



4 YEARLY REVIEW OF MODERN AWARDS (AM2014/208)

**The Australian Public Transport Industrial
Association**

AMENDED APTIA'S SUBMISSION (Exposure Draft)

12 May 2015

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Preamble

1. The **Australian Public Transport Industrial Association (APTIA)** is the industrial arm of the Bus Industry Confederation (BIC), which is the peak representative body for bus and coach operators, bus and coach chassis suppliers and body manufacturers and other associated suppliers.
2. BIC and APTIA members employ over 30,000 persons of whom 75% are bus or coach drivers and who are impacted by the **Passenger Vehicle Transportation Award 2010 (PVTA 2010)**.
3. APTIA has previously made application and submissions to the Fair Work Commission with respect to the Passenger Vehicle Transportation Award 2014 (**PVTA 2014**), by application on 24 November 2014 and with respect to the exposure draft on 2 February 2015 and in reply on 4 March 2015
4. APTIA has also had the benefit of consultation with representatives from the Transport Workers Union of Australia (TWU) and has participated in a conference on 4 May 2015 before Deputy President Sams.
5. In the context of these submissions APTIA's position has changed from its previous positions as set out in the submissions previously referred to.
6. APTIA still retains its concerns about the process to make the PVTA, better understood by making them simpler to read and supported by examples to assist with their understanding.
7. It is APTIA's contention that the PVTA 2010 had been working well within the industry and was not broken. Therefore it is APTIA's position to seek to minimise changes to the current PVTA 2010 in its response to the exposure draft.
8. What is not clear to APTIA is the relevance of the examples suggested by FWC to the exposure draft. Is it intended that the examples themselves will form part of the substance of the PVTA 2014 and will the examples therefore act as a strict interpretation by FWC of the particular clause? Similarly **Part 1 – Application and Operation** is silent on what status the summaries (Schedule B and C) will have in the enforcement of the PVTA 2014.

Submission to Exposure Draft

9. The Exposure draft invites responses to a number of specific issues and in this part of its Submission, APTIA seeks to address them.

Parties are requested to submit examples that clarify the operation of particular provisions

10. APTIA has decided not to provide examples as their legal effect may only give rise to different interpretations, particularly when there is not the appetite in the industry to provide such examples.

Cl. 6.5 (d) (ii) – Parties are asked to clarify whether minimum payment applies to each shift i.e. two hours 'to school' plus 'two hours' from school

11. APTIA's position is as set out in its substantive application and that the following changes should be made to clause 6.5 (d) (ii)

"A casual employee must receive

- (i) A minimum payment of three hours for each shift; or*
- (ii) Where solely engaged for the purpose of transportation of school children to and from school, a minimum payment of two hours for each engagement/start, provided further that that the employer and employee may agree to a lesser minimum payment of hours in any of the following specific circumstances:*
 - (a) Where the employee has secondary employment;*
 - (b) Where the employee is in receipt of other income or benefit;*
 - (c) Where the employer does not have enough work for the entire shift or engagement;*
or
 - (d) When the employee cannot complete the entire shift or engagement."*

12. APTIA supports the view that the term engagement is meant to refer to a start so that during the day a school bus driver who takes school students to school in the morning and who brings the school children back home in the afternoon is entitled to a 2 hour minimum payment for each of those two starts.

13. APTIA supports the inference made by Commissioner Bissett during the 2 yearly review of the PVTA 2010 [2012] FWC 3221 June 2013 (at paragraph 28)

"Whilst different language is used in the PVT Award to describe the basis of the minimum payment due to full-time employees (per 'shift/day engaged'ⁱ); part time employees ('for each day engaged'ⁱⁱ); casual employees ('for each shift'ⁱⁱⁱ); and casual employees engaged solely for the purpose of the transportation of school children to and from school ('each engagement'^{iv}) this does not, of itself, create an anomaly. It may actually support the view that it was intended that casual employees engaged solely in the transportation of school children to and from school should be treated differently to other employees - whether casual, part-time or full-time."

14. Similarly APTIA relies on the pre-modern federal award the AW818060CR, **Transport Workers (Passenger Vehicles) Award 2002, Part C**, which clearly states at clause 12.1.1 from which the modern award has primarily been derived:

"A casual employed as a Driver of Conductor shall perform a minimum of three hours work and shall receive payment for each start on any day."

Cl. 6.5 (e) Parties are asked to provide a list of provisions that do not apply to casual employees.

15. APTIA recommends that the following clauses are specifically excluded for casuals and that clause 6.5 (e) is amended accordingly.

- Clause 5 – Facilitative provisions
- Clause 8.1(c) – Rostered day off
- Clause 15 – Annual leave
- Clause 16 – Personal Leave
- Clause 19 – Public Holidays
- Clause 20 – Termination of Employment
- Clause 21 – Redundancy

Cl. 8.1. (a) – Parties are asked to consider whether a span of ordinary hours for employees two up driver operations should be specified as per times in clause 10.5 (a) and 10.5 (c)

16. APTIA does not understand how clauses 10.5 (a) and (c) are relevant to this section.

Cl. 13.2 – Parties are asked to comment on the application of this clause in relation to payment for work performed on a public holiday. i.e. is an employee always entitled to be paid an additional 8 hours on a public holiday (even where the employee does not work an eight hour shift) or is an employee entitled to double time for all hours actually worked on a public holiday.

17. APTIA's position is that it considers that an employee should only be entitled to public holiday payments if they are rostered on the day of the holiday and if they would have been rostered on but for the public holiday it is APTIA's position that the employee should be paid what they would have otherwise received had they worked and had that day not been a public holiday.
18. No payment at all should be received if the day upon which the public holiday fell was a non rostered day for the employee.
19. APTIA takes the view that the Two Up clause has served a very small part of the industry well and should not be changed. APTIA seeks to re-instate the previous clause 23.6 into the exposure draft.
20. Clause 13.2; Employees on two up driver operations – APTIA opposes the TWU contentions. Two Up driving forms a very small part of the public transport task and takes its roots from the **Transport Workers (Passenger Vehicles) Award 2002, Part C, (AW818060CR)** in which the rates of pay (see clause 17.6.1 Part C) have been duplicated into the PVTA 2010. To change the rates of pay for two up drivers that have worked effectively in a very narrow part of the industry for many years would be counter-productive, especially when there has been no pressure brought to bear to change the unique nature of the operation.

21. Clause 31.2; Two Up driver operations - It is APTIA's contentions that the overtime loadings have never applied to the industry and that the casual loading only applied as referred to in clause 13.2. The casual loading never applied to public holidays and no driver is ever paid a minimum of 8 hours if they did not work those 8 hours. Payment is made for time worked only.
22. Clause 13.2; Two Up driver operations - The history of the provision, which provided lower rates than other passenger transport drivers was designed to allow the long distance services to be viable and at the same time not necessitate drivers being offloaded on long distance trips whilst they waited for a return vehicle.

Cl. 15 – This clause may be affected by AM2014/47

23. APTIA has made submissions with respect to the matters referred to in AM2014/47 and also notes that the Fair Work (Amendment) Bill 2014 also seek to address the issues raised in AM2014/47 which specifically affects clause 15.3. APTIA contends the exemption for payment of annual leave has been part of the industry in the pre modern awards and has been included because of other benefit to employees reflected in the modern award.
24. APTIA contends that any inconsistency is an unintended consequence of the NES and should be corrected as supported not only by the Fair Work (Amendment) Bill 2014 but also the Fair Work Act Review panel.
25. Other smaller changes to the exposure draft include:
 - (i) **Clause 5** – facilitative provisions to be incorporated in the suggested format.
 - (ii) **Clause 6.4 (e), (f) & (h)**; Part Time employment – should read 6.4 (b).
 - (iii) **Clause 8.1 (a)**; Ordinary Hours of Work and Rostering
 “The ordinary hours of work will be an average of 38 hours per week.”
 - (iv) **Clause 10.1** – The table should refer to “Full Time or Part time minimum hourly rate” and “Full Time and Part Time hourly rate” instead of “minimum hourly rate” and “minimum weekly rate”

Substantive Claims

26. APTIA has set out below its substantive claims and the specific changes sought to the PVTA 2014. Also attached to this submission is a brief explanation for the reasons for the proposed variations.
27. The first proposed variation outlined in Schedule A will give effect to the Decision of the Full Bench [2013] FWFCB 2170, **Modern Awards Review 2012 – Award Flexibility of 15 April 2013**.
28. At paragraph 108 of that Decision, the Full Bench, comprising Justice Ross, Senior Deputy President Watson and Commissioner Gregory, noted:

“While we are not persuaded to vary the scope of the model flexibility term in the manner sought we acknowledge that sub clause 7.1 has given rise to some ambiguity and uncertainty, particularly in relation to the scope of the expression

'arrangement for when work is performed'. It is appropriate that this ambiguity and uncertainty is addressed."

29. At paragraph 109 the Full Bench commented:

"As to how this matter may be addressed a number of parties agreed with the proposition that one way of providing clarification would be to identify the specific provisions within each modern award that fall within the expression 'arrangements for when work is performed' in clause 7.1 "

30. The proposed second variation outlined in Schedule B seeks to provide employment flexibility to allow greater employment opportunities in the public transport industry which might not be available but for the flexibility.

31. The variation recognizes the specific use of casual employees/ drivers in the public transport industry whether as school bus drivers or charter drivers. It recognizes that there are circumstances where a driver is using the casual bus driving job purely to supplement other income and benefits which may be impacted or eroded if additional pay is made for hours that are not worked or deliberately intended to be worked.

32. The variation also allows flexibility to employers and casual employees to rearrange hours of work where broken shifts are rostered and where different hours are worked during each period of work in that broken shift.

33. The variation set out in Schedule B more specifically addresses the following sub section 134 of the Fair Work Act modern award objectives:

(c) "The need to promote social inclusion through increased work force participation (sub clause c")

(d)"the need to promote flexible modern work practices and the efficient productive performance of work (sub clause d)

34. .The proposed variations outlined in Schedule A and B hereto meets the scope and nature of the section 156 Review as anticipated by the Fair Work Commission in its Decision of 17 March 2014, **4 Yearly Review Of Modern Awards: Preliminary Jurisdictional Issues; [2014] FWCFB 1788** and more particularly the objectives of the modern awards as set out section 134 of the Act.

Evidentiary Material

35. APTIA will seek to rely upon its membership in support of its substantive variations and will utilise at least 4 different members from 4 different states who have exactly the same experience when dealing with the need for flexibility in setting minimum engagements.

36. APTIA will further seek to rely on written submissions and does not consider that a separate Full Bench to be constituted to hear the applications.

Ian MacDonald

National Industrial Relations Manager

11 May 2015

Form F1 Application

Fair Work Act 2009, ss.156

FAIR WORK COMMISSION

<i>Commission use only</i>
Commission Matter No.:

Applicant

Name:	AUSTRALIAN PUBLIC TRANSPORT INDUSTRIAL ASSOCIATION				
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If the Applicant is a company or organisation:					
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Applicant's representative (if any)

Name:	N/A		ABN: [If applicable]		
Address:					
Suburb:		State:		Postcode:	
Contact person:					
Telephone:		Mobile:			
Fax:		Email:			

1. **What is the name of the modern award to which the application relates?**

MA000063; PASSENGER VEHICLE TRANSPORTATION AWARD 2010

2. **What is the industry of the employer?**

PUBLIC TRANSPORT

3. **Variation(s) sought:**

The Applicant seeks to vary the Passenger Vehicle Transportation Award 2010 in accordance with those draft Determinations as set out in Schedule A and Schedule B to this Application.

4. **Grounds:**

1. The proposed variation outlined in Schedule A will give effect to the Decision of the Full Bench [2013] FWFCB 2170, **Modern Awards Review 2012 – Award Flexibility of 15 April 2013.**
2. At paragraph 108 of that Decision, the Full Bench, comprising Justice Ross, Senior Deputy President Watson and Commissioner Gregory, noted:

"While we are not persuaded to vary the scope of the model flexibility term in the manner sought we acknowledge that sub clause 7.1 has given rise to some ambiguity and uncertainty, particularly in relation to the scope of the expression 'arrangement for when work is performed'. It is appropriate that this ambiguity and uncertainty is addressed."

3. At paragraph 109 the Full Bench commented:

"As to how this matter may be addressed a number of parties agreed with the proposition that one way of providing clarification would be to identify the specific provisions within each modern award that fall within the expression 'arrangements for when work is performed' in clause 7.1 "

4. The proposed variation outlined in Schedule B seeks to provide employment flexibility to allow greater employment opportunities in the public transport industry which might not be available but for the flexibility.
5. The variation recognizes the specific use of casual employees/ drivers in the public transport industry whether as school bus drivers or charter drivers. It recognizes that there are circumstances where a driver is using the casual bus driving job purely to supplement other income and benefits which may be impacted or eroded if additional pay is made for hours that are not worked or deliberately intended to be worked.

6. The variation also allows flexibility to employers and casual employees to rearrange hours of work where broken shifts are rostered and where different hours are worked during each period of work in that broken shift.
7. The variation set out in Schedule B more specifically addresses the following sub section 134 of the Fair Work Act modern award objectives:

“the need to promote social inclusion through increased work force participation (sub clause c).

“the need to promote flexible modern work practices and the efficient productive performance of work (sub clause d) .
8. The proposed variations outlined in Schedule A and B hereto meets the scope and nature of the section 156 Review as anticipated by the Fair Work Commission in its Decision of 17 March 2014, **4 Yearly Review Of Modern Awards: Preliminary Jurisdictional Issues; [2014] FWCFB 1788** and more particularly the objectives of the modern awards as set out section 134 of the Act.

Date:	11 May 2015
Signature:	
Name:	Ian MacDonald
Capacity/Position:	National Industrial Relations Manager

Service requirements

The Applicant must seek directions from the Commission as to service of this application.

SCHEDULE A

DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards- Stage 2 Sub-group C

Public Transport

FULL BENCH

SYDNEY, xx DECEMBER 2014

A. Further to the decision on _____ and pursuant to s.156 of the *Fair Work Act 2009*, the PASSENGER VEHICLE TRANSPORTATION AWARD 2010 (AM000063) is varied as follows:

1. Delete the current Clause 4.1, Award Flexibility
2. Insert a new Clause 4.1 to read:

“Notwithstanding any other provision of this award, an employer and individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and individual employee may agree to vary the application of are those concerning:

(a) Arrangements for when work is performed, as set out in;

(i) Clause 21: Hours of Work;

(ii) Clause 22 Breaks;

(b) Overtime rates;

(c) Penalty rates;

(d) Allowances; and

(e) Leave loading.”

B. This variation takes effect from the first full pay period commencing on or after

_____ 2015.

PRESIDENT

SCHEDULE B

DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards- Stage 2 Sub-group C

Public Transport

FULL BENCH

SYDNEY, xx DECEMBER 2014

A. Further to the decision on _____ and pursuant to s.156 of the *Fair Work Act 2009*, the PASSENGER VEHICLE TRANSPORTATION AWARD 2010 (AM000063) is varied as follows:

1. Delete the current Clause 6.5 (d), Casual Employment
2. Insert a new Clause 6.5 (d) to read:

"A casual employee must receive

- (i) A minimum payment of three hours for each shift; or*
- (ii) Where solely engaged for the purpose of transportation of school children to and from school, a minimum payment of two hours for each engagement/start, provided further that that the employer and employee may agree to a lesser minimum payment of hours in any of the following specific circumstances:*
 - (a) Where the employee has secondary employment;*
 - (b) Where the employee is in receipt of other income or benefit;*
 - (c) Where the employer does not have enough work for the entire shift or engagement; or*
 - (d) When the employee cannot complete the entire shift or engagement."*

B. This variation takes effect from the first full pay period commencing on or after _____ 2015.

PRESIDENT