



## DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years

**Transport Workers' Union of Australia**  
(AM2012/198)

**Australian Public Transport Industrial Association**  
(AM2012/47)

COMMISSIONER BISSETT

MELBOURNE, 7 JUNE 2013

*Application to vary Passenger Vehicle Transportation Award 2010.*

[1] The Transport Workers' Union of Australia (TWU) and the Australian Public Transport Industrial Association (APTIA) have each made applications to vary the *Passenger Vehicle Transportation Award 2012* (PVT Award) in accordance with Schedule 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act).

### Background

[2] A number of initial applications were received to vary the PVT Award as part of the Schedule 5 review of modern awards. Ultimately the applications of the Queensland Tourism Industry Council and the Australian Federation of Employers & Industries (AFEI) were not pressed.

[3] The applications of both the TWU and the APTIA were subject to conciliation before me on 12 November 2012.

[4] On 31 January 2013 the TWU lodged an amended application.

[5] Further conciliation occurred on 28 February and 27 March 2013. Following the conciliation the TWU advised that they did not intend to pursue all of its amended applications. The APTIA pressed all of its application.

[6] Each of the proposed variations to the PVT Award were subject to a hearing on 29 April 2013 in Sydney.

### The relevant legislation

[7] Schedule 5, Item 6 of the Transitional Act provides:

## **6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**

- (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.
- (2) In the review, FWA must consider whether the modern awards:
  - (a) achieve the modern awards objective; and
  - (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
- (2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.
- (3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.
- (4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.
- (5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.
- (6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5).

**[8]** Further provisions of the *Fair Work Act 2009* (the Act) relevant to these applications are:

### **134 The modern awards objective**

*What is the modern awards objective?*

- (1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
  - (a) relative living standards and the needs of the low paid; and
  - (b) the need to encourage collective bargaining; and
  - (c) the need to promote social inclusion through increased workforce participation; and

- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

...

### **138 Achieving the modern awards objective**

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

### **The variations sought**

#### ***Minimum payment for casual drivers engaged in transportation of school children***

[9] Both APTIA and the TWU seek variations that go directly to the issue of the minimum payment due to casual bus drivers who are engaged solely for the transportation of school children to and from school.

[10] The PVT Award clause relevant to the claims on this matter provides:

#### **Casual employment**

- (a) A casual employee is an employee engaged as such and paid by the hour.
- (b) An employer must wherever practicable notify a casual employee if their services are not required the next working day.
- (c) A casual employee while working ordinary hours must be paid on an hourly basis 1/38th of the appropriate weekly wage rate prescribed by the award, plus 25% of ordinary time earnings for the work performed.
- (d) A casual employee is to be paid a minimum payment of three hours pay for each shift. A casual employee solely engaged for the purpose of transportation

of school children to and from school is to be paid a minimum payment of two hours for each engagement.

(underlining added)

[11] Each of the variations sought go to whether transportation of school children in the morning is one engagement and transportation of them at the end of the school day is another separate engagement or whether the work of the day is a single engagement.

[12] The APTIA seek to address the issue by replacing the word ‘engagement’ in clause 10.5(d) with the word ‘shift’<sup>1</sup> so that the clause would read:

- (d) A casual employee is to be paid a minimum payment of three hours pay for each shift. A casual employee solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum payment of two hours for each shift.

[13] The APTIA says that there is an anomaly in the use of the word engagement in the PVT Award that has created confusion in the industry. The anomaly is that:

- A casual driver receives a payment of three hours for each shift; but
- A casual driver, who drives children to and from school, receives a minimum payment of two hours for each ‘engagement’; but
- A casual driver who is made a permanent part time driver receives a minimum payment for each ‘shift’ engaged.<sup>2</sup>

[14] This anomaly, it submits, creates confusion and uncertainty and does not promote flexible work practices. The anomaly has led to different interpretations of clause 10.5(d). The problems with the clause have been raised with the Fair Work Ombudsman (FWO).

[15] The APTIA rely on evidence from a number of its members as to the confusion generated by the current clause to support its contention as to the existence of an anomaly. Some employers pay a minimum of two hours per day whilst others pay a minimum of two hours in the morning and another minimum of two hours minimum in the afternoon. Further the witnesses indicate that provisions that existed in the National Agreement Preserving State Awards (NAPSAs) that applied prior to the PVT Award are not reflected in the PVT Award such that reliance could be placed on practices in place prior to the making of the PVT Award for the purpose of providing clarity as to meaning.

[16] The APTIA produce what it says are contrary advices from the FWO on the operation of the clause. In Queensland, in investigating a complaint with respect to payments of wages from an employee the FWO said that ‘[o]n balance, for the purposes of this investigation, I have undertaken an assessment based on one 2 hour minimum engagement per day.’<sup>3</sup> In advice however provided by the FWO to Tasmanian Industry the FWO said that:

Clause 10.5(d) uses the word “engagement” in relation to the minimum payment for casual school bus drivers but the word “shift” for casual employees generally. The modern award does not define the word “engagement” or the word “shift”. The use of

the word “shift” in respect of the minimum payment for casual employees and the work “engagement” for casual school bus drivers appears to imply that they have different application.

We are inclined to the view that if it was intended for the 2 hour minimum payment to apply only on a daily basis, then the clause could have been expressly provided for this. We note that the minimum payment for full-time and part-time employees is expressed by reference to each ‘shift/day engaged’ (clause 10.3(b)) or ‘each day engaged’ (clause 10.4(g)). By not doing the same for casual school bus drivers under clause 10.5(d), it appears that it was not intended that the 2 hour minimum payment apply on a daily basis.<sup>4</sup>

[17] The TWU do not support the variation proposed by APTIA and submit that there is no confusion about the wording in the PVT Award. It submits that, when the provisions in clause 10.5(d) are compared with provisions dealing with full-time and part-time employees which provide for minimum payments per day, it is clear what was intended by the Full Bench in making the PVT Award.

[18] Whilst not conceding that the clause does create an anomaly, the TWU says that if there is an anomaly then it is best rectified by the addition of a sub-clause in clause 26 of the PVT Award. This would clarify that, although the work on one day might be considered a single shift, employees engaged solely in the transportation of school children would be considered to be on two engagements on such a day. The proposed TWU variation is to insert the following:

#### **21.6 Broken shifts**

A casual employee solely engaged for the purposes of transportation of school children to and from school may be rostered on a broken shift with a minimum payment of two hours for each of two engagements per day. (sic)

#### *Consideration*

[19] The first matter to determine is if the PVT Award (in respect of this clause) meets the modern awards objective and is operating effectively, without anomalies or technical problems.

[20] On 22 May 2009 the Full Bench of the AIRC published an exposure draft for the PVT Award. In its statement issued in conjunction with the draft the Full Bench said:

The exposure draft contains minimum engagement provisions for full-time, part-time and casual workers. We invite submissions as to whether a minimum engagement provision is necessary for a full-time employee. In the case of part-time and casual employees we have included a three hour minimum engagement. We are aware that the transport of school children gives rise to special considerations about minimum hours particularly in more remote areas. We leave it to the parties to make any further submission about this matter if they see fit.<sup>5</sup>

[21] In making the PVT Award some months later the Full Bench said:

Several amendments were sought by parties with an interest in this award...We have amended the part-time provisions in cl.10.4 to accommodate, in part, the submissions of the Bus Industry Confederation. In the case of casual employees we have retained a three hour minimum for each shift but where the transportation of school children is undertaken then we have provided for a two hour minimum for each engagement...<sup>6</sup>

[22] Based on the decision of the Full Bench the exposure draft of the PVT Award was amended to reflect specific provisions for casual employees engaged in the transportation of school children.

[23] That the award provides for different minimum payments for different groups of casual employees is not, in my opinion, an anomaly. It is clear that it was intended that different provisions would apply to casual employees engaged solely in the transportation of school children from those applying to casual employees more generally.

Nothing was put to me to suggest that the PVT Award did not achieve the modern awards objective with respect to this provision.

[24] Whilst APTIA submits that it seeks to remove an anomaly, the ultimate effect of its variation is to set a minimum payment of two hours on each day that a casual employee is engaged where that engagement is solely for the purposes of transporting school children to and from school. There does not appear to be any agreement that this was the intent of Clause 10.5(d) of the PVT Award.

[25] No evidence has been given to this review that suggests the provision is not operating as intended or that it creates a technical problem. Disagreeing with a provision is not a 'technical' problem of the kind contemplated by the Transitional Act. In any event I am not convinced that appropriate evidence of the actual operation of the award clause has been presented that would allow what could be a substantial variation of the provisions that could halve the wages paid for the work provided.

[26] Whilst I accept the evidence that there are enterprise agreements in New South Wales in the sector that provide a minimum daily payment of one hour these are agreements which, in their totality, have been approved in accordance with the Act.

[27] Whilst a number of witnesses for the APTIA raised 'technical' issues with the calculation of payments due to casual employees I do not consider these to be grounds on which the variation sought should be granted.

[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'<sup>7</sup>); part time employees ('for each day engaged'<sup>8</sup>); casual employees ('for each shift'<sup>9</sup>); and casual employees engaged solely for the purpose of the transportation of school children to and from school ('each engagement'<sup>10</sup>) 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.

[29] The view of the FWO expressed in its Tasmanian advice is in accordance with such an approach. I do not consider that the FWO has provided contrary advice on the application of the clause. The advice given in respect to Tasmania is considered advice. The statement in the resolution of the Queensland complaint did no more than state an assumption that was used in calculating payment due. Further, the Queensland decision provided no basis for the assumption or analysis as to how or why that assumption was made.

[30] If, in fact, the issue APTIA wish to pursue is a question of what the minimum payment per day or per shift (however defined, and I note it is not defined in the PVT Award) then this is a matter more properly dealt with in the 4 yearly review of the modern awards which does not appear, on its face, to have constraints such as those imposed in this review.

[31] I do not consider that the APTIA has met the requirement of the Transitional Act such that the variation should be granted. For these reasons the application of APTIA to vary clause 10.5(d) of the Award is dismissed.

[32] As to the application by the TWU for an additional clause with respect to broken shifts (which goes to the same matter as the APTIA application), it seems to me that the variation sought by the TWU has the potential to create more confusion than it might solve. The change proposed by the TWU would allow a casual employee to be engaged on one shift but have two engagements for that shift. Such amendment is not an appropriate for the PVT Award. There is no utility in granting the TWU application. It is dismissed.

[33] There are a number of issues with the PVT Award as a whole which have been identified in consideration of this specific issue. Interested parties are encouraged to further explore these issues with a view to improving the overall clarity of the award.

***Payment of waiting time for drivers of a bus whilst on charter work.***

[34] APTIA seek a variation to clause 21.5 of the PVT Award. Clause 21.5 deals with the payment of waiting time for coach drivers. The effect of the APTIA variation is to extend the operation of the clause to all drivers of passenger vehicles by replacing the words ‘coach driver’ with the words ‘passenger vehicle driver’ so that the clause 21.5 would read:

**21.5** An employee who is engaged as a passenger vehicle driver on a single day charter may have a rostered shift divided into two working periods with no requirement to return to the depot during a rostered shift. Such an employee will be paid waiting time at the rate of 50% of the ordinary rate of pay plus any applicable penalty or loading, provided that the waiting time so paid for will not be taken into account in the computation of hours for overtime purposes.

[35] A ‘passenger vehicle’ is defined at clause 3.1 of the PVT Award as including ‘motor vehicle, limousine, hire car, bus, coach, electric tramway, monorail and light rail.’

[36] APTIA say that it makes no sense to limit the payment of waiting time only to coach drivers and to exclude bus drivers from such a provision when the vehicle is being used on a single day charter.

[37] The TWU oppose the application.

*Consideration*

[38] In this case it seems to me that an anomaly does exist. The relevant factor in the waiting time provision is the purpose for which the vehicle is being used. The clause clearly stipulates that waiting time is payable in circumstances where the vehicle is being used for a single day charter. It is anomalous that waiting time is payable if the vehicle is a coach but not if it is a bus. I accept the evidence that there may well be locations where a coach is not available and a bus is chartered for such a purpose. However, the variation proposed by APTIA would affect not just bus drivers but also motor vehicle, limousine and hire car drivers.

[39] The application of the APTIA with respect to clause 21.5 will be granted but only to the extent that it deals with bus drivers and coach drivers on charter operations.

*Classifications - pre-departure checks of passenger vehicles*

[40] The APTIA seek a variation to the classification description of B.2 Grade 2 in Schedule B to the PVT Award to include in the list of duties for Grade 2 the requirement to conduct 'pre-departure checks of passenger vehicles; driver monitoring and reporting of vehicle defects' so that the clause would read:

**B.2 Grade 2**

Grade 2 employees are employees with skills in excess of Grade 1 and includes:

- (a) employees engaged in duties associated with effective ticketing, conducting and customer relations service in all contact with passengers and the general public. Duties include operating and issuing tickets; ensuring correct revenue is collected; balancing and accounting for all tickets to ensure correct money has been received; pre-departure checks of passenger vehicles; driver monitoring and reporting vehicle defects; liaising and communicating with passengers and the general public to provide information and directions and performing various administrative procedures associated with Grade 2 duties;

[41] The TWU make no submissions on this proposal.

*Consideration*

[42] The requirement to conduct pre-departure checks and the monitoring of vehicle faults currently sits at the Grade 4 level.

[43] I accept the evidence presented that the practical requirement to undertake a pre-departure check rests with all drivers. I accept the submission of APTIA that if the lowest classification at which such work was required to be done was Grade 4 all drivers would have to be at least a Grade 4 because all drivers are required to undertake pre-departure check of the vehicle.

[44] If the Grade 2 description is amended as sought the requirement will also apply to Grade 3.



[45] The application by the APTIA with respect to B.2(a) will be granted.

***Classifications - driving a bus on day charter***

[46] The APTIA seek to vary the classification description of a B.3 Grade 3 in Schedule B to the PVT Award by deleting the words ‘a coach driver of’ a passenger vehicle and replacing it with the words ‘employees engaged in driving’ a passenger vehicle so that clause B.3 would read:

**B.3 Grade 3**

Grade 3 employees are employees with skills in excess of Grade 2 and includes all employees engaged in driving a passenger vehicle with a carrying capacity of 25 or more school children to and/or from school; employees engaged in driving a passenger vehicle with a carrying capacity of less than 25 passengers on a specified route service which operates regularly between fixed terminals; employees engaged in driving a passenger vehicle which undertakes charter, single day tours or which operates regularly between fixed terminals with a return distance of less than 650 km.

[47] APTIA say that the variation is warranted because a driver who is not a coach driver who undertakes a day charter and nothing else is not covered by the classifications in Schedule B of the PVT Award.<sup>11</sup>

[48] The TWU oppose the variation because, it submits, a consequence of the change is to permit a driver who is ordinarily engaged is in route work at grade 4 to be paid at grade 3 if they are engaged in charter work. It submits that the reference to coach drivers in grade 3 and grade 4 is intentional and covers drivers who are solely engaged in coach services travelling less than (grade 3) or greater than (grade 4) 650 kilometres.

*Consideration*

[49] The classifications in schedule B to the award at B.3 (grade 3) and B.4 (grade 4) include the following descriptions:

<b>GRADE 3</b>	<b>Grade 4</b>
<p>Grade 3 employees are employees with skills in excess of Grade 2 and includes</p> <ul style="list-style-type: none"> <li>• ...</li> <li>• employees engaged in driving a passenger vehicle with a carrying capacity of less than 25 passengers on a specified route service which operates regularly between fixed terminals;</li> </ul>	<p>Grade 4 employees are employees with skills in excess of Grade 3 who</p> <ul style="list-style-type: none"> <li>• ...</li> <li>• employees engaged in driving a passenger vehicle with a carrying capacity of 25 or more passengers on a specified route which operates regularly between fixed terminals; and</li> </ul>

<ul style="list-style-type: none"><li>• a coach driver of a passenger vehicle which undertakes charter, single day tours or which operates regularly between fixed terminals with a return distance of less than 650 km.</li></ul>	<ul style="list-style-type: none"><li>• a coach driver driving a passenger vehicle with a carrying capacity of 25 or more passengers on extended trip/tour with a return distance of 650 km or more and who may be required to deliver descriptive commentary and/or be absent overnight from their place of residence.</li></ul>
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**[50]** For both grade 3 and 4 employees involved in route services, the differentiator between the grades is the carrying capacity of the bus.

**[51]** For grade 3 and 4 coach drivers, the differentiator in this instance is primarily the distance travelled on the charter.

**[52]** The APTIA is correct that there is no classification for a bus driver who only performs a single day charter.

**[53]** The extent or effect of the anomaly said by the APTIA to exist (what do you pay a bus driver who only does charter work) is not clear from the evidence provided. The issue appears to stem from the different grade differentiator for bus drivers and coach drivers within the broader issue of the increased use of buses to do what has been the domain of coach operators, i.e. charter work.

**[54]** Whilst I accept that there may be an anomaly with respect to the classification of a driver of a passenger vehicle (who is not a coach driver) who undertakes charter, single day tours, the granting of this application does not resolve the wider issue that this raises. Further, the variation sought by the APTIA may have an adverse impact on bus drivers who normally undertake route work who occasionally do charter work using a bus.

**[55]** The immediate anomaly identified by the APTIA can be resolved by an amendment to the grade 3 classification by adding an additional dot point as follows:

- a bus driver of a passenger vehicle who only undertakes charter, single day tours which operates regularly between fixed terminals with a return distance of less than 650 km who is not otherwise classified at the grade 4 by virtue of the specified route work normally performed.

**[56]** That is, in circumstances where a bus driver is normally engaged in route work and is paid at grade 4 the employee should continue to be paid at grade 4 when on a charter.

**[57]** I am aware that this proposal has not previously been considered by the parties and I intend to give the parties an opportunity to comment on it prior to the making of a final decision and determination.

## Conclusion

[58] I shall issue a draft determination in conjunction with this decision. Interested parties shall have 14 days from the date of the draft determination to advise me of any potential issues or unintended consequences arising from the draft.

[59] Upon receipt of those comments a final determination shall be made.



### *Appearances:*

*M. Gibian* of Counsel for the Transport Workers' Union.

*I. MacDonald* for the Australian Public Transport Industrial Association.

### *Hearing details:*

2013.

Sydney:

29 April.

<sup>1</sup> Neither the term 'engagement' nor the term 'shift' is defined in the PVT Award although a 'split shift' is defined to include a shift.

<sup>2</sup> Exhibit APTIA1, pages 3-4.

<sup>3</sup> Exhibit APTIA 8.

<sup>4</sup> Exhibit APTIA 4.

<sup>5</sup> [2009] AIRCFB 450, [187].

<sup>6</sup> [2009] AIRCFB 826, [229].

<sup>7</sup> PVT Award, clause 10.3(b).

<sup>8</sup> PVT Award, clause 10.4(g).

<sup>9</sup> PVT Award, clause 10.5(d).

<sup>10</sup> PVT Award, clause 10.5(d).

<sup>11</sup> Exhibit APTIA1, page 10.