern awards. The position of APTIA is supported widespread by both employer and employee groups.

The process has substantially reduced the availability of the Fair Work Commission to deal with the day to day operations of the Commission and has introduced substantial costs to both employer groups and employee groups in dealing with issues that would not have otherwise been raised but for the review itself.

The removal of the set review periods would mean that any future reviews would be well thought out and developed through industry need and experience.

(e) Draft Recommendations 15.2, 16.1, 16.2 – Individual flexibility arrangements

APTIA supports the extension of the IFAs to allow for a wider range of issues, including a specific definition of 'when work is performed'.

APTIA also supports the proposed changes to section 144 of the Fair Work Act 2009 as set out in the Fair Work Amendment Bill 2014 which includes termination in 13 weeks and clauses which allow benefits to be included, other than monetary benefits.

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Unless these amendments are incorporated into the Fair Work Act 2009 then APTIA is of the view that the creation of IFAs serves little or no industrial purpose.

(f) Draft Finding 15.1 – Productivity clauses

APTIA does not agree with this draft finding that the argument and desire for productivity as a condition of an enterprise agreement negotiation is not strong. In APTIA's opinion, it is productivity that drives the case for higher wage rights.

APTIA's view is that the Fair Work Act 2009, at section 186 (2), should specifically refer to productivity as a prerequisite for approval of an enterprise agreement. In APTIA's submission the modern award objectives (sections 134 (1) (d) and (f)) are compromised without the requirement.

In this regard APTIA supports the introduction of the Fair Work (Bargaining Processes) Bill 2014 which included the need to discuss productivity improvements during the bargaining process and, as recommended by the APC, the need to have genuine negotiations before protected action ballots are approved.

(g) Draft Recommendation 19.1 – Protected Action ballots

APTIA does not consider that the draft recommendations go far enough. In its submission APTIA outlined an anomaly which exists with the interpretation of section 437 (5) of the Fair Work Act 2009 which limits a vote for a protected action ballot to employees represented by bargaining agents. This means, in practice, that only trade union members get to vote in favour of strike action. However, once the protected action ballot is ordered the protected action is usually taken by all employees irrespective of whether they have voted for such action.

This inconsistency could be rectified, in APTIA's submission, by either amending section 437 (5), as recommended in APTIA's submission or simply amending section 418 (1) to define circumstances, which would not be considered protected action, to those employees, who had not voted in a ballot for such action. (Refer paragraph 6.4 of APTIA's submission)

(h) Draft Recommendation 19.2 – Amendments to section 432 (2) to suspend or terminate industrial action

APTIA supports the lowering of the bar to taking protected action. This would include amendments to section 424 which would allow for protected action being suspended or terminated in circumstances where the Fair Work Commission determined that a particular industry was deemed an essential service. (Refer paragraph 6.3 of APTIA's submission)

The APC draft recommendation which seeks to introduce an amendment which allows for suspension or termination, where it is causing or threatening significant economic harm, is too broad and has been construed by the Fair Work Commission, only in extreme circumstances.

APTIA in its submissions has provided examples of where the extremities of economic harm to the employer, the employee and the community were not considered enough in the case of public transport to suspend protected action. Decisions such as those exemplified in APTIA's submission are not in accord with international practice in large cities which are dependent upon public transport.

(i) Chapter 17 – The enterprise contract

APTIA does not understand the basis for this proposal as the current enterprise agreement system, supported by a strengthening of the individual flexibility arrangements would cover, in the opinion of APTIA, the industrial environment. Common law contracts are also often used to supplement industrial agreements.

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(j) Chapter 22 – Transfer of Business

APTIA does not consider that this draft recommendation goes far enough. In its submission APTIA sought the repeal of the Fair Work Amendment (Transfer of Business) Act 2012, which amended the Fair Work Act 2009, and which acts as a bar to the privatisation of public utilities, in favour of private ownership, which provided greater cost efficiencies to Government. (Refer paragraph 4 of APTIA's submission)

Yours faithfully

Ian MacDonald

National IR Manager

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