APTIA
Industrial Arm of the Bus Industry Confederation
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Committee Secretary

Senate Education and Employment Committee

P.O. Box 6100

Parliament House

Canberra ACT 2600

23 April 2014

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

Dear Committee Secretary

Subject: The Fair Work Amendment Bill 2014

You have invited the Australian Public Transport Industrial Association (APTIA) to make a submission to the Senate Education and Employment Legislation Committee into the Fair Work Amendment Bill 2014, currently before you.

The Australian Public Transport Industrial Association (APTIA) is the industrial association 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 (30,000) employees who are employed by members of BIC or members of the respective State Bus and Coach Associations.

Public Transport is a labour intensive industry, which is significantly impacted by Australia's industrial laws.

Protected action, which appears to be the mantra of the Fair Work Act 2009, lawful or otherwise, will have a dramatic impact for users of public transport e.g. the public will be prevented from access to schools, hospitals, medical centres and commercial centres. Protracted protected action in the public transport industry will eventually jeopardise the safety of the community and severely diminish local economies.

So far the Fair Work Commission has failed to recognise the fact that public transport is an essential service. The Commission has acknowledged that the public is inconvenienced by protected action in the public transport industry and has acknowledged the impact on safety and the economy in limited communities **(Transit Australia Pty Ltd v. Transport Workers Union of Australia [2011] FWA 3410, paragraph 32)** and the inconsistency with the objects of the Act which promote productivity and economic growth **(Transit Australia Pty Ltd v. Transport Workers Union of Australia [2011] FWA 5006 paragraph 19).**

Because of this failure BIC/ APTIA has embarked on a campaign to have public transport legislated as an essential service which flows through its submissions before the Senate Education and Employment Legislation Committee.

Dealing with each specific amendment APTIA seeks to make the following comments:

1. **Extension of period of unpaid parental leave (S.76 (5)) - cannot be refused unless an employer has given an employee a reasonable opportunity to discuss the request.**

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Comment: APTIA supports the opportunity for an employee to meet with an employer to discuss such a request.

2. Payment for Annual Leave - (S. 90 (2) - the rate to be paid to an employee whose employment is terminate is the base rate only.

Comment: APTIA considers that Section 90 (2) of the Fair Work Act has been misconstrued by the Solicitor General and the Office of Fair Work Ombudsman and that there isn't any inconsistency between the NES and modern awards such as the Passenger Vehicle Transportation Award 2010 which provides an exemption for payment of any annual leave loadings on termination. APTIA contends that the legislation merely supports the historic position in relation to leave entitlements on termination.

2. **Accrual of leave entitlements whilst on workers compensation (S 130 (2)) - This clause is repealed so that no leave accrues whilst on workers compensation even if a local jurisdiction allows it.**

Comment: APTIA supports the amendment as anything otherwise has been an unintended consequence of being in receipt of workers compensation entitlements.

3. **Individual Flexibility Arrangements (S. 144 (4) (c)) - Requires a statement by the employee setting out why the employee believes they are better off overall and that the genuine needs of the employee have been met.**

Comment: APTIA strongly supports amendments to the IFA's which allow non financial benefits to be considered as part of the BOOT as it achieves greater flexibility in the public transport industry in which casual employment and part time employment is a significant factor. Examples of this are school bus drivers who operate their buses for only two to four hours a day 201 days a year during school periods only. Because public transport is an essential public service casuals are regularly used in circumstances when permanent drivers are absent on personal leave which can sometimes come at short notice.

4. **Individual Flexibility Arrangements (S. 144 (4) (d) - IFA can be terminated on 13 week notice.**

Comment: APTIA supports the extension of IFAs to allow greater effect. APTIA supports a provision being added to this amendment which would allow the parties by agreement to extend the IFA up to 52 weeks without renewal of the agreement. An IFA will usually be entered into as part of a long term arrangement. A review after 12 months of extensions would not disadvantage the parties in APTIA's opinion.

5. **Individual Flexibility Arrangements (S. 144 (4)) – Benefit other than payment of money may be taken into account.**

Comment: APTIA supports this provision as it reinforces the basis for the introduction of IFAs in the first place i.e. to provide an opportunity of an employer and an employee in a modern workplace to reach agreement on the best way forward for each party to achieve their best scenario at the workplace. APTIA does not consider that the extent to which the rate of pay are impacted by the 'non financial' benefit so long as each party accepts the outcome as being more beneficial to them.

6. **Individual Flexibility Arrangements (S145 (3)) – An employer does not contravene a flexibility term if the employer reasonably believes that the term does comply (new section 145AA).**

Comment: APTIA supports this amendment

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7. **Enterprise Agreements (S. 203 (2) (a) – Allows an IFA clause in an enterprise agreement to incorporate any other terms of the EA as part of an IFA. S. 203 (4) also allows benefits other than monetary entitlements to meet the BOOT. The Employees statement of benefits is required along with a 13 week termination clause.**

Comment: APTIA supports this amendment to protect the integrity of the individual flexibility arrangement. Currently flexibility clauses in enterprise agreement negotiations become an area of intractable agreement as employee organisations seek to diminish the effect of IFAs. The legislation will allow individual agreements beyond the collective which can only enhance the workplace.

8. **Greenfields Agreements (S176, 177) – Greenfield's agreements must only be bargained between an employer and an employee organisation that is entitled to represent the employees. The FWC has powers to arbitrate after 3 months has elapsed and no agreement has been reached.**

Comment: APTIA supports the proposed manner within which the FWC may be able to deal with a Greenfields agreement.

APTIA considers that arrangements relating to Greenfield agreements should be extended to industries that are designated as 'essential services'. APTIA considers that the protections afforded by section 437 (2) of the Fair Work Act should also be afforded to industries declared as essential services.

If this was the case then the same provisions of the amendments to section 176 and 177 would also apply to those essential service industries. In other words, industries which are declared as 'essential' would be able to put time limits on the negotiations of their agreements and be prevented therefore from engaging in unnecessary protected action.

APTIA considers that if the legislature is serious about ensuring the objects of the Fair Work Act (Section 3) to provide a balanced framework for cooperative and productive workplace relations then the declaration of those industries in which the public has an expectation of continuation of services must be treated in the same way as the development of new businesses through the Greenfields agreement process.

9. **Transfer of Business (S. 311 (1)) – A transfer of business does not occur if the transfer is from an old employer who is an associated entity of the new employer and employee seeks to become employed by the new employer.**

Comment: APTIA does not consider that this amendment goes far enough. APTIA considers that the amendment should repeal the provisions set out in Part 6-3A, Chapter 6 which were a consequence of the Fair Work (Transfer of Business) Act 2012. APTIA considers that the legislation, which itself is under review does have some unforeseen consequences for achieving cost efficiency through Government privatisation of their public utilities.

Given that labour costs in providing public transport (route and schools services) represents at least 50% of the total costs of providing those services the provisions in the Act to require any incoming, successful private transport operator to take over the same terms and conditions of an enterprise agreement or award of an outgoing public operator defeats the Government's intention to tender the public services (being to gain cost efficiencies by allowing private operators, traditionally more cost efficient).

The effect of this anomaly 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.

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It is difficult therefore once a private transport operator has taken over a public utility then to seek to bargain for a more efficient work force which has been dominated by Union involvement in obtaining further non cost effective gains for their members.

Because public transport is not considered an essential service by the Fair Work Commission it is difficult to actually stop continued protected action which places the new private contractor at risk of default of their recently acquired government contract because of the frustration of their services which is usually a default provision of any new contract.

10. **Transfer of Business (S.768AD) – A transfer also does not occur for the purposes of requiring the same agreement if the old state entity employer is an associated entity of the new state employer and the employee prior to transfer seeks to be employed by the new employer.**

Comment: APTIA refers to its comments above.

11. **Protected Action Ballots (S. 437 (2)) - Protected action ballots cannot occur until the Notification time (S. 713(2)) occurs which is the employer initiates commencement of negotiations or a majority of employees seek to commence bargaining.**

Comment: APTIA supports the amendments as it gives effect to the intended interpretation of section 437 rather than the one attributed to it by the Fair Work Commission in the JJ Richards case. The amendment should make it clear that meaningful discussions are taking place before a protected action ballot can be taken.

The amendment should indicate what 'meaningful discussions' are to avoid further involvement of the FWC.

APTIA has further concerns about the practice of employee groups who use the application phase as a vehicle to seek to renegotiate terms of an enterprise agreement which have been voted on by a majority of employees.

In this regard APTIA would seek an amendment to Section 183 to prevent an employee organisation from seeking to be added to an agreement where they have not specifically been requested to act as a bargaining agent.

12. **Right of Entry (S.12; S. 478) - Repeal transport and accommodation arrangements for entry by Unions. Entry only permitted for employees who are entitled to represent and are working and wish to participate in discussions.**

Comment: APTIA supports the reinstatement of the rights of entry provisions which limit trade union intervention into businesses without proper reason.

13. **Right of Entry (S. 492) - Repeal existing section and replaced with a section that allows an employer to request interviews to held in a particular location and by a particular route. The request cannot be unreasonable. The FWC can rule on reasonableness.**

Comment: APTIA supports this amendment.

14. **Powers to Dismiss Matters (S. 397) - The Bill adds another power to the FWC (designated application- dismissal powers) which provides power sot FWC to dismiss applications for unfair dismissal and others if the claims are vexatious or have no base.**

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Comment: APTIA support this amendment to provide stronger powers to the FWC to dismiss vexatious and unnecessary applications. APTIA considers that FWC should be able to assess these types of claims at application time.

APTIA requests your consideration of its submission during your deliberations and would be happy to address you on any matters of which you may seek clarification.

Yours faithfully

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