

The Committee Secretary
Senate Education and Employment Committee
P.O. Box 6100
Parliament House
Canberra ACT 2600

APTIA
14-16 Brisbane Avenue
Barton ACT 2600

Mob: 0427 206 326
E: imacdonald@bic.asn.au

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

Dear Committee Secretary

Subject: The Fair Work Legislation Amendment (Closing the Loopholes) Bill 2023

You have invited submissions with respect to the **Fair Work Legislation Amendment (Closing the Loopholes) Bill 2023 (Closing the Loopholes Bill)**, currently before you.

On behalf of the Australian Public Transport Industrial Association (**APTIA**) the industrial arm of the Bus Industry Confederation (**BIC**), I wish to make the following submissions for your deliberation regarding the Closing the Loopholes Bill 2023.

The Australian Public Transport Industrial Association

APTIA is the industrial arm of the Bus Industry Confederation, which is the peak private bus and coach association in the country, which represents state bus and coach operators, as well as bus and coach chassis suppliers, body manufacturers and associated providers.

There are approximately 45,000 bus and coach drivers employed across the nation. You might say 45,000 employees out of sixteen million workers is not many!

That 45,000, however, provide millions of passenger-trips each year, transporting the elderly, socially disadvantaged, young persons, and those who just prefer to travel by bus to avoid further polluting our airways in their cars.

The 45,000 bus and coach drivers transport hundreds of thousands of our precious school children to and from school each day during the school term in the metropolitan cities and the rural regions of our vast country. This work is undertaken every school day for 40 weeks each year.

The essential nature of public transport services was no better demonstrated than during the Covid-19 pandemic, when public transport workers continued to operate when many industries shut down. Drivers, who risked their own health carried passengers knowing that some had the deadly virus. Drivers carried passengers entering Australia into quarantine, again knowing a substantial proportion were positive to the virus. They are our heroes.

Can you imagine the mayhem that would occur, within our communities, if public transport services stopped? I am pleased to say however that, in recent times, both the Government and the Trade Unions have finally acknowledged that, which BIC has advocated for years, public transport is an essential service.

Currently the industry is suffering a loss of confidence which is reflected in the reduction in recruitment and retention in all areas of employment. The New legislation needs to be considered in the light of this predicament.

Summary of APTIA's position to the Closing the Loopholes Bill

APTIA generally supports the passage of the Closing the Loops Bill, but it expresses some concerns below and would like to see the Bill amended to mitigate those concerns.

On a positive note, in respect of casuals, it will:

- i) Better define casual employment by giving to casual employees a much better understanding of what it means when they make the choice to be a casual employee rather than seek more permanent employment. The Bill further clarifies when casual conversion to a more permanent form of employment can occur by giving the right not only to employers to offer conversion, but also for employees to seek more permanent employment.

- ii) Enable bus drivers who are employed as casuals by choice, whether about public transport generally, or more particularly in respect of school bus services in regional areas, to remain as casual employees to suit their purposes.

Other general comments and concerns in respect of the Bill:

- iii) As no doubt you are aware, there are significant differences between passenger transport and the other forms of transport such as road, freight, and waste management. Indeed, this was the basis of passenger transport being previously excluded by Parliament under the **Road Safety Remuneration Act 2012**. Given the extensive role the Commonwealth already has in ensuring the wages and other terms and conditions of the passenger transport industry via the PVTA 2020, and safety via the NHVR/NHVL, not to mention the state and territory detailed safety regimes, APTIA's position is that the passenger vehicle transportation industry not form part of the definition of the road transport industry under the Bill. That said, if it isn't excluded, then it is imperative that the passenger vehicle transportation industry has representation on the proposed Transport Industry Advisory groups to ensure that the differences are fully considered. APTIA has also submitted that the road transport objective established by the proposed section 40D of the Bill be amended to reflect the nature of the differences between the road, freight, and waste management and passenger transport industries.
- iv) APTIA has long advocated for recognition of the role that casual employment plays with the passenger transport industry. On 6 August 2020, APTIA gave evidence to the Attorney General's Roundtable meeting to consider casual and part time employment. Similarly, APTIA provided submissions to the Senate Select Committee on 4 February 2021 in response to the Fair Work Amendment (Supporting Australia's Economic Recovery) Bill 2021. On each occasion APTIA sought to have the legislation recognise that an employer who employs a casual to work for 40 weeks a year during school terms is not able to convert that employment to permanent part time since the employer cannot offer agreed hours of work for less than 38 hours per week, for 52 weeks a year. (Obviously school bus services only operate when schools are open - 40 weeks of the year - not 52.) APTIA once again seeks that recognition as set out below.
- v) APTIA believes that the rights of the trade union movement with respect to paid training time are best negotiated at the enterprise level. Such an approach ensures that outcomes are better matched to the resources and scale of each enterprise and has already resulted in

APTIA and many APTIA members negotiating such clauses in enterprise agreements. However, it is critical that there be limits to any attempts to abuse those processes as set out below.

- vi) APTIA is mindful of the need to have substantial penalties for intentional or even a reckless disregard of the obligations to pay the correct wages. Nevertheless, because of the often-complicated nature of shift work prevalent in the passenger transport industry, APTIA notes that from time-to-time underpayments will occur. APTIA does not consider this type of innocent breach should fall within the proposed legislation, provided any underpayment is acknowledged and rectified.

Specific concerns in the Closing Loopholes Bill

APTIA recommends that the Senate Select Committee reviews the following clauses set out below.

Section 66AAC (4) – Grounds for employer to not accept notification.

The proposed Closing the Loopholes Bill amendment is to add a new section 66AB which relates to employee choice about casual conversion. A new section 66AAB (4)(b) will provide grounds for not accepting an employee’s notification for conversion because of ‘substantial changes to the employee’s terms and conditions.’

What is not clear is that a casual who works seasonally regular rosters such as a school bus driver, who only works 40 weeks a year, could not be afforded agreed hours of work for less than 38 hours per week, for 52 weeks a year, as a part time employee.

Recommendation: The following further Note is included after section 66AAC (4)(c).

“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.”

Section 359A – Misrepresenting employment as casual employment

Rural casual bus drivers, who are not offered work beyond school terms are often employed as casual school bus operators which is their wish as they are often older persons on pensions who are just looking for work to enable them to receive additional monies over and above their pensions. The current

section 359A relies solely on the belief of the employer. We consider that the employer should not be held liable when the employee's employment as a casual is due to the employee's stated wish to be employed as a casual employee.

The Buslines Group in New South Wales are a good example of rural school bus operators who employ casual employees who have had opportunities to convert but who reject such offers.

Details include:

- Buslines operates town and school bus services through some 13 regional centres in New South Wales.
- The total workforce is some 403 employees.
- Over 95% of their workforce is casual employees.
- Over 89% are 45 years of age or older. In fact, 58% are over 60 years of age.

The concern is that a company such as Buslines might be captured by section 359A in its current format.

Recommendation: Add the following words to section 359 A (3)(b):

“Including the stated wishes of the employee.”

Section 350C – Workplace Delegates and their Rights

Delegates rights such as envisaged by section 350C are the subject of some enterprise agreements, in the passenger transport industry, but the terms, frequency and purpose are agreed upon by the parties to an agreement.

The days that training occurs, as referred to in section 350C (3) (b), are limited, and at the same time the specific details of the training are also provided before such release is permitted.

To this extent APTIA seeks an amendment which clarifies the clause to prevent abuse of this power.

Recommendation: That section 350C (5) (d) is added with the words:

“The frequency and purpose of the training set out in clause section 350C (3) (b)(ii).”

Section 40D – The road transport objective and Section 15S – Meaning of road transport industry.

When the Road safety Remuneration Act 2012 passed into law the definition of road transport excluded passenger transport. It did so because the Parliament of the day, especially the Minister for Transport the Hon Anthony Albanese, understood the significant differences between passenger transport and road transport, freight, cash in hand and waste removal.

Those differences between passenger transport and other forms of transport, include:

- The nature of the deliverables. Passenger transport is an essential service which carries people, from school children, the elderly, the infirm and the socially disadvantaged. Thousands of passenger services operate each day across Australia. There is no comparison with other industries referred to in section 15S.
- In most cases of route and school service the contracts are between bus and coach operators and a single regulator, usually a state regulator. In some cases, schools independently contract with bus and coach operators.
- The vehicles, i.e., buses and coaches, are subject to very different State and Commonwealth regulations impacting vehicle size, length, width, and height from other forms of transport vehicles such as those used for road, freight, and waste management.
- Accessible transport standards under the Disability Discrimination Act 1992 apply to the passenger transport industry but not in the same way to the other industries.
- Regulations relating vehicles in the passenger transport industry are significantly different for other road transport industries, including mass limits, width of vehicles and length of vehicles.
- Employment in the passenger vehicle industry is direct with drivers being employed by the operators. There is very little application for regulated workers, regulated businesses, employee-like workers. Terms and conditions of employment are determined by the Award system, or an enterprise agreement linked to the regulators funding of a service contract. None of these characteristics form part of the mantra of other transport services.

Recommendation: APTIA seeks the deletion of section 15S (e) ("the passenger vehicle transportation industry") from the Closing the Loopholes Bill.

In the alternative APTIA seeks the addition of the following provision in section 40D(c)

"a recognition of the specific differences between the passenger transport industry, referred to in section 15S (1) (e), and the other members of the transport industry referred to in section 15S."

These submissions are provided after significant consultation with the industry. I have requested the opportunity to meet with the Committee to further elaborate the matters set out herein.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ian MacDonald', is written over a light blue horizontal line. The signature is stylized and cursive.

Ian MacDonald, National Industrial Relations Manager