

## **Workplace Relations Inquiry**

### **Australian Public Transport Industrial Association**



**March 2015**

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## **1. The Workplace Relations Inquiry**

- 1.1 The Australian Government has asked the Productivity Commission, by Terms of Reference, to look at possible improvements to Australia's workplace relations systems.
- 1.2 The Commission having produced a number detailed issues papers has asked a series of questions including:
- What works well in the system?
  - Views on minimum wages, penalty rates unfair dismissal, compliance burdens etc, and
  - Changes one would like to see?
- 1.3 The Australian Public Transport Industrial Commission seeks by this submission to provide examples of experiences within the public transport industry, which may enable to the Productivity Commission, within the scope of their terms of reference, to recommend changes to Australia's workplace relations system.

## **2. An introduction to the Australian Public Transport Industrial Association (APTIA)**

- 2.1 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. There is an estimated thirty thousand employees (30,000) who are employed by BIC members. APTIA represents all State Bus and Coach Associations with over 2000 small and large bus and coach operators. APTIA also represents Urban Bus and Coach Operators whose businesses traverse state boundaries such as the multi-national corporation, Transdev Australia, Transit Systems Australia, Transit Australia Group, Greyhound Australia and Murrays Australia. Other public transport operators, who are members of APTIA, include the Ventura group, operating in Melbourne and the Bus Lines group who operate throughout 10 large rural regions in New South Wales.
- 2.2 The Public Transport Industry is a labour intensive industry and bus and coach drivers are employed under the modern award or in most cases under negotiated enterprise agreements. Most bus operators specifically operate Government contracted route and school bus services. The public is dependent upon the regular scheduled bus services. A break down in

those services, which occurs from time to time creates considerable inconvenience to the public but more importantly:

- Places the public in harm's way as they try to get to their destinations without access to their public transport
- Impacts in the ability of the public to access medical assistance, hospital services, shopping centres and family
- Discriminates against those who are unable to access any other form of transport, especially the young of school age and the elderly
- Impacts on the economy of a region if the break down in services is protracted.

2.3 Long distances travel, day charters, tourist ravel are generally deregulated and dependent upon the number of passengers carried to provide services. Movement therefore in wage rates without commensurate productivity savings would cause such operators to question their viability. On the other hand with the Government contracted services are funded by the Government and unrealistic wage claims can lead to extra government costs followed by reduced services.

2.4 The industry has a diversity of employment types such as permanent, permanent part time and casual workers. The school bus services are predominantly undertaken in the morning and afternoon. In most isolated rural areas, school bus drivers are employed as casual employees. The average age of bus drivers is 53 years old and the demographics include drivers who drive as a second job, drivers who are retired or on the pension and work for some extra pocket money. In the majority of cases permanent drivers have taken to the industry as a second or third career change.

### **3. Proposed Changes**

3.1 That the **Fair Work Amendment (Transfer of Business) Act 2012** is repealed and the previous circumstances restored whereby a successful private tenderer of a public utility is not obliged to incorporate an existing inefficient workplace agreement into their operations.

3.2 The **Fair Work (Registered Organisations) Act 2009** is amended to recognise that all registered organisations are not the same size and that regulatory obligations are less onerous and more flexible for smaller organisations.

3.3 That public transport is recognised as an ‘essential service’ and the **Fair Work Act 2009** is amended to lower the bar to suspend or terminate protected action for ‘essential services’ such as public transport (**section 424**); that the definition of adverse action is limited to circumstances of significant adverse action (**section 342**); that the anomaly that prevents exemptions for payments of annual leave loading on termination is removed (**section 90 (2)**) and that protected action can only be taken following a majority ballot of all employees not just members of a trade union (**section 437**).

#### **4. The Fair Work Amendment (Transfer of Business) Act 2012**

4.1 APTIA seeks the repeal of the Fair Work Amendment (Transfer of Business) Act 2012 and has already made a submission to Acting Director of Workplace Policy, Department of Employment, as part of a review of the Act.

4.2 APTIA considers that the legislation, which was not originally part of the Fair Work Act 2009 and which was only introduced at the end of the previous Government, does have some unforeseen consequences for achieving cost efficiency through Government privatisation of their public utilities.

4.3 This occurs because a private operator who tenders for a public utility is required to take on board the existing employees and their current public workplace agreement. In many cases the public workplace agreement does not allow flexibility for a successful operator to create more efficient and productive workplace conditions and therefore does not provide to Government the efficiencies that they are seeking in the privatisation process in the first place.

4.4 The effect of the Fair Work Amendment (Transfer of Business) Act 2012 therefore in any tender process is to push costs up rather than down and to place enormous burdens in the current industrial environment, dominated by potential protected action to support employment terms and conditions.

4.5 Examples:

- There are examples of government privatisation of public transport utilities especially in Western Australia and South Australia. More recently Sydney

Ferries were privatised and the Northern Territory is currently privatising their bus operations in Darwin.

- In the other States and Territories New South Wales has the State Transit Authority in Sydney and Newcastle, Tasmania has its Metro in Hobart and Launceston, Queensland has through its Brisbane City Council Brisbane Buses and in the ACT ACTION operates bus services. Privatisation of these services would all be affected by the Fair Work (Transfer of Business) Amendment Act 2012.

4.6 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.

## **5. The Fair Work (Registered Organisations) Act 2009**

5.1 APTIA has 23 members comprising State bus and coach associations, urban transport operators, whose businesses traverse state lines and public transport operators, who operate in single states. The total budget for APTIA does not exceed one hundred and fifty dollars (\$150,000.00) a year and its controlled by a council comprising 13 individual representatives, who are located across all States of Australia.

5.2 APTIA is part of the Bus Industry Confederation (BIC), which is the peak industry body, representing, not only bus and coach operators, but also bus and coach chassis suppliers and body manufacturers, along with associated suppliers. The Council members of BIC and APTIA are mirrored and are subject to governance obligations in their roles at BIC.

5.3 In 2012 amendments to the Fair Work (Registered Organisations) Act meant that approved governance and finance training was required for those 13 Council members. The training had to be approved by the General Manager of the Fair Work Commission and undertaken within six months of the appointment of the Council.

5.4 APTIA has undertaken its training of its Council Members following a six months process with the Fair Work Commission in seeking approval to its training program. APTIA decided that an industry based program was more effective than seeking a template governance module that was available to it. The training was required to occur on site and was held in Melbourne as Council membership came from all over the country to attend

- 5.5 The training package included a lengthy five (5) hour training session, supported by some 50 power point slides. A compulsory written test was taken by each Council member at the conclusion of the presentation. It was a requirement of the FWC that each Council member achieve an 80% success rate with the questions
- 5.6 As a further consequence of the 2012 Act, APTIA was required to change its rules to reflect the new reporting obligations and the need to undertake financial training. Resolutions were made on 18 June 2013 and were approved by the Fair Work Commission on 22 November 2013.
- 5.7 In 2014 APTIA held an election for its Council members. The election was conducted by the Australian Electoral Office. Despite the fact that the election of APTIA's Council is based on a collegiate systems and despite the fact that there were no elections actually held as all position were filled the election took over six months whilst changes have been recommended by the AEC to APTIA's rules because of uncertain interpretations of those rules by the AEC.
- 5.8 Whilst APTIA understands the need for stringent regulations for registered organisations and also the public's expectation to ensure good governance, nevertheless APTIA is concerned that no consideration is give to the size of the organisation, as opposed to large trade unions, with significant resources from members in the thousands and revenue in the millions.
- 5.9 The Government has committed to a number of industrial relations reforms affecting small business in their "Improving the Fair Work Laws" and has stated:

*"The Coalition will provide practical and useful help for small business workplaces because this is where many jobs are created and innovation happens. Small business men and women have many demands on their time and don't have the resources to be legal experts as well. The Coalition is determined to help them by ensuring the Fair Work Ombudsman provides targeted and clear help. This will include a number of initiatives and help small business improve their understanding of the Fair Work laws so they have confidence to grow and employ. We will also encourage greater compliance and education by providing potential immunity from Fair Work Ombudsman pecuniary penalty prosecutions for a small business employer if it pays or applies the wrong employment conditions, provided the error was not deliberate and the employer had previously sought Fair Work Ombudsman advice and help on the same issue."*

5.10 Given the Government's stated intentions to address issues of red and green tape and to reduce onerous requirements for small business APTIA is of the view that smaller organisations should be given more flexibility in meeting their regulatory obligations such as:

- Allowing a smaller organisation to conduct their own Council member elections
- Allowing governance and financial training to be undertaken on line to avoid the tyranny of distance
- Acknowledging that training modules for smaller organisations should be tapered to meet the size and undertaking of the organisation by eliminating the need for an examination at the end of the governance training and reducing the annual financial reporting requirements.

5.11 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..

## **6. The Fair Work Act 2009**

### **6.1 Section 90 (2) (Payment for Annual Leave)**

1. The meaning of s. 90(2) of the Fair Work Act 2009 has long been in dispute, and the Fair Work Review Panel, established by the former Labor Government recommended amending the provisions to specify that annual leave loading is not payable on termination unless expressly provided for in an award or agreement.
2. While Labor's Workplace Relations Minister Bill Shorten did not include this in his post-review amendments to the legislation, current Minister Eric Abetz is seeking to adopt the recommendation in his Fair Work (Amendment) Bill, 2014.
3. The FWO, when the issue was first contested, posted advice on its website from Jeffrey Phillips SC that: *"If an employee is entitled to annual leave and annual leave loading, then they must be paid out for both entitlements if their employment is terminated. This applies even if a clause in a modern award, agreement or contract expressly states their either entitlement is not payable."*
4. An interpretation of Section 90 (2) of the Fair Work Act 2009 has now been considered in the Federal Court. On 2 March the Federal Court, in a case, **Centennial Northern Mining**



**Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 136**

**(27 February 2015)** sought to clarify this long-disputed issue, holding that annual leave owed to workers whose employment is terminated has to be paid out at the same rate they would have received had they taken the leave while still at work.

5. If this case is followed then section 56 of the Fair Work Act 2010 would apply to negate that part of clause 24.3 of the Passenger Vehicle Transportation Award 2010 which exempts the payment of leave loading on termination.
6. The decision and the failure of the legislature to adequately deal with the issue of Awards, such as the Passenger Vehicle Transportation Award 2010 (PVTA), which are historically exempted from the payment of leave loadings means businesses, will face a higher financial burden as a result of the introduction of the Fair Work Act 2009, which is an unintended consequence.
7. **The Passenger Vehicle Transportation Award 2010 (PVTA)** exempts the annual leave loading from termination pay and is one of six Awards that exempt the loading payment. The exemption was a historical exemption and in some jurisdictions an increase in the loading to 25% compensated for this exemption. Another 10 Awards provide for limited exemptions.
8. The PVTA was introduced by the Decision of the then **Australian Industrial Relations Commission (AIRC) on the 4 September 2009 [2009] AIRCFB 826** as part of the Award Modernisation process.
9. The Decision of the AIRC relating to annual leave loading reaffirmed the provisions of the pre-modern Federal Award **Parts A and C Transport Workers (Passenger Vehicle) Award 2020 AP818060** which stated at clause 34.11 (Part A) and clause 32.10.1 (Part C) as follows:  
  
*“During each period of annual leave a weekly employee shall receive a loading of 17 1/2 per cent on the ordinary wage rate prescribed for his or her classification under this Award. Annual leave loading as prescribed above shall not apply to proportionate leave on termination of employment.”*
10. The pre-modern federal award applied across Victoria, South Australia, Western Australia, parts of Tasmania and Queensland.

11. In New South Wales, the pre modern award was the **Motor Bus Drivers and Conductors (State) Award (No: IRC 19444 of 2008)** which dealt with the matter of leave loading on termination at clause 23, as follows:

*“(1) See Annual Holiday Act 1944.*

*“(ii) An employee at the time of his or her entering upon a period of annual leave, in accordance with the said Act, shall be entitled to an additional payment calculated on the basis of 25 per cent of the holiday pay for that period of annual leave. Should circumstances arise where an employee has received annual leave loading to which he/ she is not entitled, then such payment shall be deducted from any monies due at termination.”*

12. Similarly section 4 of the Annual Holiday Act (NSW) 1944 states:

*“4 Holiday pay where holiday is not taken*

*(1) Where the employment of a worker who has become entitled to one or more annual holidays provided by this Act is terminated, the employer shall be deemed to have given the holiday or holidays (except so much, if any, as has already been taken) to the worker as from the date of termination of the employment, and shall forthwith pay to the worker, in addition to all other amounts due to the worker, the worker’s ordinary pay for the period of the holiday or holidays.”*

- a. In the passenger transport industry leave loading has never been paid on termination and this fact was recognized by the AIRC in its determination of the Passenger Vehicle Transportation Award 2010. Rates of pay have always been determined on this premise and APTIA cannot point the Fair Work Commission to any approved enterprise agreement which permits the payment of leave loading on termination. To permit the application of the ACTU would simply be to increase wage rate costs to the industry which in APTIA’s submission would be an unintended consequence of the Four Year Review.
- b. APTIA seeks that 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.

## 6.2 Section 342 (Meaning of Adverse Action)

1. Section 342 of the Fair Work Act outlines circumstances in which an employer may be guilty of taking adverse action against an employee which includes: dismissing that employee; injuring the employee in his or her employment; altering the position of the employee to the employee's prejudice or discriminates between the employer and other employees.
2. APTIA's concern is that this definition, which is used by employees or representatives of employees, is too broad and with the current 'reverse onus of proof' upon employers to show that such adverse action hasn't occurred has opened the door to expensive, protracted and vexatious claims which are totally unrelated to the rationale behind this employment protection and do not meet the objects of Division 3 – Workplace Rights.
3. APTIA seeks to provide the following industry example of one of its members, Premier Motors Services Pty Ltd, which was the subject of an adverse action application by the Transport Workers Union of Australia on behalf of a member, who was also an employee of Premier Motors Services and one of the Union delegates.
4. The details of this example are set out below:
  - Premier Motors Service Pty Ltd T/A Premier Illawarra operates route and school services under the Transport for New South Wales contract in the southern Wollongong Region. The Company also undertakes charter work and other transport work such as rail replacement (scheduled or emergency). Premier Illawarra employs over 249 persons to operate its transport services (173 buses) over two depots in the Wollongong region (i.e. at Unanderra and Shell Harbour)
  - In or around the 25 September 2012 the Transport Workers Union, representing its Union delegate lodged an application under section 372 against Premier Illawarra alleging the following adverse action had been taken against their Union delegate.
    - In breach of section 346 (b) of the Fair Work Act 2009 that Premier Illawarra on 9 August 2012 took adverse action against the delegate because the delegate was engaging in an industrial activity as defined by section 347 9b) of the Act.
    - The alleged adverse action was to deny the delegate the opportunity of undertaking charter work, instead of his normal route service work because he had exercised his right to seek support for a protected action ballot amongst drivers.

- The TWU further claimed that the delegate was affected by the adverse action, suffering humiliation and should be entitled to a pecuniary penalty along with a payment of \$150.00, being the difference in the different jobs and a pecuniary penalty for the trade union which it alleged had also been humiliated.
  - The application was unsuccessfully conciliated in the Fair Work Commission on the 29<sup>th</sup> October 2012 (**Transport Workers Union of Australia v. Premier Motor Service Pty Ltd [2014] FCCA 9**). As a consequence the Transport Workers Union initiated, on the 17<sup>th</sup> December 2012, proceedings in the Federal Circuit Court, Fair Work Registry by way of a Claim under the Fair Work Act 2009, alleging contravention of a general provision. The Application of the TWU was dismissed by the Federal Circuit Court on 24 March 2014.
  - An appeal was lodged by the TWU and that appeal was heard on 14 August 2014.
  - It is now more than two and half years since the alleged adverse action. The union delegate is still employed by the Company and the TWU continues to have representation with employees of the Company. The only thing that has changed is that the Company has the matter hanging over its head and has paid almost one hundred thousand dollars ((\$100,000.00) in fees to defend themselves.
5. 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.

### **6.3 Section 424 (Suspend or Terminate Protected Action)**

1. The Bus Industry Confederation (BIC) and its industrial arm, the Australian Public Transport Industrial Association (APTIA), advocate that public transport should be declared an 'essential service' in order to:
  - Minimise disruption to the public as a result of protected action
  - Ensure tax payers dollars aren't wasted on protracted enterprise agreement negotiations wherein employers, relying on the public purse, giving in to unrealistic demands from employee groups, and
  - Provide grounds for the intervention of the Fair Work Commission to resolve employment terms and conditions in the public transport industry.

2. The debate about which industries should be declared as essential has raged for many years and is tied up in Australian Labour law in the powers given to the Fair Work Commission under the Fair Work Act 2009 to suspend or terminate protected action if that action endangers the life, personal safety or health or welfare of the population or part thereof. There is cogent international evidence of jurisdictions such as Canada, the United States (New York Metro) New York and the London Underground where public transport has been considered either as an 'essential service' or is being considered.
3. The Bus Industry Confederation (BIC) has referenced bus usage within Australia and relying on the last ABS Motor Use Survey in 2006 that collected this data found that 13.6% of all Australian adults caught public transport to work, which equates to more than 1 million adults per day. BIC estimated that over 300,000 of those numbers travel by bus. 25 % of all children in Australia catch a school bus to school up to 201 day per year which equates to 3.7 million children of which at least 1 million ( a quarter) catch a bus.
4. There are many examples (some of which are reviewed in this paper) where the Fair Work Commission has failed to suspend or terminate protected action preferring the right to freedom of association (Objects; Section 5 (e)) as opposed to promoting productivity and economic growth (Objects: Section 5 (a)).
5. This failure has flown in the face of the impacts that public transport has:
  - In providing social equity in transport for all in the community
  - Providing essential transport for the elderly and young to medical centres, hospitals and commercial centres
  - Providing essential school services up to 201 days a year to school students particularly in the isolated areas of Australia which are vast and significant
  - Providing a safe and secure manner of transport during the evenings particularly in heavily populated areas or tourist destinations.
6. In all of these cases the safety, health and welfare of the population becomes the relevant test. Unfortunately the Fair Work Commission has tended to keep the bar to terminate very high and it has only been in cases when the nation was impacted in the Qantas case of 2013 that the power was used.
7. BIC/ APTIA propose the following strategies:

- To provide evidence to the Productivity Commission Inquiry that public transport should be declared an 'essential service' and that protracted strike action impacts on the safety, health and welfare of the community.
  - To seek amendments to the Fair Work Act to enable a public transport employer to lower the bar set out in section 424 of the Fair Work Act 2009 and be able to seek suspension or termination of protracted protected action on the basis that public transport is an 'essential service' and that protracted strike action should be suspended or terminated in circumstances where an employer has opted for a workplace determination..
8. APTIA is concerned that an employers' prospects are limited by current legislation whereby an employer can apply for the suspension or termination of protected action as provided by section 424 of the Fair Work Act 2009. That section requires evidence that 'life' is endangered; the 'personal safety and welfare' of the public is at risk or 'significant' damage to the economy or part thereof is threatened.
  9. To date only employers in the most extreme circumstances, such as the ambulance service, the power service industry and international air travel have succeeded. It is APTIA's contention that all public transport should be included in this category.
  10. APTIA considers that 'public transport' is an 'essential service' industry, and as such is of the view that consideration should be given to providing employers in the public transport industry a right to suspend or even terminate protected action in certain circumstances (see paragraph [?] below).
  11. APTIA suggests that any protected action that stops public transport, especially bus services, impacts on all services and therefore operating reduced services as part of protected action is not practical, and running some services and not others has a cascading impact through the timetable, rostering and scheduling of all services and only succeeds in creating uncertainty in the community. APTIA believes that operators run either all their services or NO services.
  12. It is therefore APTIA's position that if negotiations for an enterprise agreement have not been concluded or such negotiations have reached an impasse, that the employer should have the right to seek the termination or suspension of the protected action, and have the additional right, if they seek to terminate or suspend the protected action, to be able to call upon the Fair Work Commission to make a workplace determination.

13. APTIA provides the following examples to demonstrate the impact of protracted protected action on the public transport industry.

- In 2011, an APTIA bus operator member, on the Sunshine Coast, sought to negotiate a new enterprise agreement. The Transport Workers Union of Australia, representing its employee members could not reach agreement with the local operator and for a period of six months (December 2011 to June 2012) the Operator and the community on the Sunshine Coast, Queensland, had to endure over six months of rolling strikes.
- The Company sought the assistance of the Fair Work Commission (then FWA) which was not prepared to suspend or terminate the protected action. After the community cries for an end to the strikes, which impacted upon the tourist economy of the Sunshine Coast and threatened the security of an area, which had the largest crime rate in the State and after the refusal of the Federal Workplace Minister to intervene the Queensland Government intervened and appointed an independent conciliator who resolved the issue in two meetings.
- The enterprise agreement negotiations on the Sunshine Coast were the subject to various applications, initiated by APTIA, on behalf of its member, before FWC including:
  - An Application for protected ballot (S.437)
  - An Application for bargaining orders x 2 (S.240)
  - An Application for termination of an Enterprise Agreement (S.225)
  - An application for FWA to deal with a bargaining dispute (S.240)
  - An Application for FWA to extend the protected action period (S.459)
  - An Application to terminate/ suspend the protected action (S.424)
  - An Application to suspend the protected action (S.425,426)
- On at least seven occasions FWA had attempted to conciliate the disputes and to seek a resolution of the negotiations. FWA refused two applications to suspend the protected action.
- **Transit Australia Pty Ltd v. Transport Workers Union of Australia [2011] FWA 3410 (Decision of Commissioner Asbury, 31 May 2011)** was an application to suspend protected action under s. 424 of the FWA on the grounds of threatened action, which endangered the life, personal health and safety, welfare of the population or part thereof. The Decision of Commissioner Asbury reflects the points made by APTIA in this submission.

*“The evidence establishes that the travelling public will be inconvenienced by the industrial action. However it is a well established in case law that more than inconvenience is required before the power to suspend or terminate protected action on the grounds in s.421(1)(c) would be exercised by the Tribunal.” [32]*

*“I am also unable to accept that the loss of wages to drivers who choose to take protected industrial action is a relevant consideration under s. 421(1)(c) of the Act with respect to the welfare of the drivers.” [35]*

*“I accept that public transport is an important service and that the public depends upon it. However, I am of the view that public transport is not an essential service as was the case with the service in Ambulance Victoria v LHMWU.” [36]*

- **Transit Australia Pty Ltd v. Transport Workers Union of Australia [2011] FWA 3410 (Decision of Commissioner Cambridge, 29 July 2011)** was an application pursuant to s.425 of the FWA to suspend protected action on the grounds that the suspension would be beneficial to the bargaining representatives and that the suspension would not be contrary to the public interest. Again the Decision of Commissioner Cambridge reflects the contradictory nature of the objects of the Act.
- *“On balance, however, the overall time period which has elapsed since the first incident of protected industrial action occurred is significant. It must also be recognized that for a substantial period whilst FWA was actively assisting in the conciliation process there was an absence of protected industrial action. In many respects, that period may appropriately be considered as cooling off period, which unfortunately did not resolve the enterprise bargaining negotiations.” [17]*
- *“There is some basis to support the proposition that the public interest would be served by suspension of the protected industrial action as is relevant to paragraph (c) of subsection 425 (1) of the Act. It would seem however that support for this proposition is largely contingent upon a public interest test confined to the travelling public of the Sunshine Coast as opposed to the broader concept of public interest.” [18]*
- *“In that respect the objects appear to be confined to providing ‘clear rules governing industrial action’. There is no specific object relating to avoiding or minimizing protected industrial action.” [19]*
- *“The legislative regime has been constructed with a clear intention to facilitate the taking of protected industrial action. Although I personally find such an approach to be inconsistent with other objects regarding the promotion of productivity and economic*



*growth, it would appear that the suspension of the protected industrial action by way of Order under s.425 would in this instance, be likely to be inconsistent with the objects of the Act.” [19]*

- During the various hearings APTIA provided sworn statements to the then FWA and set out below are some examples of comments included in the statements.
  - “The strikes are killing their family members”
  - “Daniel Morecombe is going to happen again (Reference that it was this operator’s bus for which Daniel was waiting)”
  - “They would hold us responsible for the outcome of their loved one's conditions if they were not able to get to them”
  - “Need to be able to travel to the station to go to the Brisbane hospital”
  - “So are you going to pay my taxi for the whole time this is occurring”
  - “I lost my job because of you”
  - “I am paying more in taxi's than I receive from my job are you going to feed my kids”
- Other examples which were included into the sworn statements but did not resonate with FWA because they didn’t reach the bar set by section 424 included:
  - “Customer catches bus regularly. Is very sick with cancer and needed to get to a doctor’s appointment on Wednesday morning as he was getting his final results. Patron is very much a larrikin and optimistic about his illness. We organised for a 600 bus to start at early at around 8.40am (after the stop work meeting) to go and get him so he could connect on to the 620 to get to Pacific Paradise in time for his appointment. He was very grateful for our help as there was no way for him to get to the appointment without the bus.”
  - “Elderly patron rang regarding the strike. Says that her husband has been put in a nursing home at Noosa. Her only mode of transport is the buses. She not able to visit him when the buses are on strike. Her husband was not in a good way and treasures every moment she can spend with him.”

- "Customer has called several times and was very angry regarding the bus strike. His wife is in the ICU at Nambour and he fears that she will pass away. He was most upset that he and his children would not be by her side when she passed away. Adam said if he could not be there when she passed away that he would hold us responsible."
- "Customer is an elderly passenger who uses the service regularly. She relies on the service to get to doctor appointments and pick up medicine for her and very ill husband. Is at a loss on how to she will be able to get these necessities."
- "Customer contacted and said she had to cancel a few doctors' appointments for her very sick child as there is no other bus company that can assist her in taking her son to hospital."
- "Customer contacted and said that they are not able to take their child to the Brisbane Show because of us; do you want to explain that to my child?? Patron had not seen the child in many weeks."
- "Customer contacted and said she is a mother with children that will not be able to feed her children tonight because it is too far to walk to the supermarket. Not to mention that the children have not been able to attend school as they do not have transport. This is affecting everyone."
- "Young single mother contacted and said that she may lose her job because of the strike. In turn she would also lose her day care position as she would be unable to get them to day care or pay the additional costs for not attending."
- "Customer called regarding the strike and said that it has cost her over \$100.00 in taxis this week. Wanted reimbursement for the fares as she will not be able to afford food this week."
- "Many university students have called up and are quite vocal and upset on the phone towards staff. Have said we are responsible for ruining their education. They have paid a lot of money for courses which they are now unable to attend. Had one call where a parent & student were yelling down the phone at the same time."

- “Customer contacted as her husband is very sick and they cannot get to the hospital to attend appointments.”
- “Patron cannot get to work as he relies on the buses and public transport to get to work in Brisbane from the Sunshine Coast and has not been able to go to work on the days the strike has been on.”
- In the sworn statements further emails were put into evidence of proof of the impact of the protracted protected action. Examples include:
  - *“I catch the bus to and from work each week day, as do many others. Similarly, many pensioners, students, sole parents and others are reliant on the buses to get to classes, medical appointments, grocery shopping and other essential commitments. I appreciate that your drivers have the right to strike and that you do not have to give into what they want just because they are on strike but the current situation where there are no buses for virtually a whole working week is no longer simply inconvenient to the public but simply untenable.”*
  - *“What about all the kids? Don’t want anything like the Daniel Morecombe thing happening again hey. I have to catch 2 public buses to get home from school. Now how the hell am I meant to get home???? School buses don’t go that far. Go on strike when the buses aren’t operating.”- I say”.*
  - *“I just wanted to thank you guys for striking for nearly an entire week just after I started a new job. You couldn't run limited services in the morning & afternoon so that people could get to work could you? Nope. Whatever you guys are striking over you just have to make sure that the rest of us get punished as well. Do you honestly think I can afford over \$25 per day on cab fares? I have 6 shifts this week & no other way to get to work thanks to you selfish ass-hats. I have zero sympathy for any of you. The only thing I do feel is contempt for the way you lot are treating the thousands of people on the Sunshine Coast who rely on you people to get them to work ON TIME. I just wish there was a competing bus service here on the Coast. That way none of you would ever get another cent from me again. Sort your crap out, get the hell back to work again AND STOP PUNISHING THE REST OF US OVER WHATEVER CHILDISH SPAT YOU LOT ARE HAVING.”*

- *"This is seriously getting beyond a joke. Do you people actually care about your passengers?? There are plenty of us who would like a pay rise but we don't go constantly striking and affecting others to get our point across. I don't think you really understand the impact that you are having and as far as I'm concerned I hope you don't get a pay rise out of all of this because this is ridiculous. I hope the government don't step in because all that does it make people think they can throw a tantrum, affect thousands of people and eventually get what they want. After all of this childish behaviour what are you going to give back to the public to say sorry to them. I had to go and drop off my husband to a train station 30 minutes away at 5am with a crook neck, 31 weeks pregnant, had to wake up my daughter to put her in a car and then nearly crashed as I was not well, all because you want to strike so therefore my husband can't get on a connecting bus to Landsborough"*
- *"Your bus drivers abuse others, leave people at bus stops, drive off on passengers but yet you think they all deserve a pay rise?? Then you get offered a pay rise but TWU want more? Greed absolute greed. If people don't like the pay well go and get another job as I'm sure there will be plenty of people willing to jump in the bus seat and at least earn an income."*
- *"I'm a member and rep of the union in my industry and I would be embarrassed to have my union behave this way. This is no way to go about getting what you want."*
- *"I am a student who relies solely on public transport to attend classes, job interviews, medical appointments and day - to - day activities. I am now three weeks behind in studies and cannot attend important job interviews and medical appointments. Is this company going to be paying for my classes for that I now have not been able to attend? Are you going to explain to prospective employers/government employment agencies why I have not been 4 able to attend appointments? I can't afford a taxi or to hire a car. I'm not the only person in this situation; they just don't know who to talk to about this. Regards Broke, sick uni student"*
- APTIA calls upon the Productivity Inquiry to recognise the impacts that protracted protected industrial action has on the community in public transport and to lower 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.

#### **6.4 Section 437 (Application for a Protected Action Ballot)**

1. Section 436 of the Fair Work Act 2009 outlines the object of the Division (Division 8 – Protected Action Ballots) which is to provide a *‘fair, simple and democratic process to allow a bargaining representative to determine whether employees must engage in particular protected industrial action for a proposed enterprise agreement.’*
2. APTIA submits that an anomaly is created by section 437 (5) which only provides that ‘those employees represented by the Bargaining Agent’ are required to vote for the taking of ‘Protected Action’.
3. The consequence of such a ballot of only trade union members is that it would be illegal protected action for an employee other than a Union member, who was a party to the original ballot, should be allowed to take protected action.
4. In practice, of course, when protected action is taken all employees, Union and non Union employees, take protected action either as a unity issue or because the non union employees are coerced into that circumstance.
5. APTIA is not aware of any applications by employers to penalise employees, not being parties to a ballot who had gone out with their Union employees.
6. It is APTIA’s contention that the current terms of section 437 (5) are totally undemocratic and do not reflect the mood of the workforce to take protected action unless all employees are able to participate in the protected action ballot.
7. APTIA seeks to amend section 337 (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.

#### **7. In Summary**

1. The Terms of Reference called upon the Productivity Commission Inquiry to assess the impact of the workplace framework in the following areas:
  - a) Unemployment, underemployment and job creation
  - b) Productivity, competitiveness and business investment

- c) The ability of business and the labour market to respond appropriately to changing economic conditions
  - d) Fair and equitable pay and conditions for employees, including the maintenance of the relevant safety net
  - e) Patterns of engagements in the labour market
  - f) The ability for employers to flexibly manage and engage with their employees
  - g) Red tape and compliance burdens for employers
  - h) Industrial conflict and days lost to industrial action
  - i) Small business
2. Set out below against this criterion is a summary of the specific matters which APTIA asks the Productivity Commission to consider as part of their inquiry.
- (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.
  - (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.
  - (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.
  - (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.
  - (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

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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.

- (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.

**Ian MacDonald, National Industrial Relations Manager**

**13 March 2015**