APTIA
Industrial Arm of the Bus Industry Confederation
moving people

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The Committee Secretary

Senate Education and Employment Committee

P.O. Box 6100

Parliament House

Canberra ACT 2600

8 December 2023

By email: eec.sen@aph.gov.au

Dear Committee Secretary

Subject: The Fair Work Legislation Amendment (Closing the Loopholes No 2) Bill 2023

The purpose of this supplementary submission is to address several amendments now approved by the House of Representatives on 29 November 2023, and currently before the Senate and titled the Closing the Loopholes No.2 Bill, 2023.

I refer to the submissions of the Australian Public Transport Industrial Association, dated 15 September 2023, and my appearance before you on 11 October 2023, by teleconference in Launceston. I have already referred to the matters of concern to APTIA but wish to raise two matters.

The supplementary submission relates to that part of the Bill now known as the Fair Work Legislation Amendment (Closing the Loopholes No2) Bill 2023 and only relates to casual employment and intractable bargaining workplace determinations.

Casual employment - Definition

The revised Explanatory Memoranda states the purpose of the amendments relating to casual employment are:

"Improving job security by replacing the existing definition of 'casual employee' with a fair and objective definition and by introducing a new employee choice pathway for eligible employees to change to permanent employment if they wish to do so."

APTIA supports the omission of section 359A from the Bill as it removes the necessity of a civil remedy provision which would have been unnecessarily extreme and not in the best interest of those employees who wish to remain in casual employment.

APTIA further presses its previous submission of 15 September 2023, relating to the proposed introduction of 66AAB (4)(b), which refers to the employee's choice about casual conversion.

APTIA continues to press for a further note to be added to the current note following section 66AAC (4)(c) along the lines set out below.

"Including where an employee notification requires an employer to offer the employee work for 52 weeks a year when the employee was originally employed for less than 52 weeks a year, and the employer does not have work for that employee over 52 weeks."

Intractable Bargaining Workplace Determinations

Of greater concern to APTIA is the proposed inclusion of section 270A into the Fair Work Act 2009, which has the intended consequences, as set out in the revised explanatory memorandum.

"Ensuring that terms included in an intractable bargaining determination made by the FWC, if not previously agreed by the bargaining representatives, must be not less favourable to employees or employee organisations than corresponding terms in existing enterprise agreements."

APTIA's concerns are that it may effectively remove the ability for the Fair Work Commission to make a determination which considers the totality of the bargaining process because of the need to disregard:

1. Clauses that may be less favourable than an existing enterprise agreement between parties; and
2. Certain decisions that parties have already agreed to.

Indeed, the Fair Work Commission's role may simply be restricted to adjudicating on rates of pay, which in the totality of the bargaining process is only one aspect of the negotiation process between the parties.

In APTIA's view the inclusion of such an amendment would make the process of arbitration and the FWC's intervention an irrelevance and would defeat the intended objectives of the original legislation

from **the Fair Work Legislative Amendment (Securing Jobs, Better Pay) Act 2022** as outlined in the original Explanatory Memoranda to that Bill, as set out below:

"784. The amendments in Part 18 of Schedule 1 would support the FWC to assist parties involved in bargaining for a new enterprise agreement to resolve disputes arising in bargaining.

785. The amendments would provide for the FWC to issue an intractable bargaining declaration if satisfied, among other things, that there is no reasonable prospect of the bargaining parties reaching agreement.

786. If the FWC makes an intractable bargaining declaration, the FWC would consider whether to provide the parties with a further period in which to negotiate following the intractable bargaining declaration (a post-declaration negotiating period).

787. Whether to allow the parties a post-declaration negotiating period would be in the discretion of the FWC, having regard to the circumstances and whether a post-declaration negotiating period might assist the parties to reach agreement.

788. Following any post-declaration negotiation period, the amendments would provide for the FWC to make a workplace determination to resolve any matters on which agreement had not been reached by the parties.

789. The amendments would repeal the existing provisions for serious breach declarations and bargaining-related workplace determinations as these provisions have not been effective in assisting parties to resolve bargaining disputes and would no longer be required following the commencement of the new intractable bargaining provisions.

790. These amendments support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them."

Some of the decisions that the Fair Work Commission would have to adjudicate on, each time an application is made, includes:

1. What constitutes an agreed term pursuant to a new subsection 274 (3)?
2. What might be considered a less favourable term? Is it a BOOT test? Is it a 'No Nett Disadvantage' test or is it some new test yet to be determined?
3. What is classified a class of employees, especially when each set of employers may have different provisions in their existing agreements?
4. How does the less favourable test apply to a multiple industry agreement where more than one previous agreement is in place?

Some examples of this potential confusion are set out below. In these examples, APTIA would suggest it would be impossible to work out what would be less beneficial to a class of employees, based on current terms, relating to the passenger transport industry.

(i) Some transport operators have entered agreements which provide a minimum payment of ten hours when a driver is located away from the Home Depot, whilst others simply follow the Passenger Vehicle Transportation Award 2020 (PVTA), allowance of eight hours.

(ii) Because broken shifts are a regular occurrence in passenger transport due to the requirement to meet peak capacity there is often a limit to the spread of hours for which a driver is expected to be on duty. Penalty rates will often be payable to drivers where hours are exceeded. This is variable however as some spread of hours can be thirteen hours or less and penalties will apply after varying hours of the day. The PVTA is silent on this issue.

(iii) Rates of pay for Government contracted route and school services are accounted for in an operator's service contract but the indices that determine increases in the rates of pay vary from the Wage Price Index, the Consumer Price Index, or the Average Weekly Ordinary Times Earnings. Indexation can occur every six months or annually. The Minimum wage determination is determined annually by the Fair Work Commission.

(iv) Annual leave loadings are discretionary and vary from 17.5% to 25% depending upon the jurisdiction, along with allowances, loadings, and penalty payments.

The power of the Fair Work Commission to bring the parties together and to seek an agreed approach before the need for arbitration is lost if the amendment is carried in the Senate. This will disadvantage both employers and employees, and their representatives and defeat the original intention of the Intractable bargaining Order process.

The Government needs to seriously rethink this amendment as it defeats the clear intentions of the Government's own legislative program, to close loopholes and to provide secure jobs and better pay.

Yours faithfully

Ian MacDonald, National Industrial Relations Manager