

FAIR WORK COMMISSION

FOUR YEARLY REVIEW OF MODERN AWARD

MATTER NO. AM 2014/196 and AM2014/197

AWARD: Passenger Vehicle Transportation Award 2010

AWARD CODE: MA000063



FINAL COMPREHENSIVE WRITTEN SUBMISSIONS of THE AUSTRALIAN PUBLIC TRANSPORT INDUSTRIAL ASSOCIATION (APTIA)

Preamble

1. These submissions are made in response to Directions of the Casual Full Bench on 9 March 2016 with respect of casual employment and part time employment (common cause).
2. These submissions are also a response to the Issues Paper released on 11 April 2016 with respect to the common cause and are designed to specifically provide an outline of the position of passenger transport (specifically bus and coach) to the application of the ACTU.
3. APTIA has made submissions on 22 February 2016 and 12 October 2015 and in a letter of 4 March 2016 to the FWC. These documents are relied upon in support of APTIA's position on the common cause.
4. In addition APTIA relies upon the affidavit evidence of Mark Driver (Exhibit 141) and Geoffrey Ivan Ferris (Exhibit 142) both sworn on 24 March 2016.

APTIA will further rely upon affidavit evidence of Geoffrey Ivan Ferris, Benjamin James Doolan, Ben Adam Campbell Romanowski and Shane Dewsbery to be sworn and tested on 15 August 2016.

5. In summary the submission of the 12 October 2015 argues that:
 - (i) APTIA has sought to provide an evidentiary base in support of proposed variations to clause 6.5 (d) (ii) of the PVT 2014 to better define an 'engagement' and to allow flexibility between an employer and employee to agree upon reduced minimum engagement in circumstances where an employee seeks to reduce work hours to satisfy their specific

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circumstances (e.g. to support a second job, to maintain benefits or because of a lack of work).

- (ii) APTIA has provided evidence across the passenger vehicle transport industry in which employees have sought reduced hours to protect pension entitlements, because they hold second jobs or simply because they only wish to work less hours.
- (iii) APTIA has further sought to demonstrate to the FWC that passenger transport is a provider of aged employment and has a special set of circumstances requiring flexible workplace considerations.
- (iv) That passenger transport is in a similar position to that of the retail industry in which lower minimum engagements were supported by the FWC. In the national retail case it was youth unemployment that needed to be addressed. In passenger transport it is the aged population that needs similar support.
- (v) Finally APTIA argues that the confusion that exists with the definition of 'engagement' can easily be overcome with the additional period of work being referred to as new 'start', to reflect the work undertaken each school day by its drivers.

6. In summary APTIA has noted in its submission of the 22 February 2016 that:

- (i) It is APTIA's submission that the proposed application to vary the PVTA by the ACTU with respect to Casual and Permanent Part Time employment should not be approved by the FWC because the ACTU has not provided cogent and probative evidence in support of its claim. At the same time the variations sought by the ACTU do not meet the objectives of the Modern Award system as set out in section 134 of the Act since the variations would not promote flexibility or social inclusion, whilst at the same time promoting unequal pay for the same work undertaken.

Casual and Part Time - General

1. What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part-time employment?

Casual employees are employed on an ad hoc basis with no guarantee of regular and consistent hours of work unlike part-time employees who are initially engaged on agreed hours. In the bus industry because of the seasonal uncertainty of the work, because in most cases the public transport task is essential with the community having an expectation that services will always operate, and given that the task especially for school bus drivers is only limited to school days i.e.

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200 days a year, it is not possible to offer part time work beyond those 200 days. There is little likely take up of the conversion clause with such casual employees who only work 20 hours a week and 200 days a year. The APTIA draft conversion clause recognises this issue and only commences at 25 hours a week.

2. What are the fundamental elements of part-time and casual employment?

In passenger transport the fundamental elements of casual employees are short shifts (no more than 4 hours a day) and, particularly for charter work, irregular and inconsistent work. Part time employment is rarely used to the extent that Part C of the previous Federal Transport Workers Award (Part C), which applied in Victoria, did not have a provision for part time employees.

3. What factors lead employers to engage casuals?

As stated, in passenger transport it is short time work i.e. 4 hours a day or irregular work used to fill in where employees are off sick or on leave, or where there is charter work, there is also no guarantee of long term contracts. In addition in passenger transport with often set schedules and timetables under strict contractual and regulatory systems casual employment is essential for continuity of the services and to plug gaps caused by absenteeism, failure of rail connection or road congestion preventing the completion of the shifts.

4. What are the positive/negative impacts of casual work on employees?

The positive impacts of casual work is that the 25% loading allows employees in passenger transport to work 20 hours a week and get a reasonable income, and to be able to supplement that with second jobs or welfare benefits. At the same time because passenger transport is an aged employer it provides a positive way to provide work for older Australians. Conversion from casual to permanent or part time school bus drivers, will lead to a significant loss of income for drivers. Another positive impact for passenger transport, given it is an important public service, is to be able to provide scheduled services at all times.

5. Does the evidence demonstrate any change over time in the proportion of casual employees engaged including via labour hire businesses?

Passenger transport has a large proportion of casual school bus drivers, but greater contracted services has allowed for the employment of more permanent employees in the larger metropolitan areas.

Casual conversion - General concepts

1. Is it appropriate to establish a model casual conversion clause for all modern awards?

Absolutely not, as demonstrated in Secure Employment Test case in New South Wales in 2006, wherein the Transport Workers Union and the Bus and Coach Association of NSW (representing

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employers), reached an agreement to a variation of the approved conversion clause to meet the nuances and practicalities of the industry. The clause should not be mandatory as to do so would remove the flexibility needed in passenger transport to ensure services continue and to provide flexible employment to an aged work force.

2. Should the establishment of any model clause be subject to the right to apply for different provisions or an exemption in a specific modern award based on circumstances peculiar to that modern award?

APTIA does not support a mandatory casual conversion clause but would consider such a provision, which would allow the specific issues of conversion in passenger transport to be recognised. In passenger transport, for instance, the pre modern award upon which the PVTA is based, being the Transport Workers (Passenger Vehicles) Award 2002 (AW818060), does not even have reference for part time or permanent part time employees. An Enterprise Agreement Template in Victoria is often negotiated between the relevant Employer Association and the Transport Workers Union which specifically excludes part time employment given it is still based on the pre modern award. In these circumstances there is no possibility of conversion.

3. Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?

The introduction of a casual conversion clause should not introduce new employment terms which might not only impact upon the employer's ability to retain such employees but also cause unemployment.

4. Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which currently exists for that casual employee?

In passenger transport, where employees undertake a lot of additional hours depending upon the extra work, such as extra charter work or work related to new routes required under contracts of service it would not be appropriate to force an employer to convert beyond those hours of work that are sustainable by the business. Because the extra work cannot be guaranteed, in any conversion an employee should only be required to guarantee those hours that are regular and consistent, and form part of the regular contract of service requirements.

5. Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part-time work under the relevant award?

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It is APTIA's position that an employer should be able to reserve the right on reasonable business grounds to refuse an application to convert. If a business cannot reasonably sustain conversion, especially in an industry where work is not regular and consistent and where it is regular and consistent but not for 52 weeks a year or 38 hours a week, then unemployment will be a consequence and a disastrous outcome for the work force.

6. What would be the consequences for employers if "regular" casuals had an absolute right to convert to non-casual employment (after 6 or after 12 months)?

Provided an employer was only required to guarantee those hours and period of work available to them then conversion would be possible. In the case of school bus drivers an employer can only guarantee work for 40 weeks a year. In any event a converted employee would lose up their 25% casual loading for 20 hours a week and this would be cost prohibitive to the school bus casuals.

7. Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the *Fair Work Act 2009* and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?

APTIA does not oppose criteria which recognises the needs of passenger transport and which does not mandate conversion. It should also be recognised that an employer, to keep a casual work forces needs to be able to provide them with work. If an employer is forced to guarantee hours of work to part time employees then the employer may lose the capacity to employ a pool of casuals and place at risk the essential public transport services provided under Government contracts of service.

8. Would changes to the part-time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part-time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?

In the circumstances described above it is APTIA's contention that both employers and employees should always have the right to negotiate by mutual agreement variations to the safety net requirements provided they meet a set of criteria as sought by APTIA in its application to reduce minimum engagements for casual school bus operators.

Definition of irregular casual

1. Does the exclusionary expression "irregular casual employee" provide a workable basis for the operation of a casual conversion clause?

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The definition of an irregular casual employee is uncertain and therefore APTIA has sought to extend the period whereby conversion can occur to twelve months. In public transport work can be regular and consistent but for only a short time because of weather, tourism, economic or contractual reasons the work can dry up and work for casuals will become less regular and consistent.

2. Should any casual conversion clause contain a more specific and certain definition of what is an “irregular casual employee”? If so, what should that definition be?

APTIA has submitted that it does not support a mandatory conversion clause but has advocated that a period of 12 months would give a much greater opportunity to assess whether conversion is possible. IN passenger transport where charter work is seasonal, school bus work limited to the school terms and contracts regularly tendered there is no certainty of employment in the short term. These issues are overcome by the employment of casual employees.

3. Should the concepts of regular and irregular casual employment be understood, for the purpose of consideration of the casual conversion issue in the same way as the concept of regular and systematic engagement referred to in s.11 of the *Workers Compensation Act 1951* (ACT) was interpreted in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 (In that decision Crispin P and Gray J stated at [65] that “it is the ‘engagement’ that must be regular and systematic; not the hours worked pursuant to such engagement” and at [69] that “the concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required” and Madgwick J said at [89] that “It is clear from the examples that a ‘regular ... basis’ may be constituted by frequent though unpredictable engagements and that a ‘systematic basis’ need not involve either predictability of engagements or any assurance of work at all.”

It is APTIA’s contention that with passenger transport it is necessary to understand how regular and consistent applies to the industry. As set out above the work may not be a predictable but not regular and consistent.

4. If the interpretation in *Yaraka Holdings* is to be applied, how does an employee/employer determine what hours are to be used in a right to convert to part-time employment?

Only hours that are part of a contracted service could be guaranteed in passenger transport industry so that a school bus driver could only be guaranteed those hours of work undertaken to transport school children to and from school which may be only 2 hours in the morning and 2 hours in the afternoon.

Employer Notification

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1. Having regard to a number of factors, including in particular the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?

Whilst APTIA does not agree with a mandatory conversion clause it has the view that employees should have the opportunity to request conversion rather than require an employer to notify an employee, give them an expectation and then potentially reject an application. The Fair Work Information Statement would be a useful tool to advise employees of such a right. Similarly some employers in the public transport industry include conversion clauses in their enterprise agreement negotiations.

2. Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for example, requiring all casual employees to be notified upon first being engaged, or by defining “irregular casual employee” in a way which provides clarity as to who is required to be notified)?

Note APTIA stated position in paragraph 1 above.

Period prior to conversion right

1. Is a 6 month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?

APTIA has the stated view that a 12 months period is more suitable.

2. Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?

APTIA's view is that conversion should take place on the date of conversion and that entitlements should not accrue until that time. To do otherwise places a financial burden upon an employer and seems contrary to the objectives of the award review process.

3. Are existing or claimed casual conversion clauses intended to give a one-off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?

Employers and employees need some certainty of employment and the conversion provision should be a once off offer and then as agreed between the parties or as part of an enterprise agreement negotiation which may take place at least every four years or less. The right should not however prevent an employer from offering or even changing the mix of their work force to meet the

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reasonable needs of the business. There should not be a prevention from an employer offering conversion to their work force.

Employer capacity to refuse

1. Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?

An employer should have the right to refuse. The reasons should be provided to an employee seeking to convert. Guidance could be given but circumstances in each industry as previously considered may differ and therefore a standard set of rules might not be suitable. As far as public transport is concerned the following suggestions may apply to passenger transport as a reason for not converting:

- *The need to retain casual employees to fill in for employees on personal leave or annual leave i.e. to have a pool of casual employees to fill the employment gaps to meet the scheduled services.*
 - *The need to be able to provide sufficient work for a sufficient number of casual employees to fill in where necessary to undertake shifts.*
 - *In circumstances where the work is regular and consistent but only the following hours of work (20 hours a week only) and weeks (40 weeks a year only) can be guaranteed.*
 - *The type of work is regulated by Government contracts which stipulate services to be undertaken at risk of contract penalty.*
 - *The work is seasonal or economic dependent or subject of fluctuations which can only be accommodated with a casual work force.*
 - *The only regular work is at peak times or to and from school.*
 - *The type of work is just not available on a regular basis i.e. charter work not available.*
 - *In most contracts of service the respective State Governments all have a termination for convenience clause in their contracts which means an employer in passenger transport cannot guarantee any certainty of employment.*
2. If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:
 - (i) Where an employee has been working close to full time hours over a 6 month period (taking into account periods of leave which would be accessible to a full time employee

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and the capacity to average full time hours to the extent provided for in the relevant award)?

APTIA considers that a 12 months period is more appropriate and provided work was up to or in excess of 38 hours.

(ii) Where an employee has been working close to full time hours over a 12 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)? *Refer to answer above.*

(iii) Where the employer can demonstrate that the work requirement which has been met by the casual employee will not be continuing over the next 6 months and adjustment to the remaining casual pool is unable to meet normal or likely fluctuation in work demand? *Refer to response above.*

(iv) Where the pattern of on-going part-time hours required to meet business needs is able to be accommodated by the part-time provisions of the relevant award?

APTIA could only support such a provision if the guarantee is for school period only (196 to 201 days a year) for the period and the hours could then be averaged over the full year.

(v) Where the pattern of on-going part-time hours required to meet business needs is unable to be accommodated by the part-time provisions of the relevant award?

Reasonable.

(vi) If there were to be an absolute right to convert, or a right subject to an exemption mechanism, should that right be limited or defined by reference to the circumstances in (24) above?

APTIA does not support an absolute right to convert.

(vii) If employers retain the capacity to refuse to convert employees to non-casual work subject on reasonable grounds, should the employer be required to engage in a discussion with the employee about the issue before making a decision about conversion? *This is a reasonable matter.*

(viii) Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?

APTIA cautions about making the conversion process too prescriptive and costly. A simple right to seek the Commission's arbitration based on a reasonableness test would be the most appropriate.

Small business

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1. Is there a case for excluding small business employers from a casual conversion clause in the same way as for redundancy entitlements?

APTIA does not believe in passenger transport that conversion is an issue amongst small business.

2. Alternatively, is there a case for a longer than standard period of employment before casuals employed by a small business employer may exercise any conversion rights?

No need for conversion in passenger transport.

Labour hire

1. Have casual conversion clauses encouraged, or will they encourage, employers to source casual labour from labour hire businesses?

APTIA does not consider that casual conversion will cause a movement to labour hire businesses although our industry has a shortage of drivers and from time to time labor hire businesses are used. APTIA has already explained the reason why casual are used to ensure continuity of service. If casual conversion removes the opportunity to retain casual employees and given that casuals are then needed there would be a movement.

Allocation of additional work

1. In relation to the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?

Given that casuals or converted part time employees can undertake specific tasks and because any replacements would also be undertaking similar tasks it is totally impractical and unworkable to suggest that casual work is always offered to existing employees first. This would be exemplified as follows:

- *Not all employees are trained to drive all types of buses. I.e. some employees cannot drive manual vehicles other can't drive specific vehicles i.e. with a crash box.*
- *A Light Rigid license for instance allows an employee to drive a vehicle under 8 tonnes with two axles, whilst a medium rigid license allows an employee to drive a vehicle of more than 8 tonnes but with only two axles. A heavy rigid license allows an employee to drive a vehicle in excess of 8 tones with up to 3 axles.*
- *Employees are required to have specific verification to operate different vehicles and not all drivers are trained in this way.*
- *Not all drivers are trained or are qualified to do commentary for instance.*

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- *Fatigue is a critical factor in public transport and any attempt to foist extra hours upon existing employees would potentially put employers and employees in breach. In this regard some employees have a BFM which allows them to work different hours to other employees.*
2. Is there anything in the modern awards objective in s.134 (1) of the *Fair Work Act* which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?

It would encourage social exclusion and prevent employees in passenger transport from employing more casual employees.

E. Casual minimum engagement

1. Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?

The Passenger Vehicle Transportation Award has two different standards for minimum engagements for its casual employees and a further different standard for part time employees and permanent employees. A minimum standard was specifically varied in the award-modernisation process and any change would be counter-productive. Passenger transport cost obviously increase as a result and this would be contradictory to the review process as outlined by the Fair Work Commission.

2. Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?

It is APTIA's position that the parties should by agreement be allowed to reduce the minimum engagement period and has outlined specific circumstances in which it should occur. It would afford a protection if an employee could at least be able to request such a reduction to save their entitlements or to undertake a second job.

3. Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?

In passenger transport there are lesser minimum engagements for school bus drivers who transport school children to and from school.

4. Should a casual minimum engagement period be introduced in awards which do not currently have one (such as the *Vehicle Manufacturing, Repair, Services and Retail Award 20101*) of

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where the current minimum period is only nominal (such as for home care employees under the *Social, Community, Home Care and Disability Services Industry Award 20102*)? If so, what should the length of the minimum period be?

APTIA sees no need for minimum engagements where historically industries do not have them already.

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5 August 2016

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