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TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1047926-1

**COMMISSIONER BISSETT**

**AM2012/47 AM2012/198**

**Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years**

**Application by Australian Public Transport Industrial Association  
(AM2012/47)  
Passenger Vehicle Transportation Award 2010**

**(ODN AM2008/51)  
[MA000063 Print PR988774]**

**Sydney**

**10.10AM, MONDAY, 29 APRIL 2013**

PN1

THE COMMISSIONER: I'll take appearances.

PN2

MR M. GIBIAN: Thank you, Commissioner. Gibian is my name and I seek permission to appear for the TWU.

PN3

THE COMMISSIONER: Mr Gibian.

PN4

MR I. MacDONALD: Commissioner, MacDonald, I., from the Australian Public Transport Industrial Association. I'm representing the applicant - or one of the applicants, and I'm assisted today by MR M. THRELKELD from the New South Wales Bus and Coach Industrial Association.

PN5

THE COMMISSIONER: Thank you, Mr MacDonald. No objection to permission?

PN6

MR GIBIAN: No.

PN7

THE COMMISSIONER: Permission is granted. Has there been, just before we start, any discussion between the parties in terms of the order in which we deal with these matters?

PN8

MR GIBIAN: I had a brief word with Mr MacDonald. Perhaps just to make sure we're all on the same page, we indicated I think a couple of weeks ago to, Commissioner, your chambers that the TWU would not at this time press certain aspects and certain variations that is raised as part of this review to do with rest periods and the like.

PN9

THE COMMISSIONER: Yes, I understand that, in that respect, it leaves one variation that the TWU seek.

PN10

MR GIBIAN: Yes. I should just indicate with respect to those matters that are not pressed as part of this review, the TWU doesn't resile from what it says about those matters but it has, upon consideration, determined that it will raise those matters most likely as part of the four yearly review rather than as part of this review process, or at least will give consideration to doing so.

PN11

THE COMMISSIONER: Your four yearly review is not that far away, is it?

PN12

MR GIBIAN: Indeed, it's next year.

PN13

THE COMMISSIONER: Yes.

PN14

MR GIBIAN: That's perhaps not so much of a delay. They are issues that concern the TWU and its members and we don't want the position that's now being taken with respect to this review to suggest to the contrary. As you point out, there's one issue that we raise which we continue to press, which is the clause 21.6, which is perhaps responsive to in part or the mirror image of the issue that's raised by APTIA as to clause 10.5(d); that is, dealing with the minimum engagement for casuals engaged in school work as it were.

PN15

Now, I apprehend that Mr MacDonald still presses the other matters that APTIA had raised to do with the waiting time for coach drivers and the classification descriptors in Part B. Given that that's the situation, I would have thought it appropriate that APTIA be treated as the applicant, as it were, for the purposes of these proceedings.

PN16

THE COMMISSIONER: Yes. With respect to the witness, is there any issue with respect to the witnesses being in or out of the courtroom?

PN17

MR GIBIAN: I had a discussion with Mr MacDonald about that. Mr Threlkeld is an instructor and he can be present. I've asked that the other witnesses be outside until they have given their evidence.

PN18

THE COMMISSIONER: Certainly. Mr MacDonald?

PN19

MR MacDONALD: Commissioner, I've got no objection to Mr Giddens being in the commission during the hearing.

PN20

THE COMMISSIONER: You have no objection?

PN21

MR MacDONALD: No, I don't.

PN22

THE COMMISSIONER: Fine. Then I think what we will do, Mr MacDonald, is sort of treat you as the applicant as has been suggested, which means you get to go first. I would ask your other three witnesses, besides Mr Threlkeld, to leave the courtroom. I should just indicate to the parties that we have allocated only today for the purpose of this matter and it's my intention to get the matter dealt with today, and if that means we need to sit a bit later then we'll do that. So the intent is to try and get everything dealt with today, as needs be.

PN23

MR GIBIAN: Just before we start, so far as the witnesses are concerned we indicated that we didn't need to cross-examine some of the witnesses. We've assumed that this is not a matter that's decided on the basis of having to put matters to witnesses and I will adopt that approach with the witnesses that are here as well and raise only matters that are necessary to do so, given the time.

PN24

THE COMMISSIONER: Certainly. Mr MacDonald.

PN25

MR MacDONALD: Thank you, Commissioner. Will the Commissioner allow me to give just a short overview of the - - -

PN26

THE COMMISSIONER: Certainly.

PN27

MR MacDONALD: - - - application of the Australian Public Transport Industrial Association? Just for formality, the application to vary the modern award was filed and dated 7 March 2012 and it also contained a Schedule A, as required, which set out certain bases for the variations. APTIA - if I could just abbreviate the acronym so I don't sort of get my tongue twisted every time - APTIA continues to press those applications and just for formality I would like to place on the record that what APTIA seeks to do in relation to the Passenger Vehicle Transportation Award - and if the Commissioner also allows me to refer to that award as the PVTA, that may help us for some brevity as well, be it only small.

PN28

THE COMMISSIONER: Just refer to it as "the award", if you like.

PN29

MR MacDONALD: Okay, the award.

PN30

THE COMMISSIONER: We only have one award before us today.

PN31

MR MacDONALD: So APTIA seeks to amend clause 10.5(d) of the award in relation to casual employment and replace that clause, 10.5(d), with the following words:

PN32

*A casual employee is to be paid a minimum payment of three hours for each shift. A casual employee solely engaged for the purposes of transportation of school children to and from school is to be paid a minimum payment of two hours for each shift.*

PN33

The difference in the current clause is the word "shift" replaces the word "engagement", Commissioner.

PN34

The second variation sought to the award relates to clause 21.5, ordinary hours of work and rostering, and APTIA is seeking to replace the existing clause 21.5 with a new clause stating:

PN35

*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 the rostered shift. Such an employee will be paid waiting time at the rate of 50 per cent of the ordinary rate of pay plus an 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.*

PN36

The only change there, Commissioner, is in the first line, which in the award itself it refers to the words "coach driver". The APTIA application seeks to replace the word "coach driver" with "passenger vehicle driver".

PN37

The final change, Commissioner, relates to the classifications and APTIA seeks to delete in the award Schedule B.2(a), Grade 2, and replace it with the following words -

PN38

*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.*

PN39

The only change there is that the words "pre-departure check of passenger vehicles; driver monitoring and reporting vehicle defects" has been included in Grade 2 of Schedule B.2(a) as it doesn't exist at the moment.

PN40

Further, in relation to the grade classifications, APTIA seeks to delete Schedule B.3, Grade 3, and replace it with the following words:

PN41

*Grade 3 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 from school; or 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; or 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.*

PN42

The change there is in the second-last line where it refers to driving a passenger vehicle. The Schedule B3, Grade 3, Commissioner, currently refers only to coach drivers rather than passenger vehicle drivers.

PN43

The application is then supported by a series of submissions by APTIA. Those submissions are dated 20 December. There were further supplementary submissions resulting from the application of the TWU dated 24 January 2013 and there was a further supplementary submission dated 2 April 2013, Commissioner, which was a response to a request that you'd made in relation to our previous

conference in this matter. The applications and submissions are then supported by a series of statements.

PN44

There are two sworn statements; they're identical to the statements referred to in the outline of submissions dated 20 December 2012 by Messrs Ben Doolan and Geoffrey Lewis. The Ben Doolan statement is now a sworn statement dated 16 April 2013 and a further sworn statement by Geoffrey Lewis dated 23 April 2013. Commissioner, hopefully you will have those in the file and my friend has got copies of those as well. There are further statements upon which I will seek to rely and those persons are here today and I will seek to tender their statements as sworn statements when they actually take their evidence.

PN45

Commissioner, that forms the basis of the application by APTIA. In general terms APTIA seeks to, in its submissions - and I won't go into the submissions, other than to say APTIA has sought to stay true to the provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 insofar as the submissions are concerned and we seek to address anomalies and technicalities within the award which we hope to provide evidence through our witnesses and our submissions as having existed.

PN46

We also have a general overall view that the decision of the Full Bench of the now Fair Work Commission on 29 June 2012 is the most appropriate way to approach the review today; that is, to limit the review to those matters that are in fact of a technical nature or have created anomalies which seek to be addressed or which otherwise are in some way contrary to the objective of the modern awards. Commissioner, as a general overview, that's the position of APTIA and when the Commissioner advises me, I would seek to call my first witness.

PN47

THE COMMISSIONER: Thank you.

PN48

MR GIBIAN: Would it assist if I just indicate the TWU's position with respect to those matters at the outset?

PN49

THE COMMISSIONER: Certainly.

PN50

MR GIBIAN: Just briefly, with respect to the three issues that are raised the TWU opposes the proposed variation to clause 10.5(d); that is, the replacement of the word "engagement" with the word "shift". The intention of the variation sought by APTIA is to allow persons engaged solely in the transportation of school students to be engaged for a minimum period of one hour in the morning and one hour in the afternoon. We don't think that that ought occur. On its proper construction, the award is relatively clear. We would say that it currently provides for two hours per engagement.

PN51

Particularly when one compares that provision with the provisions dealing with full-time and part-time employees which provide for minimum payments per day,

it's clear that what was intended by the Full Bench that made the modern award was that this be two hours on each occasion of work. When one looks at that in the context of the history of the pre-modern award awards, it's clear that that was what was intended; that it was a matter given specific consideration by the Full Bench in the making of the modern award and is not a matter that would be varied to reduce it in half as part of this award review.

PN52

To the extent that there's said to be confusion, we don't think that is reasonably based or genuine. If there is confusion, then the TWU has suggested an addition of clause 21.6 which can make absolutely clear what we say is the existing meaning of the award; that is, that for school bus drivers there ought be a two-hour minimum period of work on each start, essentially, to try and put it in as plain a term as possible.

PN53

With respect to the second matter, the proposed variation to clause 21.5 to expand the capacity to pay 50 per cent waiting time from coach drivers to any bus driver engaged on a charter, that is also opposed. It doesn't appear to us that there's any technical difficulty or anomaly. It appears to be a fundamental change to the conditions of bus drivers who, in addition to engaging in the usual route work or school runs, are engaged from time to time in charter work which will produce a very substantial reduction. In the example that's been given by Mr Gibian, it's more than a 50 per cent reduction in the amount of earnings for such work.

PN54

The third issue is the two alterations that are sought with respect to the classification descriptors for respectively Grade 2 and Grade 3 in Schedule B of the award. So far as the addition of reference to pre-departure checks in Grade 2, in the descriptor for Grade 2, the TWU doesn't have very much to say about that. We accept that all drivers should conduct pre-departure checks. We haven't specifically said there needs to be a change to the award in that regard but we don't say that drivers do not conduct or should not conduct pre-departure checks.

PN55

With respect to the proposed change to Grade 3, the effect of what is sought is to alter the express reference to "coach driver" to "passenger vehicle driver". The effect of that would be to permit a driver who is engaged in ordinary route work and paid at level 4 to be paid at level 3 if they engage in charter work, and we don't think that that's what is envisaged. The specific references to coach work in Grade 3 and in Grade 4 are intentional. They are to cover drivers who are specifically engaged to, and solely to engage, in coach services. Grade 3 is for under a particular distance: 650 kilometres; Grade 4 is for over 650 kilometres.

PN56

Where a driver has an ordinary role performing route work or school work, as it may be, they will have a classification level for that role having regard to their duties and they should be paid that classification level when they engage in charter. Now, if that's level 4, then they should be paid by their employer at the classification in which they're employed and there's no need for any change to the award in that regard. Thank you.

PN57

THE COMMISSIONER: Just before you start, Mr MacDonald, we might just mark the material that's been submitted by APTIA. The outline of submissions on 20 December I will mark as APTIA1; the supplementary submissions on 24 January as APTIA2; the further supplementary submissions on 2 April as APTIA3; the affidavit of Geoffrey Lewis which consisted of 31 paragraphs and is dated 23 April 2013 I will mark as APTIA4; and the signed statement of Ben Doolan consisting of 23 paragraphs and dated 16 April as APTIA5.

**EXHIBIT #APTIA1 APPLICANT'S OUTLINE OF SUBMISSIONS DATED 20/12/2012**

**EXHIBIT #APTIA2 APPLICANT'S SUPPLEMENTARY SUBMISSIONS DATED 24/01/2013**

**EXHIBIT #APTIA3 FURTHER SUPPLEMENTARY SUBMISSIONS DATED 02/04/2013**

**EXHIBIT #APTIA4 AFFIDAVIT OF GEOFFREY LEWIS, CONSISTING OF 31 PARAGRAPHS, DATED 23/04/2013**

**EXHIBIT #APTIA5 SIGNED STATEMENT OF BEN DOOLAN, CONSISTING OF 23 PARAGRAPHS, DATED 16/04/2013**

PN58

MR MacDONALD: Thank you, Commissioner. I call Geoffrey Ferris.

PN59

THE ASSOCIATE: Could you state your full name and address.

PN60

MR FERRIS: Geoffrey Ivan Ferris, (address supplied).

**<GEOFFREY IVAN FERRIS, SWORN [10.31AM]**

**<EXAMINATION-IN-CHIEF BY MR MacDONALD [10.32AM]**

PN61

MR MacDONALD: Mr Ferris, you are the group operations manager for the Buslines Group. Is that correct?---Yes, correct.

PN62

And you've prepared a statement in relation to the proceedings before the commission today?---Yes, correct.

PN63

And that statement is dated 19 December 2012?---Yes.

PN64

Do you have that statement with you?---I do.

PN65

Can you take a very short time of perusing that statement?---Yes.



PN66

Is the statement before you the statement that you provided to the commission?  
---It is.

PN67

Do you say that the contents of that statement are true and correct?---They are.

PN68

Commissioner, I tender that document.

PN69

THE COMMISSIONER: Thank you. I will mark the statement of Geoffrey Ferris dated 19 December 2012, consisting of 27 paragraphs as APTIA6.

**EXHIBIT #APTIA6 STATEMENT OF GEOFFREY FERRIS,  
CONSISTING OF 27 PARAGRAPHS, DATED 19/12/2012**

PN70

MR MacDONALD: I've just got a couple of little issues that I would like to raise with Mr Ferris, Commissioner.

PN71

THE COMMISSIONER: Certainly.

\*\*\*\* GEOFFREY IVAN FERRIS

XN MR MACDONALD

PN72

MR MacDONALD: Mr Ferris, in relation to your statement, you've referred to the practice of negotiations for enterprise agreements. Could you elaborate on those negotiations insofar as they relate to school bus casual drivers?---Yes, as I said in my statement, we operate in 10 different regional towns around New South Wales and we go out and have negotiated our current enterprise agreement with each of the depots that we operate in. We go out and negotiate with all the drivers and then the drivers have typically selected a negotiating committee - a small committee of approximately four people, depending on the depot - and we negotiate with that group on behalf of the drivers. Then with the final product of the draft EA we go back to our full members in each depot and have a session with all the drivers to make sure they understand each and every clause and then they carry out the necessary voting procedure and we lodge the draft EA.

PN73

The terms and conditions of the enterprise agreements that you have with your various depots, do you actually negotiate the terms and conditions, rates of pay, minimum engagements, et cetera?---It's mostly done via BusNSW and their industrial group. Generally the New South Wales operators have a standard set of rates of pay rates which we then inform and discuss with our drivers but we'd be on the state - well, the old award rates. Now they're under the - it's a standard set of rates, yes.

PN74

Are you part of that negotiating team?---I sit on the BusNSW Industrial Committee, yes.

PN75

And who are those negotiations done with?---Usually with TWU New South Wales - well, I'm not sure what Wayne Forno and Nimrod and a variety people there for the TWU - - -

PN76

So they're the members of the TWU?---Yes.

\*\*\*\* GEOFFREY IVAN FERRIS

XN MR MACDONALD

PN77

Mr Ferris, if I could show you a document. I have given a copy to my friend, Commissioner, and I will ultimately get Mr Ferris to tender that. If you could have a look at that document and explain what it is?---Yes, this is our current enterprise agreement for one of our depots, which is our Picton depot, south of Sydney.

PN78

Does that represent basically the enterprise agreement for all your - - -?---The other nine are carbon copies of this, yes.

PN79

Can I take you then to clause 8(c)(i) and if you could tell me what that is?  
---8(c)(i). "Monday to Friday, that casual employees be paid for all time worked to the nearest minute, with a minimum engagement of one hour, provided that for all time worked in excess of 38 per week or 10 in any day, the rate of pay shall be time and a half." So that is our method of payment for our employees. We employ 370 drivers, of which 350 are termed casual. Casual in our industry - in operation, sorry, means they work five days a week, 40 weeks a year, 201 days a year, whenever we're carrying school children to and from school; not casual as in McDonalds might be you get one shift this week and three next week. Our casuals work the same shift 99 per cent of the time and do the same job day in, day out but are not full-time workers as in working 38 hours a week.

PN80

Commissioner, I would like to tender that document.

PN81

THE COMMISSIONER: I probably need to have a look at it?---Yes, sure.

PN82

MR MacDONALD: I'm sorry I didn't bring a third copy. I - - -

PN83

THE COMMISSIONER: You probably don't need to - - -

PN84

\*\*\*\* GEOFFREY IVAN FERRIS

XN MR MACDONALD

MR MacDONALD: It's actually a court document.

PN85

THE COMMISSIONER: - - - tender it because it is a court document. I will just note that it's the decision in Picton Buslines Pty Ltd, a Member of Buslines Group

Fair Work Agreement 2010. The commission document reference is (2011) FWAA 7455.

PN86

MR MacDONALD: Thank you, Commissioner. Just one other aspect, Commissioner.

PN87

In your statement, Mr Ferris, you've talked about the need for flexibility and you've talked about also the issue of paying the single hour to your casual school bus drivers. Could you elaborate a little bit more on that practice?---We us bus companies have been in business for over 70 years and we have always had bus operations in rural and regional areas, as well as some in Sydney at certain times. An enormous amount of our staff are people who wish to just - they're semi-retired and a lot of them want a reason to get out of bed and do something and so they come to work in the morning and in the afternoon; 40 weeks a year suits them. Many of them have other little jobs such as lawn mowing or other trades that they still have on the side. A good share of them are pensioners and self-funded retirees who, while they may have given away full-time work, as I said, they still want to have an interest, they still want to have a job and they come to work morning and afternoon for us and drive school children to and from school every day that school attends.

PN88

And I understand you have prepared a summary of your depots and a number shifts in fact in which there are bus drivers who work less than two hours?---Yes.

PN89

Can I show you this document, Mr Ferris. Commissioner, this is a document you may already have a copy of. I flagged previously I would seek to tender this.

\*\*\*\* GEOFFREY IVAN FERRIS

XN MR MACDONALD

PN90

THE COMMISSIONER: This is the document that was sent on 26 April.

PN91

MR MacDONALD: Yes, Commissioner.

PN92

THE COMMISSIONER: Yes.

PN93

MR GIBIAN: Just before my friend continues, I mean we have some difficulty of dealing with this, having received it on Friday. Now, I don't know whether it's right or wrong but we've certainly had no opportunity to investigate this - either the accuracy of this document or whether such a result is indicative elsewhere in other operators in New South Wales or elsewhere in Australia.

PN94

THE COMMISSIONER: Are you objecting to its tender?

PN95

MR GIBIAN: Yes.

PN96

THE COMMISSIONER: As to its truthfulness, the witness is going to deal with that, I would have thought. It tells me no more than what it tells me.

PN97

MR GIBIAN: Indeed.

PN98

THE COMMISSIONER: And I take it as no more than that.

PN99

MR GIBIAN: Indeed. Thank you.

PN100

THE COMMISSIONER: I will allow it in.

PN101

MR MacDONALD: Thank you, Commissioner.

PN102

\*\*\*\* GEOFFREY IVAN FERRIS

XN MR MACDONALD

Mr Ferris, can you explain what that document is actually stating?---Yes. Well, I did a summary of each of our a.m. and p.m. shifts that we operate in each of our 10 locations, and that's covering all shifts that operate Monday to Friday in a school term, and had a look at a number of shifts and a number of those shifts that are less than two hours and just summarised them as a percentage of the total shifts. So if you look across the line there's a number of a.m. shifts. Six of those first ones in Ballina are less than two. In the p.m. there's 33 shifts with 15 less than two. So of our 67 shifts that operate that day, 21 of them are less than two hours.

PN103

So just looking at the totals, is it correct then to say that 26 per cent of your shifts are operated for less than two hours?---That's correct.

PN104

I seek to tender that, Commissioner.

PN105

THE COMMISSIONER: I will mark the summary of shift times as exhibit APTIA7.

#### **EXHIBIT #APTIA7 SUMMARY OF SHIFT TIMES**

PN106

THE WITNESS: There's a copy here of all the - a computer printout of each shift if you like, but it's a matter of paper.

PN107

MR MacDONALD: No, I won't trouble - - -?---Yes.

PN108

- - - Mr Gibian with going through all of that. I've got nothing further, Commissioner.

<CROSS-EXAMINATION BY MR GIBIAN

[10.42AM]

PN109

MR GIBIAN: Thank you, Mr Ferris. Sir, I just want to ask you how long have you been the group operations manager of Buslines?---12 years.

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

PN110

Now, I think we understand from the answers that you gave to Mr MacDonald that drivers employed by Buslines are all covered by enterprise agreements? ---Yes, correct.

PN111

That is at all locations?---Yes, correct.

PN112

And I think you also said you have a separate agreement for each of the depots that you have?---Each depot has got its own registered agreement.

PN113

But you participate in the collective negotiation - that is, the Buslines Group, I should say, participates in the collective negotiation undertaken through BusNSW?---Correct.

PN114

And you yourself are involved in that in a more active way?---Yes.

PN115

Now, and the way that that collective negotiation has worked for quite some time is that essentially the TWU and BusNSW negotiates - sometimes they agree, sometimes they don't - - -?---Yes.

PN116

- - - but they negotiate a standard agreement?---Yes, correct.

PN117

Pre Work Choices, as it were, that was done through the New South Wales industrial relations system?---Correct.

PN118

And a consent award was put forward on a periodic basis to the state industrial commission - - -?---Correct.

PN119

- - - to be made and the commission was asked to make that award?---Mm'hm.

PN120

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

And since Work Choices everyone has moved to the federal system, obviously? ---Yes.

PN121

But at least so far as operators participate through the BusNSW process, essentially a standard agreement is negotiated, which is then put to the ballot by operators who - - -?---Each operator.

PN122

- - - participate?---Correct.

PN123

And BusNSW does that and puts the standard agreement, does it, to each of its depots?---Buslines.

PN124

Yes?---Not BusNSW.

PN125

I'm sorry, Buslines?---Buslines does it. We then put it to each depot, to a vote at each depot and then reach it, yes.

PN126

And you understand that to the extent that all of Buslines' employees relevantly are covered by enterprise agreements, that any alteration of the award will not affect directly their conditions of employment?---Correct.

PN127

So far as the Picton agreement was concerned, Mr MacDonald took you to clause 8(c)(i) - - -?---Yes.

PN128

- - - which referred to a minimum engagement of one hour?---Yes.

PN129

And you understand that that provision facilitates Buslines, to the extent it's possible, to roster a school bus driver for one hour in the morning and one hour in the afternoon?---That's correct.

PN130

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

You also have produced this, the summary document that was marked as APTIA7?---Yes.

PN131

And I take it that the summary you've produced indicates that 26 per cent of shifts are less than two hours, I take it?---Correct.

PN132

That is, they're somewhere between one and two, presumably?---Yes. Yes, we have nothing less than one. It's between one and two, yes.

PN133

So the minimum is one; there's no less than one?---Yes.

PN134

And that 26 per cent would be between one and two at some point?---Yes.

PN135

I take it from that that in the majority of cases the school bus duty, as a result of the time it takes to conduct it, it takes more than two hours - or at least two hours?---It takes two hours, yes.

PN136

Two hours?---Yes.

PN137

And the bus run involves the driver coming to the depot, attending the bus?  
---Doing a pre-departure check.

PN138

Doing a pre-departure check?---Yes.

PN139

Generally one says that's 15 minutes or so?---Usually 10 minutes, yes.

PN140

10 minutes?---Yes.

PN141

Is there sometimes or always fuelling to be done?---We fuel at some stage during the week, not like a metropolitan operation because of the kilometres we do. Some buses fuel daily but the majority would fuel two to three times a week.

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

PN142

So the driver does that - - -?---He does it - - -

PN143

- - - as well as the pre-departure check?--- - - - within those hours, yes.

PN144

And whether it's one or two times a week or every day, depends - - -?---Yes.

PN145

The driver then is required obviously to go to wherever the route starts - - -?  
---Yes.

PN146

- - - from the depot, conduct the bus route, picking up the children?---Yes.

PN147

Attends the school and the unloading - - -?---Yes.

PN148

- - - and the like of the children and then returns to the depot?---Could do more than one trip with certain locations.

PN149

Sure?---What governs that is usually the bell times of the school, a spread of bell times within a town. That's why you will see some towns are higher than others. If all the schools go in at a very similar time, a bus can't service too many schools.

But in some of our other towns where they're spread over an hour, you can do more than one run.

PN150

So some bus drivers do a primary school trip and then a high school - - -?---High school trip, yes.

PN151

- - - trip, is it? The other way around?---Yes.

PN152

So a high school trip and then - - -?---And then a primary school trip.

PN153

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

- - - a primary school trip. Yes, I understand. When the driver - after they have finished their last one, then they have to drive from the school and go back to the depot - - -?---Back to the depot, yes.

PN154

- - - park the bus, clean - - -?---Sweep the bus.

PN155

Sweep the bus?---Mop the bus and - - -

PN156

And then they can clock off, essentially?---Yes.

PN157

And the majority of time that's a two-hour job?---Somewhere between one and three usually.

PN158

Between one and three?---There's a few that do, you know, two and a half hours but, as you can see, the percentage there is less than two, yes.

PN159

You've given some evidence as to the types of employees that you have and I think you've elaborated on that to a degree with - - -?---Yes.

PN160

- - - Mr MacDonald. Now, you've indicated that some are pensioners and semi-retired persons - - -?---Yes.

PN161

- - - who don't wish to do too much work, as it were?---The majority of our people are semi-retired people. The average age of our workforce would be high 50s, yes.

PN162

You assert in some of their cases they don't wish to earn too much money because it may affect either their superannuation or pension entitlements?---Dollars isn't motivating them; it's that they don't wish to lose their entitlements particularly, yes.



PN163

If it's the case that a person wishes to work less hours, it's available for you - or for Buslines, is it not, to roster one driver in the morning and one in the afternoon if you have two people who - - -?---We rarely do that. We have the ability to do that but it would happen in very, very rare cases that the fellow - a person as there's quite a few women as well who do the same thing - that they generally work a morning and an afternoon. It doesn't happen that they too often want to just come in of a morning or the afternoon. They would rather work the two hours in one day than over two days.

PN164

Yes, I understand. But if someone approached you and said, "Look, the hours that you've got are too much for me, either because I don't want to work the hours or because the earning are affecting their pension or the like," and they're a long-term employee and they say, "Well, can I just work Monday-Tuesdays or just work mornings," for example, that's something that you would consider and accommodate if you're able to?---We have some drivers who share fiver days a week amongst two people; they do three and two.

PN165

You've also referred to some school teachers who do the work. How does that work?---Well, understand, some of - well, as I said, our operations are in large regional towns. If you go to somewhere like Lismore, we cover an area that's equivalent to the Hawkesbury River to Wollongong to Katoomba with 81 buses. So some of those are out in little villages and the school teacher in that one-teacher school quite often lives in Lismore and will drive the bus to their school. It's got the 15 or 20 children on that go to that school that we pick up and then they park at that, yes, at quarter to 9, do the school day and then drive it home in the afternoon.

PN166

Is the teacher who does that work paid by Buslines or the school?---Buslines.

PN167

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

By Buslines?---Yes. It's just an additional job to their school teaching.

PN168

Have you got your statement there?---I do.

PN169

You give an example in paragraph 21 of what you say is a standard shift for a casual school bus driver?---Yes.

PN170

And you say morning is commence at 7.45 and finish at 9.15?---Yes.

PN171

Do you see that there?---Yes, I do.

PN172

Firstly, what did you mean by "a standard shift" in the commencing words of - - -?---We operate about 290-something shifts. So what is a standard shift? I mean, we have a few that start early in the morning and take someone into a town but the majority are just carrying school children. So you can't pick up much before quarter to 8, 8 o'clock. I mean, the children aren't going to get to school at 8 o'clock when the school doesn't open till 9.00. So generally we drop the children at school between 8.30 and quarter past 9, depending on their bell time. So therefore you can't start the run too much before quarter to 8, 8 o'clock, yes. So that's what I mean by standard: the hours most people would work.

PN173

Firstly, the example of the morning that you've given here is one and a half hours?---Yes.

PN174

In fact 74 per cent were of at least two hours, weren't they?---Yes.

PN175

So it's not standard in the sense the majority of people work in that fashion?  
---What I've included in your two-shift, we pay all our drivers 20 minutes extra to clean their bus after the end of a shift.

PN176

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

Of course?---So they all have a - sorry, there's a few people who wish not to clean but once again, a high 90 per cent of the drivers all do cleaning as well.

PN177

The second dot point in paragraph 21 you've referred to a standard shift involving some work from midday to 12.45?---Yes.

PN178

What's the person doing in that?---Schools have sport and now with the spread of not just state schools, sport operates five days a week where - I'll tell you, 40 years ago when I started in the industry - or 50 years ago - it was always Friday afternoon sport, but now sport is Monday, sport is Tuesday, sport is Wednesday, Thursday and Friday. So at lunchtime a school goes to sport or to the pool, to the gym, to the golf course - whatever it is. We drop the children there. They play sport for two hours and then we go back prior to the school run in the afternoon and take them from the gym back to the school and then do our school run out.

PN179

But on this example the person has finished, as you say, at about 12.45?---Yes, it's only - - -

PN180

So they don't link straight up with their afternoon shift?---No, it doesn't back up to any other shift.

PN181

And they then recommence at 2.30 - - -?---2.30, yes.

PN182

- - - and work for two hours doing the trip home, essentially?---Take the children back to school and then do their shift, yes.

PN183

Under the enterprise agreements at least that you have, you would pay that person for four and a half hours work only?---Correct.

PN184

And that is, they have two unpaid breaks more than 60 minutes?---They have two periods in there. Yes, they go home and mow their lawns or do whatever they wish to do.

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

PN185

Have you given any consideration as to whether that arrangement or the payment of only four and a half hours for that work is permissible under the award?--- Yes.

PN186

The modern award?---Under the modern award? Yes, we have. We have compared it with that. Under our EA it's admissible but under modern award it wouldn't be paid that way.

PN187

That is, at best one could have one break?---Yes.

PN188

Indeed, you would have to pay two hours each time the person worked?---Yes.

PN189

Sorry, just going back in your statement to paragraph 4, you refer to the contract with the New South Wales government?---Yes.

PN190

I'm confused about contract A and contract B?---Okay.

PN191

What's the difference?---So contract B, which is the majority - we have both types but our far majority - we have 29 contract type A's that is a charter to the government. So the government charters the bus and tells us that, "You're carrying children to school A and you turn left at Smith Street, right at Jones Street," and you follow their schedule. Contract B, in Dubbo we have a contract that says every child that lives in the contract boundary, which is usually the census township boundary - we have to move every child to and from school within some certain parameters of time and of walking distance to the bus stop, but it's up to us how we schedule those buses. So contract B we are paid per head. Contract A, they charter the full bus irrespective of whether 23 children catch it or 28 children catch it - we're paid the same amount today. Under type B, depending how many children travel is how we're paid. So there's two models.

PN192

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

So most of your work is conducted by what you'd call the Fair Box model?---The Fair Box model.

PN193

Type A you're paid a set sum, \$X per child?---Yes.

PN194

Is that correct?---Yes, correct.

PN195

And it's only contract A which has a calculation based upon the hourly costs of the driver?---Correct.

PN196

And that's a minority of - - -?---In our operation it's a minority, yes.

PN197

So far as that contract refers to a minimum hours, it has a minimum of two per day?---One hour in the - type A are you talking?

PN198

Yes, type A?---Yes, one hour in the morning, one hour in the afternoon.

PN199

It just says "a minimum of two hours", doesn't it?---Yes.

PN200

Now - - -?---Sorry, there's no type A that only operates a.m. or p.m.

PN201

Okay?---They all operate a.m. and p.m.

PN202

In any event, the contract or part of the contract price is operated upon an agreed contract hours?---Yes, correct.

PN203

And the minimum contract hours is two?---Yes, correct.

PN204

The fact that the minimum is two says nothing about what number of hours is in fact agreed in any particular case?---In the contract we have a Schedule 5 attached to it which lists the route with the time that the bus must be at each bus stop and then there's a payment schedule as well which actually lists the hours that the driver is paid from commencement at depot to finish at depot.

\*\*\*\* GEOFFREY IVAN FERRIS

XXN MR GIBIAN

PN205

And that will vary depending on - - -?---On how far the bus has to travel, yes.

PN206

Nothing further, Commissioner.

<RE-EXAMINATION BY MR MacDONALD

[10.57AM]

PN207

MR MacDONALD: You did mention it but could you just, for the record, state how long you've actually been in the bus industry?---53 years. I'm 53 years old and I was born into it but I have worked in it since I have been 20, so 33 years I have worked in it full-time and another five previous to that part-time.

PN208

Sorry, Commissioner, I knew that. You were asked a couple of questions about the type A and type B contracts and just in clarification in relation to the type A contracts can you explain to the Commissioner how they're actually funded?---So a type A contract, which is the charter to the government, we are paid a component of capital to buy the bus and pay the bus off over the period of its life. We then paid an hourly rate for the driver's wages. We paid a rate of running kilometres for fuel maintenance per kilometre, and then an admin charge as well.

PN209

So would it be fair to say with a type A contract that the variables that relate to what you get paid basically are the bus, the number of hours it takes to do the task and the number of kilometres the - - -?---And how far the bus travels, yes.

PN210

Perhaps you could just give us a very brief view on what the impact, for instance, of changing the two-hour rate to a four-hour rate would do to the type A contracts, for instance.

PN211

MR GIBIAN: I object to this. This is going well beyond re-examination. This is - - -

PN212

\*\*\*\* GEOFFREY IVAN FERRIS

RXN MR MACDONALD

THE COMMISSIONER: Yes, I think so.

PN213

MR GIBIAN: I mean, if evidence of that nature was wanted to be led, it ought to have been led in chief.

PN214

MR MacDONALD: No, it's all right. I can ask Mr Threlkeld that anyway. I've got nothing further, Commissioner.

PN215

THE COMMISSIONER: Thank you.

PN216

You're excused. Thanks very much?---Thank you.

<THE WITNESS WITHDREW

[10.59AM]

PN217

MR MacDONALD: My next witness, Commissioner, is Mr David Tape.

PN218

THE ASSOCIATE: State your full name and address.

PN219

MR TAPE: David Tape, (address supplied).

**<DAVID TAPE, SWORN**

**[11.00AM]**

**<EXAMINATION-IN-CHIEF BY MR MacDONALD**

**[11.01AM]**

PN220

MR MacDONALD: Thank you, Mr Tape. You're the executive director of the Queensland Bus Industry Council. Is that correct?---Correct.

PN221

How long have you held that position?---Since November 2006.

PN222

Do you recall preparing and signing a statement in relation to the matters with which we're before the commission today?---Yes, I do.

PN223

Do you have a copy of that statement with you?---Yes, I do.

\*\*\*\* DAVID TAPE

XN MR MACDONALD

PN224

Could you just have a very brief look at that statement. That's a statement dated 19 December 2012. Is that correct?---That's correct.

PN225

Do you say that the contents of that statement are true and correct?---Yes, I do.

PN226

Commissioner, I would tender that statement.

PN227

THE COMMISSIONER: Thank you. I will mark the statement of David Tape, consisting of 20 paragraphs, dated 19 December - and four attachments - as exhibit APTIA8.

**EXHIBIT #APTIA8 STATEMENT OF DAVID TAPE,  
CONSISTING OF 20 PARAGRAPHS, DATED 19/12/2012**

PN228

MR MacDONALD: Thank you, Commissioner, I've got no questions of this witness.

**<CROSS-EXAMINATION BY MR GIBIAN**

**[11.02AM]**

PN229

MR GIBIAN: Thank you, Mr Tape. Sorry, you just indicated that you've been the executive director of the Queensland Bus Industry Council since 2006? ---That's correct.

PN230

Were you involved in the bus industry prior to that or - - -?---No, I was not.

PN231

In paragraph 5 of your statement you indicate that all of the council's members pay their employees under the PVTa or under enterprise agreements?---To my knowledge, yes.

PN232

What's the extent of your knowledge?---That all my members pay under the PVTa or under an EA; I'm not aware of any that don't.

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

PN233

Are you able to say or give any indication of the proportion of your members that have enterprise agreements rather than operating directly under the award or don't you know?---No, I don't.

PN234

You're not able to give any indication at all?---The only ones that I'm aware of that have the A's are ones that are on Metro contracts through TransLink in South-East Corner. The majority of the school sector which are regional operators work under the PVTa.

PN235

Does the Bus Industry Council actually engage as an industrial organisation on behalf of its members or - - -?---Yes, we do.

PN236

You say that there's been some confusion as to the term "engagement" in clause 10.5(d) of the award?---Yes, there is.

PN237

Now, the award has been in place since 2010?---That's correct.

PN238

Is the confusion that you refer to as to the use of the term "engagement" an issue that's arisen since 2010?---No, there's always been some doubt in regards to the term "engagement". It was never clearly defined in our previous two awards, the southern or northern division. It's been a grey area.

PN239

The confusion that you've referred to is not a matter arising out of the making of the modern award itself; it's just there's been confusion for some time?---Yes, there is.

PN240

Can I just show you this document. Commissioner, I've just got together and just extracted the casual provisions from the preceding awards as we understand them. Some of those are referred to in some of the statements that APTIA has put forward but I thought it might be useful to put them into a bundle. Perhaps my friend should have given those at one time. Just for ease of reference, obviously particular clauses in awards perhaps have to be seen in the context of definition provisions and the like and I haven't endeavoured to extract the whole of every award for brevity's sake but just so it can be of assistance to the commission

I thought it might be useful. Can I just ask you, Mr Tape, you will see that there's hand numbers in the top right-hand corner?---Mm'hm.

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

PN241

You can see those. Perhaps not on the first page but thereafter?---Yes.

PN242

The page numbered 4 is the front page of what I think you referred to as the northern award - - -?---That's correct.

PN243

- - - referred to as the Passenger Vehicle Drivers Etc Award - Northern and Mackay Divisions - 2003. That's the award that was applicable in that geographical area prior to the commencement of the modern award. Is that right? ---That's correct.

PN244

The provision dealing with casual employees is on the following page that's hand numbered 5, at the bottom of that page. It's clause 4.2.1. Do you see that? ---Mm'hm.

PN245

You're familiar with these provisions?---I was.

PN246

You were?---But since the PVTAs I really must - indeed, I haven't referred to these.

PN247

Now, the first sentence refers to the rate. Then the second sentence provides for a daily period of employment of not less than four hours generally for casual employees. Do you see that?---Yes, but there's no stipulation for a dedicated school bus driver.

PN248

The final paragraph on that page refers to casual employees engaged by non-profit charitable organisation or for school purposes. Do you see that?---Yes, I do.

PN249

"For not more than two hours on any engagement shall be paid for a minimum of two hours." Do you see that?---Or actual time worked. Yes, I do.

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

PN250

"Or if longer than actual time worked"?---Yes.

PN251

And you understood that to require that each time the person works they're required to be paid for a period of two hours, even if for some reason the run takes less than two hours?---No, my understanding was an engagement was for the day.



PN252

The other award was the southern division award and the front page of that is at page 6. Do you see that?---Yes, I do.

PN253

It's known as the Motor Drivers Etc Award, Southern Division. The relevant provision there is clause 7 - sorry, on page 7. It's clause 4.3 that deals with casual employees?---Mm'hm.

PN254

You will see clause 4.3.3 refers to a minimum engagement of each of two hours? ---That's correct.

PN255

Do you know whether that award has - I mean, I haven't extracted the full award for you there but if I suggest to you it doesn't contain any definition of "engagement" would you know that one way or the other?---No, I believe it didn't.

PN256

Sorry?---I believe it didn't.

PN257

You believe it did not?---Yes.

PN258

Can I suggest to you that that clause requires the payment of two hours for each time the person attends work?---Can you repeat that, please.

PN259

That clause require the payment of two hours for each time the person attends work?---No, not my understanding.

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

PN260

So far as your understanding is, you indicated earlier that this was a matter of confusion for some time?---Yes, because there was a difference in the wording between the northern division and southern division and when the PVTAs were struck, that clarity wasn't given also.

PN261

So far as you say that you express a view about what engagement means, you understand that other people had a different view about that?---Yes.

PN262

You refer - sorry, just going back to your statement - to having conducted a survey of members in 2010?---That's correct.

PN263

What was the purpose of doing that?---To try and get a feel across our industry in the state of Queensland as to how operators paid their drivers, whether it was two hours for the whole shift for the day or whether there was an understanding that it may have been 2.00 in the morning, 2.00 in the afternoon.

PN264

What you say you surveyed your members about was the minimum engagement. Is that right?---Yes.

PN265

That is, the shortest period of engagement. Is that right?---Correct.

PN266

That is, you didn't ask your members for an average, say, of how long the routes actually took. You asked for the shortest period?---I didn't look at the route timings or how long it takes to run a particular route; it was purely how they paid their drivers.

PN267

And when you were asking how they paid their drivers you were asking the minimum amount that they paid their drivers - - -?---Yes.

PN268

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

- - - not how much they actually paid their drivers on average?---No. What they came back to me - in my survey I actually asked the question, "How do you pay your drivers? Do you pay your drivers for an engagement which is a shift for the whole day - ie, two hours - or do you pay your drivers two hours in the morning, two hours in the afternoon?" and the result was the majority paid - or 53 per cent indicated they looked at an engagement as a shift for the day and paid two hours as the minimum.

PN269

But then you're not saying that 53 per cent of the operators paid all their drivers only two hours; that is, their runs only took one hour in the morning and one hour in the afternoon?---No.

PN270

You're not saying that?---No, I'm saying that's what they paid as a minimum.

PN271

As a minimum?---If they worked longer then they paid time worked.

PN272

You've referred - and this is I think in paragraph 14 to correspondence with the Fair Work Ombudsman?---Yes.

PN273

That correspondence that you referred to concerned a particular investigation concerning a particular complaint. That's right?---Yes, that's correct.

PN274

Made by Mr Mulheron?---Yes.

PN275

Who was an employee I think of Polleys, P-o-l-l-e-y-s, Coaches?---That's correct.

PN276

The correspondence that you've annexed is - I'm not sure what annexure it is but anyway it's the letter under the letterhead of the Fair Work Ombudsman dated 21 November 2011?---Mm'hm.

PN277

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

Do you see that? Were you actually involved in this at all, this complaint at all, or this is just correspondence provided to you by Polleys Coaches?  
---Correspondence provided.

PN278

That is, you were not involved in the incident?---No, it was referred to our industrial arm when they - - -

PN279

I'm sorry?---Polleys were referred to our industrial arm when they requested assistance.

PN280

That is, did the council assist Polleys with respect to this incident or - - -?---We referred.

PN281

I'm sorry?---We didn't provide any manpower, or resource, or any financial support.

PN282

I mean, the correspondence is addressed to Polleys Coaches?---That's correct.

PN283

That is, I take it, the Fair Work Ombudsman was dealing directly with Polleys Coaches - - -?---Correct.

PN284

- - - with respect to this issue, rather than the Bus Industry Council as its representative?---Correct.

PN285

Would I be right in understanding that your knowledge of this matter is obtained from the correspondence you've been provided with?---Correct.

PN286

So far as that correspondence is concerned, it's not clear that there was any complaint about the minimum engagement period made by Mr Mulheron, is it?  
---Mr Mulheron indicated, from my understanding, that he thought he was inadequately paid. It was referred to the ombudsman and it was investigated and the payment paid by our member at the time was deemed I think in one case to be insufficient to \$1400. That was rectified and the matter has taken no further action.

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

PN287

What I'm suggesting to you is that it's not clear that Mr Mulheron made any complaint that he was underpaid by reason of the period of his engagement?---No.

PN288

I think you've extracted a sentence that appears on the second page of the correspondence at about three-quarters of the way down the page where it's said, "On the balance, for the purposes of this investigation, I have undertaken assessment based on a one two-hour minimum engagement per day." Do you see that?---Yes, I do.

PN289

Even approaching it on that basis, Mr Mulheron had been underpaid by the amount that you mentioned, \$1400 or so?---Mm'hm.

PN290

Just going back to your statement, at paragraph 17 on page 2 you say that, "The Bus Industry Council supports an approach of a two-hour minimum engagement for each shift, which would include a broken shift." Do you see that?---Yes, I do.

PN291

And that you'd indicate that, "To do otherwise would extend the minimum engagement, would mean less casual work would be available to passenger vehicle drivers." Do you see that?---Yes, I do.

PN292

Is that because operators would engage full-time or part-time staff instead of casuals?---No, they'd probably do the work themselves.

PN293

I'm sorry?---They'd probably do the work themselves.

PN294

Sorry, the owner of the company would - - -?---Yes.

PN295

- - - do the work?---Mate, what you've got to understand, in Queensland there are around about 1200 regional school contracts and they vary from one bus contract to an operator holding a few contracts, and a lot of the work is done by casual employees or employees that have second jobs or people that are receiving pension benefits. At present we don't have a problem filling those vacancies; to extend payment might see a shortfall.

\*\*\*\* DAVID TAPE

XXN MR GIBIAN

PN296

So far as the owner of the company undertaking the work is concerned, presumably that would only be if it it a one boss company?---Well, up to two because you would normally have a mother and father and - - -

PN297

So if it's a family business - - -?---That's correct.

PN298

- - - you might have the son doing the work or something as well?---Exactly right, yes.

PN299

Presumably if that was more economic they would do that already, but for bigger operators that's obviously not the case?---Probably not; they would need to engage.

PN300

They would still engage - - -?---Yes.

PN301

- - - casual employees. Nothing further, Commissioner.

PN302

THE COMMISSIONER: Thank you. Mr MacDonald?

PN303

MR MacDONALD: Nothing in reply, Commissioner.

PN304

THE COMMISSIONER: Thank you, Mr Tape. You're excused?---Thank you.

<THE WITNESS WITHDREW

[11.16AM]

PN305

MR MacDONALD: Commissioner, I call Melissa Manley. Commissioner, whilst we're waiting to come in, I noticed my friend didn't tender that document in evidence. I was wondering did you retain that document?

PN306

THE COMMISSIONER: I retained it.

PN307

MR MacDONALD: I don't have a problem with you retaining it. I'm just wondering for what purpose it's being retained or whether it's being tendered. I would object to its tender on the basis of it representing a list, an exhaustive list, of the pre-modern awards which it simply isn't; there's just a selection in there.

PN308

THE COMMISSIONER: All right. I don't know that it was put as an exhaustive list.

PN309

MR MacDONALD: It wasn't, so that's why I was just asking - - -

PN310

MR GIBIAN: I propose to refer to it as an aid - - -

PN311

THE COMMISSIONER: Yes.

PN312

MR GIBIAN: - - - and I will do so in submissions. Whether it's exhaustive or not, Mr MacDonald can tell me, I suppose. It incorporates those that have been referred to in Mr MacDonald's evidence and was intended to be of assistance to

the commission in that regard. I'm in the commission's hands as to whether it ought be marked.

PN313

THE COMMISSIONER: I will just take it as an aid and the parties should be aware that if I do go back and refer to any of the pre-modern awards I will refer to the full award. All of those documents are filed with the commission, so - - -

PN314

MR GIBIAN: Yes. Thank you, Commissioner. Just as a matter of clarification, it doesn't refer to all the documents that I refer to; it doesn't include the Tasmanian Passenger Transport Award. So we need in this review - just my request - that we get the facts right. That's very important, Commissioner.

PN315

THE COMMISSIONER: Yes.

PN316

THE ASSOCIATE: State your full name and address.

PN317

MS MANLEY: Melissa Jane Manley, (address supplied).

<MELISSA JANE MANLEY, SWORN [11.18AM]

<EXAMINATION-IN-CHIEF BY MR MacDONALD [11.19AM]

PN318

MR MacDONALD: Ms Manley, you are the group human resources and training manager for Transit Australia?---Yes, that's correct.

PN319

How long have you held that position?---Just over two and a half years.

PN320

And do you recall preparing statements in the proceedings that we're here today for?---Yes, I do.

PN321

And have you got copies of those statements?---I do, yes.

PN322

The first statement that I would draw your attention to is a statement signed by you on 19 December 2012. Do you have that document in front of you?---I do.

PN323

Can you just have a quick look at that document. Do you say that the matters contained within that document are true and correct?---I do, yes.

PN324

I tender that document, Commissioner.

PN325

THE COMMISSIONER: Thank you. I will mark the statement of Melissa Manley dated 19 December 2012 as exhibit APTIA9.

**EXHIBIT #APTIA9 STATEMENT OF MELISSA MANLEY  
DATED 19/12/2012**

PN326

MR MacDONALD: Do you have another statement there as well?---Yes, I do.

PN327

And that statement is dated 22 February 2013?---That's correct.

PN328

And it's a short statement of four paragraphs?---Yes.

\*\*\*\* MELISSA JANE MANLEY

XN MR MACDONALD

PN329

Do you say that the contents of that statement are true and correct?---Yes, I do.

PN330

Commissioner, I would also tender that statement.

PN331

THE COMMISSIONER: I will mark the second statement of Melissa Manley, dated 22 February 2013, as APTIA10.

**EXHIBIT #APTIA10 SECOND STATEMENT OF MELISSA  
MANLEY, DATED 22/02/2013**

PN332

MR MacDONALD: Thank you, Commissioner. I've got no further questions of this witness.

**<CROSS-EXAMINATION BY MR GIBIAN**

**[11.20AM]**

PN333

MR GIBIAN: Thank you, Ms Manley. You're the group human resources and training manager for Transit Australia?---Yes, that's correct.

PN334

And how long have you been in that position?---Since August 2010.

PN335

And were you involved in either that company or the bus industry generally prior to 2010?---No, I was not.

PN336

I think you've said in your statement that employees of Transit Australia - or at least driver employees are covered by enterprise agreements. Is that right?---Yes, they are all now.

PN337

That is all of them?---All of them are currently, yes.

PN338

And you understand that to the extent that employees are covered by an enterprise agreement, any change to the award has no direct effect upon their employment?

---That's not quite true for our EAs because some of our EAs actually have the PVRTA underpinning them.

PN339

In the sense that they incorporate the award or in the sense that - - -?---Yes.

PN340

I'm sorry?---Yes, some of them incorporate the award and some of them exclude the award.

PN341

That is, there's variation in that regard. To the extent they incorporate the award, do they also provide that to the extent there's any inconsistency with the agreement the agreement prevails? If you can't answer that generally speaking then say so?---Yes, I can't recall the exact terms of the clause.

PN342

Can I just give you an example document. I will give one to the commission as well, at the same time. You will see this is the Sunbus Union Collective Agreement?---Mm'hm.

PN343

And it involves the Transit Australia Group and it applies - I'm sorry, I'm just checking this - in the Cairns region, I think, or in a depot in Cairns. Is that - sorry, that's in clause 5 on page 2?---Yes. Is this the previous agreement, sorry?

PN344

I'm sorry?---Is this the current agreement or the previous agreement?

PN345

I understood it to be the current agreement but tell me if I'm wrong about that?  
---This is not the current agreement.

PN346

This agreement has been replaced on your understanding, has it?---Yes, it has.

PN347

Yes, it did expire in 2012, so perhaps it has been replaced. Perhaps I can just ask you about this. You will see on page 3 at clause 7 there's a reference to the award and then a reference to inconsistency?---Mm'hm.

PN348

That's the type of provision that you had in mind, was it, when you were referring to - - -

PN349

MR MacDONALD: I object to that line of questioning, Commissioner, on the basis that it's so broad; it's a document that doesn't apply. I think rather than referring to the actual agreement my friend could ask a general question. In fact, I think he has and Ms Manley has answered it by saying that some do, some don't. So I object to it on the basis of its relevance.



PN350

THE COMMISSIONER: Mr Gibian?

PN351

MR GIBIAN: I'm perhaps asking the same question I asked earlier, having regard to the witness's answer, and asking whether - referring to this document, albeit that it appears it has been superseded by a further agreement, whether that jogs her memory in that regard. That's the only purpose of the question.

PN352

THE COMMISSIONER: Yes, I will allow the question.

PN353

MR GIBIAN: Do you see clause 7 there?---Mm'hm.

PN354

It's a provision which provides for the incorporation of - I'm sorry, are you looking at a different document to that?---I was referring to the council document so I could answer your question and refer that to a section - - -

PN355

What document are you looking at?---It's the Townsville Sunbus Enterprise Agreement, which will give me some ability here answering.

PN356

Can I just have a look at that document.

PN357

\*\*\*\* MELISSA JANE MANLEY

XXN MR GIBIAN

MR MacDONALD: I object to that. I object to that, Commissioner, on the basis of where this questioning is taking us. I accept that you've allowed the questioning and my friend should be allowed to question it. The items that Ms Manley refers to should be the subject of further re-examination by myself in relation to those matters, depending on what his question is. We still haven't found out what it is.

PN358

THE COMMISSIONER: He might have a chance to ask it.

PN359

MR GIBIAN: If the witness in answer to a question is referring to a document that she has, I'm entitled to ask to see the document.

PN360

THE COMMISSIONER: Yes.

PN361

MR MacDONALD: But has he asked the question first, Commissioner?

PN362

THE COMMISSIONER: Yes, he had almost asked the question and the witness indicated that she had a document in front of her. Mr Gibian is entitled to ask to see that document.

PN363

MR MacDONALD: So perhaps, Commissioner, just for my benefit alone, if he could ask the question so I understood how he was leading into the document.

PN364

MR GIBIAN: I think you interrupted me before I could ask her any question - - -

PN365

MR MacDONALD: Yes, sure, just - - -

PN366

MR GIBIAN: I asked the witness a question with respect to clause 7 of the agreement I handed her. In endeavouring to answer the question, the witness was referring to another document to assist her and I've asked the witness if she could give me that document so I can look at that document.

\*\*\*\* MELISSA JANE MANLEY

XXN MR GIBIAN

PN367

The document that you were referring to is the current Townsville agreement. Is that right?---Correct.

PN368

And so far as the award is concerned, it excludes the award I think in clause 3? ---Yes.

PN369

Sorry, it's sub (3)(d)?---Yes, that's correct.

PN370

Sorry, back to the document that I handed you, that document at clause 7 contains a provision which provides that the agreement shall be read and interpreted wholly in conjunction with the Passenger Vehicle Drivers Etc Award, Northern Division - so the old state award - "provided that where there is an inconsistency the agreement shall take precedence to the extent of inconsistency." Do you see that?---Yes, it does.

PN371

Just having seen that, does that assist you in recalling whether that's the type of provision that would be used where the award is sought to be read in conjunction with an agreement or doesn't it assist you?---It does. I mean, you're also asking me to recall six agreements that we currently have in place. I can certainly say for the Sunshine Coast that we have a similar clause to this one here that we have in the old Cairns agreement. I believe we have a similar provision in the Surfside Buslines Agreement. We obviously exclude it in the Townsville agreement and I can't recall with the Cairns newly negotiated one whether it included or excluded it.

PN372

You've indicated in the further statement, the second statement, the short four-paragraph statement, APTIA10, that you've replied to some things that Mr Gibian said?---Yes.

PN373

\*\*\*\* MELISSA JANE MANLEY

XXN MR GIBIAN

And in short Mr Gibian said that operators in Queensland did provide two hours in the morning and two hours in the afternoon to school bus drivers?---Mm'hm.

PN374

And your response to that, as I understand it, is in paragraph 4, and that is that you do have enterprise agreements that provide for that type of arrangement. Correct?---Correct.

PN375

And that those are agreements that you'd willingly entered into having regard to the negotiations which have been conducted with the TWU and its members? ---As part of our flexibility agreements, yes.

PN376

I perhaps don't need to tender that document, having regard to the fact that it has been superseded. Now, coming back to your first statement, in paragraph 7 you refer to Townsville, Magnetic Island and Rockhampton. Do you see that?---Yes.

PN377

And you say there is a minimum engagement for school bus drivers as per the award. Do you see that?---Yes.

PN378

By that, is that part of the arrangements that are two hours in the morning and two hours in the afternoon?---No, it is two hours for the entire day.

PN379

As a minimum?---As a minimum, yes.

PN380

That is, the persons are engaged for a particular period that is necessary to do the work - - -?---Correct.

PN381

- - - which may be well longer than one hour?---Correct.

PN382

In paragraph 8 you refer to Gold Coast and Tweed Heads?---Yes.

PN383

\*\*\*\* MELISSA JANE MANLEY

XXN MR GIBIAN

And you give a proportion. Now, are they covered by enterprise agreements or the award?---The Gold Coast and Tweed Heads is covered by a Surfside Buslines Enterprise - - -

PN384

I'm sorry?---It's covered by a Surfside Buslines Enterprise Agreement.

PN385

And does that contain a specific provision about casual engagements or does it refer to the award?---No, it basically says that there's a four-hour minimum engagement for casuals.

PN386

So they must be paid for four hours on any day?---Correct. We negotiated that over and above the award.

PN387

And that is they're paid for two hours in the morning and two hours in the afternoon, effectively?---No, we basically say it's four hours for the day. So it's not necessarily two and two; it could be a lot less than that. It could be 1.00 in the morning or 3.00 in the afternoon.

PN388

That is, under the enterprise agreement there could be varying arrangements but there is a minimum payment of four hours for any day?---Correct.

PN389

And just in paragraph 8, in the second sentence you say, "Of these shifts, approximately 80 per cent are under two-hour shifts in the morning and afternoon." Do you see that?---Yes.

PN390

When you use the word "shift" there, you're referring to under two hours in the morning and then another period of under two hours in the afternoon. Is that right?---Correct.

PN391

Then in paragraph 9 you refer to Townsville. Do you see that?---Yes.

\*\*\*\* MELISSA JANE MANLEY

XXN MR GIBIAN

PN392

And there you say in the second sentence, "Of these shifts, approximately 25 per cent are under two-hour shifts in the morning and the afternoon." Yes? ---Yes.

PN393

Again, there you're using the word "shift" to refer to an under two-hour period in the morning and an under two-hour period in the afternoon?---In that case I am, yes.

PN394

I take it that means 75 per cent are more than two hours in the morning and more than two hours in the afternoon, or perhaps at least two hours perhaps I should say?---I'd actually have to check my data to make sure that I'm answering correctly there, if I can refer to that because I have that as a statistic.

PN395

Perhaps just sticking with paragraph 9 for the moment?---Mm.

PN396

You've said that, "Of these shifts, approximately 25 per cent are under two-hour shifts in the morning and the afternoon." Correct?---Yes.

PN397

I assume from that the remainder are two hours or more. Is that right?---You could assume that, yes.

PN398

In the case of Townsville, the agreement there also provides for the four-hour minimum engagements, does it?---No, it does not. It mirrors that of the award currently.

PN399

It refers to the award?---Mm'hm. Well, it mirrors that of the award.

PN400

But in actual fact those drivers are paid at least four hours in the day, at least two hours in the morning and two hours in the afternoon?---No, they're paid for a minimum of two hours or the time that they work.

\*\*\*\* MELISSA JANE MANLEY

XXN MR GIBIAN

PN401

I've nothing further.

PN402

THE COMMISSIONER: Thank you.

PN403

MR MacDONALD: Nothing in reply, Commissioner.

PN404

THE COMMISSIONER: Nothing.

PN405

Thank you, Ms Manley. You're excused.

<THE WITNESS WITHDREW

[11.35AM]

PN406

MR MacDONALD: I'll call Mr Threlkeld, Commissioner.

PN407

THE ASSOCIATE: If you could state your full name and address.

PN408

MR THRELKELD: Matthew Threlkeld, (address supplied).

<MATTHEW THRELKELD, SWORN

[11.35AM]

<EXAMINATION-IN-CHIEF BY MR MacDONALD

[11.36AM]

PN409

MR MacDONALD: Mr Threlkeld, you're the manager of industry development at BusNSW?---Correct.

PN410

And BusNSW is the peak association that represents private bus and coach operators in New South Wales?---Correct.

PN411

How long have you been at BusNSW?---Just on six years.

PN412

How long have you been in the bus industry?---I was born into the bus industry. I've been engaged for just over 20 years working directly within the industry.

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

PN413

Mr Threlkeld, you've prepared two statements in these proceedings. Is that correct?---That's correct.

PN414

Do you have copies of those statements with you?---I do.

PN415

If I could take you to the first one. It's a statement of 28 paragraphs, dated the 20th of the 12th, 2012?---Correct.

PN416

Do you see that statement?---Yes.

PN417

The matters contained with that statement, are they true and correct?---They are, yes.

PN418

Commissioner, I would tender that document.

PN419

THE COMMISSIONER: I will mark the statement of Matthew Threlkeld dated 20 December 2012 as APTIA11.

**EXHIBIT #APTIA11 STATEMENT OF MATTHEW THRELKELD DATED 20/12/2012**

PN420

MR MacDONALD: If I could then take you to your other statement, dated 20 February 2013. Could I do that?---Yes.

PN421

The contents of that statement, are they true and correct?---Yes, that's correct.

PN422

I would then tender that also, Commissioner.

PN423

THE COMMISSIONER: I will mark the supplementary statement of Matthew Threlkeld dated 20 February 2013 as APTIA12.

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

**EXHIBIT #SUPPLEMENTARY STATEMENT OF MATTHEW  
THRELKELD DATED 20/12/2013**

PN424

MR GIBIAN: There was just one little issue I was going to raise with Mr Threlkeld's first statements, APTIA11. Paragraph 22 on page 3, Mr Threlkeld makes an assertion about whether there is a anomaly as a result of the use of the provision. Obviously that's a matter that the commission will determine at the end of the day.

PN425

THE COMMISSIONER: Sorry, which paragraph was it?

PN426

MR GIBIAN: I'm sorry, 22 on page 3 of Mr Threlkeld's first statement.

PN427

THE COMMISSIONER: Yes.

PN428

MR GIBIAN: I just thought I should note that.

PN429

THE COMMISSIONER: Yes, Mr MacDonald.

PN430

MR MacDONALD: Thank you, Commissioner.

PN431

Mr Threlkeld, I will take you to that paragraph 22. Could you just give the commission a brief outline as to the effect that the current definition in the award has in relation to how your members determine the minimum engagements for their school bus drivers?---Yes, certainly. Most of our members which have contracts with the New South Wales state government, and those contracts vary. There are four types of contracts. We have the metropolitan bus system contracts; the outer metropolitan bus system contracts; and then we have two types of rural and regional bus service contracts. We have what we call a contract B, which is for the provision of both school and regular passenger services in townships around New South Wales where the population is generally over 7500. Then we have contractor A services and they are solely for the provision of transporting school students to and from school and - - -

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

PN432

If I could interrupt you there. Are you able to advise the commission of the numbers of type A and type B contracts that exist within New South Wales?  
---Yes.

PN433

MR GIBIAN: Commissioner, I don't have an objection to my friend asking some questions by way of clarification but this does seem to be straying into entirely new evidence that we're not on notice of and we have had no opportunity to consider and respond to.

PN434

THE COMMISSIONER: Mr MacDonald?

PN435

MR MacDONALD: If you would just excuse me, Commissioner, I just want to see whether it's referred to in - the statement of Mr Threlkeld, Commissioner, refers to a whole range of issues relating to the type A and type B contracts. In paragraph 6 and 7 he talks about the type A and type B contracts. He also refers to them in relation to paragraph 8. He also refers to the type of duties within which they are required to be undertaken. Commissioner, as a matter of clarification, questions have been - - -

PN436

THE COMMISSIONER: I will allow the question.

PN437

MR MacDONALD: Thank you, Commissioner.

PN438

Mr Threlkeld, do you need the question repeated once more or - - -?---No, I think I understand the question. In regard to the number of contracts in New South Wales, information that we've been provided by Transport for New South Wales is that there are 1695 contract A line of route school bus service contracts in the state and they have also advised us that 1139 of those are for under four hours per day, and under those contracts there is a minimum payment to operators of two hours per day. So any change to that would obviously be of a concern to a large number of bus operators in New South Wales.

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

PN439

Can you just elaborate in relation to the funding of the type A operators, how they're funded?---Yes, the contract A services are funded based on the actual kilometres that the service travels, the hours that are used for the operation of the service and the payment of wages as well as the number of days in the year, which is generally 201 school days. The actual size of the bus that is used to provide the service which is split into four different categories and then the age of the vehicle which determines the depreciation and return on investment payment.

PN440

Are you able to assess the impact of a change in the minimum engagement of two hours to a minimum of four hours?---Well, certainly we don't have the detail of the number of hours between the two and four, but certainly based on those numbers that I've just provided it would be a major impact across the state for both our members and for also some bus operators who are not members of the association that have contracts with the state government.

PN441

THE COMMISSIONER: That contains a presumption about what they're paying people under the award at the moment though, doesn't it?---In terms of the actual time?



PN442

Yes?---There is an audit process whereby Transport for New South Wales do a audit of the actual shift information that relates to the actual contract and I'm sure that if that shift information which should reflect the payment to the driver did vary from Transport for New South Wales were paying that particular operator that there would be some concern for the state government.

PN443

MR MacDONALD: Mr Threlkeld, you've also talked in your statement of 20 December in relation to pre-departure checks. Can you just elaborate further on the nature of those pre-departure checks and the type of bus drivers that do that?---Certainly under the current arrangements that are in place with the bus operator accreditation scheme or BOAS, as we call it within the industry. There are requirements and responsibilities for the operator and the driver to ensure that pre-departure checks are carried out and that now goes into some detail. There was recently an information alert regarding drivers even having to do a visual check of wheel nuts which related to a situation where a wheel did come loose on a vehicle.

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

PN444

And does that apply to all bus drivers, irrespective of the type of bus - large/small?---It does. Yes, that's correct.

PN445

Finally, is it correct to say that you have been involved in negotiations with the Transport Workers Union New South Wales Branch in relation to industry agreements?---That is correct.

PN446

And has the issue of the minimum engagement for casual school bus drivers referred to in the award been discussed in those - - -

PN447

MR GIBIAN: I object to this. I mean, we have no opportunity to answer this. If there's purported to be evidence given as to what was said in negotiations with the New South Wales branch of the TWU, we ought know about it and obtain instructions about it.

PN448

MR MacDONALD: The witness, Commissioner, in his statement of 20 February 2013, which is exhibit 12, refers to negotiations with the Transport Workers Union in relation to enterprise agreement negotiations. It also refers to, in paragraph 8, the issue of the payment of casual employees. My questioning was seeking purely to elaborate on those negotiations and to ask a question as to whether the issue of the minimum engagement had actually been discussed in the context of those negotiations, Commissioner; that was the basis of it.

PN449

MR GIBIAN: The witness refers to the existence of enterprise agreements. I understood my friend's question to be whether there was specific discussion about the award provision in the context of any negotiations leading to the making

of those enterprise agreements. So it's not a matter that's referred to in the statements and would be entirely new evidence that we have no opportunity to obtain instructions about.

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

PN450

THE COMMISSIONER: Yes, I will allow the objection. To that extent I should say, Mr MacDonald, I mean it's a matter of fact in terms of what is contained in those New South Wales enterprise agreements.

PN451

MR MacDONALD: Yes. Thank you, Commissioner.

PN452

THE COMMISSIONER: How they came about though is not a matter that there is any evidence about.

PN453

MR MacDONALD: If I could just ask you in relation to the issue of minimum engagements again, in relation to your position at BusNSW have you been party to matters either from drivers or from the Fair Work Ombudsman in relation to the correct interpretation of the provision in the Passenger Vehicle Transportation Award?

PN454

MR GIBIAN: Again, I don't know where this is coming from or what the evidence is going to be but we're not on notice of it and we can't deal with it.

PN455

THE COMMISSIONER: Mr MacDonald?

PN456

MR MacDONALD: Commissioner, I accept your ruling on these matters but it would be my submission that under the Fair Work Act this is a review of matters of relevance. If the Commissioner considers them to be relevant, that the principles of evidence that have been so strongly pushed by my friend today is perhaps denying the commission the opportunity of making a decision based on the full circumstances. That would be my general submission in relation to that objection, Commissioner, but I'm in your hands.

PN457

THE COMMISSIONER: The problem for Mr Gibian is that he hasn't received any notice that matters associated with - I don't know if there has or hasn't been - a Fair Work Ombudsman investigation of New South Wales and such he's not been able to get instructions on that particular matter so in terms of me having everything before me about that particular matter he's restricted in being able to do so and that's where the question of fairness comes in.

\*\*\*\* MATTHEW THRELKELD

XN MR MACDONALD

PN458

MR MacDONALD: Thank you, Commissioner, I've got no further questions.

PN459

MR GIBIAN: Firstly, Mr Threlkeld, just in relation to the contracts, the government contracts, we're right in understanding that the government operates on the basis of standard contracts with bus operators for the provision of school and other route services by private companies?---When you say "standard" - - -

PN460

That is, there's a number of different form contracts - - -?---Yes, that's correct.

PN461

- - - that the government puts out?---Yes.

PN462

And if an operator wishes to participate in providing school or other private bus route services they must enter into one of those contracts?---That's correct, yes. There are the four types of contracts that I explained earlier and in the case of the Sydney metropolitan contracts there has been a recent tender process. The other contracts generally have a right of first refusal.

PN463

So far as you've referred to these contracts in your statement you've referred to the rural and regional contracts which are known as contract A and contract B? ---That's correct.

PN464

And contract B operates on what was described as a Fair Box basis; that is, a sum is paid per passenger, essentially?---That's correct, yes.

PN465

The contract A was described by Mr Ferris as involving a charter on a bus essentially by the government?---Yes, it's what we would refer to as a gross cost contract.

PN466

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

It has a method of calculation of the amount that's paid by the government with respect to those bus services?---That's correct, yes.

PN467

You've attached one page I think from the rural and regional bus contract A and that's annexure A to your first statements, APTIA11?---That's correct, yes.

PN468

That's a single page from that document. If I could just hand you another document. You will see the front page. Do you see the front page refers to the rural and regional bus service contract, contract A?---Yes.

PN469

Do you recognise that as at least a blank copy of the standard contract?---Well, yes, from a very quick look, yes.

PN470

It is quite a long document and I haven't endeavoured to replicate it all but you refer in your statement to Schedule 4 and you will see the second page of the document I've handed you, which has page 20 at the bottom, is the commencement of Schedule 4?---Yes, correct.

PN471

Sorry, just so you can orient yourself, I think it's page 28 which is obviously some short way through. Do you have that page?---Yes.

PN472

That seems to be identical to annexure A to your first statement - perhaps not exactly actually - - -?---Yes.

PN473

- - - but anyway. Sorry?---Yes, from a quick look there may be some formatting differences but it appears to be the standard Schedule 4.

PN474

Now, so far as the calculation of payments is concerned if you go to page 24 you will see there there's a heading towards the top of that page, Monthly Payments. Do you see that?---I do.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN475

And there's then a complex calculation that's contained underneath that?---Yes.

PN476

It contains a large number of acronyms, an explanation for which is then set out below. You will see two of those acronyms - the third down below the long equation refers to driver-related costs per hour. Do you see that?---Yes.

PN477

DRCPHP?---Yes.

PN478

And below that there's another calculation which is DRCDP. Do you see that?---Yes.

PN479

And that refers to driver-related costs per day payment?---Yes.

PN480

And then the other acronyms, without taking you to them all, refer to other types of costs and payments that the bus operator is entitled to, including fuel, maintenance and the like and a return on the route?---Yes.

PN481

If one then goes over to page 28, that's the page that you had extracted and it's headed Driver-Related Costs Per Hour Payment. Do you see that?---Yes.

PN482

And I think you'd emphasise that part of that calculation was an acronym, NH. Do you see that?---Yes.

PN483

Which is the second entry below the equation and NH refers to the number of contract hours per contract day. Do you see that?---Yes.

PN484

And you'd highlighted that there's a minimum of two hours to be included in the calculation?---That's correct.

PN485

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

Now, I take it you accept that that's a minimum and says nothing about what the contract hours may be in any particular case?---That's correct, yes.

PN486

And I think you've given some indication as to the number of contracts that had below or above four hours in a day in the evidence that you gave to Mr MacDonald?---Above two and below four.

PN487

Above two and below four?---Yes.

PN488

I thought you'd said that there were 1695 in total of the contract days?---That's correct, yes.

PN489

Is there a separate contract for each route?---That is the number of actual line of routes. In most cases they are single contracts but I believe there is a facility whereby a number of those routes may be contained under a single contract number but it has no relevance to any change to how that particular contract is paid for.

PN490

It would just contain that a different calculation would result for each route presumably?---It's just that those particular routes would just be sort of subheadings under a single contract number for ease of administration.

PN491

I think you'd indicated that the information you were provided with was that there was 1139 under four hours. Is that right?---That's the information that has been provided to BusNSW by the Newcastle and Wollongong regional offices of Transport for New South Wales who administer those contracts.

PN492

THE COMMISSIONER: Can I just clarify - - -

PN493

MR GIBIAN: Do you understand the - I'm sorry, Commissioner.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN494

THE COMMISSIONER: I'm sorry. Transport for New South Wales, is that the government department?---That's correct.

PN495

MR GIBIAN: They have changed everything in New South Wales to Something for New South Wales rather than the title of the transport.

PN496

THE COMMISSIONER: Thank you.

PN497

MR GIBIAN: (indistinct) for New South Wales. I think it's not actually a government department any more. I think it's become a - - -

PN498

THE COMMISSIONER: A statutory authority.

PN499

MR GIBIAN: - - - authority of some - - -?---No, it is a government department.

PN500

Sorry?---It is a government department.

PN501

All right. In terms of - - -?---That's my understanding.

PN502

THE COMMISSIONER: It's part of government.

PN503

MR GIBIAN: It's status has somewhat changed though. In any event, I don't think that matters for present purposes.

PN504

Sorry, the information you were provided with was provided by the Newcastle/Wollongong offices, is it?---That's correct.

PN505

Did you understand it to be information about the state as a whole or - - -?---Yes.

PN506

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

Do we understand the remainder to be four hours or over?---That's correct.

PN507

And to the extent that they're under four hours, the information you were provided with did not indicate to what extent they're under four hours; that is, whether it's three and a half or three or whatever it might be. That's right?---That's correct.

PN508

Now, just continuing with the contractual document that I handed to you, the contract A, the following page, page 29, a bit more than halfway down that page there's a reference at 3.6 to driver-related costs per day payment. Do you see that? I'm sorry, you're on page 29?---Okay, yes.

PN509

You will see there's a heading three-quarters of the way down or two-thirds of the way down that page, 3.6, Driver-Related Costs Per Day Payment. Do you see that?---Yes.

PN510

And there's a calculation then contained below that which includes as part of the acronym DC, which is the daily cost of drivers' wages and on cost as determined in accordance with a subsequent formula?---Yes.

PN511

So there's an hourly payment and a daily payment that is provided for under this contract. Is that right?---In terms of the terminology, yes, but it is driven by the hourly amount in terms of the actual driver-related cost.

PN512

Perhaps I should tender that extract from the contract A, rural and regional bus service contract A.

PN513

THE COMMISSIONER: Thank you. I will mark that, the extract from contract A, as exhibit TWU1.

#### **EXHIBIT #TWU1 EXTRACT FROM CONTRACT A**

PN514

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

MR GIBIAN: Can I just take you back to your statement - the first statement, sorry, Mr Threlkeld?---Yes.

PN515

You will see at paragraph 10 at the bottom of the first page you express an opinion as to the average period of school service in rural and regional New South Wales. Do you see that?---Yes.

PN516

And you say the average is 90 minutes. Did you conduct some kind of survey to obtain that information or is that just your sort of opinion or view?---Yes, it's just my opinion.

PN517

And that period of time encompasses the driver arriving at the depot?---That's correct, yes.

PN518

Clocking on or putting your - - -?---Pre-departure, yes.

PN519

Yes, putting their goods or whatever they have in the locker and the like?---Yes.

PN520

Going to the bus?---Correct.

PN521

Conducting pre-departure checks?---Yes.

PN522

Now, do you have some understanding of the amount of time that's generally allocated for pre-departure checks?---I understand it's around the 10-minute mark.

PN523

Do you know that because Mr Ferris said that or is that some different understanding that you - - -?---No, just based on my previous experience as a bus operator and talking to our members.

PN524

And there may also be fuelling required, depending on the circumstances?---Yes, depending on the circumstances. Some operators, depending on their size, have refuellers. It may be a case of the proprietor of the business doing the refuelling but from what I understand in the cases where drivers do fuel their own vehicles at the completion of their shift that that time would be included within the shift.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN525

They then are required to go to wherever the run commences and pick up the children and attend school?---Yes, that's correct.

PN526

And obviously attend to dropping the children off at the school and the like. Now, there may also be more than one run undertaken by the same driver on a particular morning. That's right?---I believe - - -

PN527

Or afternoon?--- - - - in some cases, yes, depending on the circumstance.

PN528

And where that's the circumstance - that is, where a driver drops children at one school and then commences a run for maybe a primary school subsequently and drops another group of children at a different school, would that be under more than one contract?---It could be under a single contract A but I would say that that is unlikely and it would be more a case of where it's a contract B service where the operator is responsible for designing how the network of school and regular passenger services operate.

PN529

And contract B doesn't operate on a per hour type payment; it's a per head type payment?---That's correct, yes.

PN530

To the extent that that was done under a contract A - that is, a driver did two runs in a morning under a contract A arrangement - there would be two contracts for each one, which would have a certain amount of time allocated to each. Correct? ---No, it's my understanding there would only be one contract. So I think - - -

PN531

I thought you said earlier that each route had a separate contract in most cases but there were some that had more than one on a particular contract?---Yes, I did say that but I didn't say that you're able to combine those contracts because generally they operate at the same time. So I think what you're asking me - - -



PN532

I'm not sure I understand that?---I think what you're asking me is where a particular driver might have a shift under a contract where that driver can carry out a particular run and then commence a second run after that. Is that what you're asking me?

PN533

Yes. The operator is contracted to do two runs - - -?---Yes.

PN534

- - - that is, to pick up children for high school X and drop them at school and to pick up children from primary school Y and drop them off - they would have separate contracts for each of those two runs?---Yes. To the best of my knowledge there are no sort of situations where that occurs. It's always a case of where the contract, the single contract - if it was feasible to operate in that manner, it would be included under the one contract.

PN535

Can we just take it one step at a time. If there's a run for a particular high school in a town and a run for a particular primary school in a town - - -?---Yes.

PN536

- - - why would there not be a contract for each of those?---Well, generally they're combined, depending on the actual number of students and that then determines what the category of vehicle is used and we also have rules around the actual capacity of the vehicle and a three for two rule in terms of carrying primary school students.

PN537

Are you actually involved in the negotiation of these contracts between operators and the government?---I have been in the past, yes.

PN538

That is not in your current role when you're working for an operator?---As an operator and also working with the association.

PN539

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

In any event, if there were two contracts then they would have separate amounts for each contract. If the operator decided to use the same driver to fulfil both contracts then the operator could do so?---If that was possible, yes.

PN540

In any event, once the driver has finished whatever runs they are required to do they would return to the depot and they clean and check the vehicle again at that point before the finish?---That's correct.

PN541

So far as the timing of inspections and the like - pre-departure inspections - is concerned, are operators required to estimate that time for the purposes of reporting to the government or claiming the payments?---Yes. I mean, it depends

on the actual contract and what has been in place in the past. There are mechanisms whereby the operator can apply for resets to certain parameters as far as the actual kilometres that an operator go but there are a number of conditions that would apply to that.

PN542

Do you know how much time is estimated for inspections for the purposes of reporting to the government?---In terms of the government, they obviously have some views around meeting their accreditation requirements that I mentioned earlier, but ultimately it's up to the operator to determine what that amount of time is.

PN543

Sorry, what do you mean by the government has concerns about its accreditation; that is, they require particular checks to be done?---Correct.

PN544

And they have a view about how long those checks ought take?---Well, I'm sure they do but ultimately the operator has the responsibility to comply with those requirements.

PN545

What's the government's view about how long those checks take?---I'm not aware of the government's view.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN546

You then refer to what was the New South Wales award, the Transport Industry Motor Bus Drivers and Conductors (State) Award?---Yes, that's correct.

PN547

Perhaps I've already been through this with Mr Ferris but in New South Wales the business industry has in the whole operated for many years on the basis of an industry-wide collective bargain, essentially?---Yes, the metropolitan and outer metropolitan operators have generally worked around agreements and some of those are based on - or the majority of those are based on, yes, discussion between BusNSW and the New South Wales branch of the Transport Workers Union.

PN548

There's operators that choose to operate outside BusNSW, as is their right?---Correct.

PN549

But most of the operators operate through BusNSW which conducts a negotiation with the TWU?---Yes, we make a recommendation to operators and they determine what action they take.

PN550

Generally, if they are participating through this process, they will accept the recommendation that's made by BusNSW?---In most cases.

PN551

And prior to 2006 the outcome of those negotiations was put before the New South Wales Industrial Commission and the commission was asked to make a consent award?---Yes.

PN552

And that's the award you've referred to in paragraph 11 of your first statement?---Yes, you're talking about the old state award.

PN553

Yes?---Yes, that's right.

PN554

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

Obviously everyone went to the federal system after 2006?---Yes.

PN555

And after 2006 there's continued to be central negotiations involving both BusNSW and the TWU. Correct?---Yes.

PN556

Which has resulted in what might be called a standard agreement, as it were, which BusNSW recommends that its members put to a vote among their employees?---Yes, we have made a recommendation, yes, in the past to our members.

PN557

And the standard agreement, as it were, was at least initially based upon the state award that previously existed with increases as it negotiated from time to time?---Yes, some of the provisions are from the old state award, that's correct.

PN558

You've understanding then is, at least so far as BusNSW members are concerned or operators that work through BusNSW, their employees or at least their drivers are covered by enterprise agreements?---The majority of the metropolitan and outer metropolitan operators are covered by agreements and some of the large rural and regional operators.

PN559

In paragraph 11 you referred to clause 6 dealing with casual employees of the old state award. Do you see that?---Yes.

PN560

And particularly (ii)(a) makes provision for minimum engagements on a Monday to Friday?---Yes, that's right.

PN561

And in the second - or perhaps reading it in full, on a Monday to Friday it provides that "casual employees shall be engaged by the hour and paid for all time worked to the nearest minute, with a minimum engagement of one hour". Do you see that?---I do, yes.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN562

That's a provision which BusNSW understands facilitated an hour in the morning and an hour in the afternoon?---Generally speaking, yes.

PN563

I think you've made the point in your subsequent statement that a provision with identical wording is found in enterprise agreements that BusNSW now recommends to its members?---Yes, generally through our discussions with the Transport for New South Wales negotiating team on those agreements have seen that both parties have supported that particular provision of those agreements.

PN564

And those agreements have been approved by this commission and past the BOOT?---That is correct and I understand that since the commencement of the Fair Work system that 46 of those agreements have been approved by the commission.

PN565

It's correct to say that those agreements contain higher rates of pay than under the award?---Yes, that's fair to say. I mean - - -

PN566

Substantially higher?---I wouldn't say substantially. The only thing I can say is that they have obviously met the better off overall test.

PN567

Now, just going back to your statement, you've referred there in paragraph 23 to an example. Do you see that?---Yes.

PN568

Of a shift arrangement. Is this an actual example or is it just something you've dreamed up?---It's just an example that we've used. It may or may not exist in the real world.

PN569

That is, this is not an actual driver who works in this way?---It's not something - that's right.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN570

The arrangement that you've postulated here is starting at 8 am. Do you see that?---Yes.

PN571

And I take it the person is doing a school run first of all, are they?---Yes, in - - -

PN572

Is that what you'd imagine - - -?--- - - - of the first section, yes.

PN573

Between what times?---If you look at the 8 o'clock, so then we're saying that the charter was between 9.00 and 11.00. So the actual school service between 8.00 and 9.00.

PN574

I mean, you've said at least on your opinion the average is 90 minutes; that is, starting at 7.30?---In that particular case of the opinion, yes.

PN575

And generally speaking school bus drivers can't start at 8 o'clock if they're going to drop students off between either 8.00 or 8.30 or 8.30 to 9.00. That's right, isn't it?---They could in a case where the school may not go in till, in some cases, 9 o'clock or just after 9.00.

PN576

Do we take it in this example the person doesn't go back to the depot at 9 o'clock but immediately proceeds to another job?---That's right.

PN577

So the 8.00 to 9.00 is not in fact the usual complete shift of a school bus run because it doesn't involve going back to the depot, cleaning the bus, et cetera, at that point in time?---It could. In this particular example the driver is going on to do a charter service which is between 9.00 and 11.00.

PN578

Why do you say a person has an unpaid meal break between 9.00 and 11.00?---In this particular example it could be a situation where the driver may not sort of pick up the school until, say, 10 o'clock to take them to the local sporting ground or the swimming pool or whatever it may be.

\*\*\*\* MATTHEW THRELKELD

XXN MR GIBIAN

PN579

So you've postulated that they be instructed to take an unpaid meal break at that time, have you?---That could be the case, yes.

PN580

And they're supposed to do that just waiting at the school, are they?---It may be the case, it just depends on the actual job itself and the location to the depot.

PN581

The person then stops at 11.00 on your example and then they go home, presumably, and then they come back to work at 3.00. Is that right?---That's correct, yes.

PN582

And you've postulated an hour again for the second part of the school trip in this example?---Yes.

PN583

Again, that's not the usual arrangement - at least your opinion is?---It could be. I mean, I guess my opinion is based on an average so this is just an example that's outside of that.

PN584

Nothing further, Commissioner.

PN585

THE COMMISSIONER: Thank you. Mr MacDonald?

PN586

MR MacDONALD: I've got nothing in reply, Commissioner.

PN587

THE COMMISSIONER: Thank you, Mr Threlkeld. You're excused.

**<THE WITNESS WITHDREW**

**[12.18PM]**

PN588

MR MacDONALD: That concludes the evidence of the applicant.

PN589

THE COMMISSIONER: Thank you. Mr Gibian.

PN590

MR GIBIAN: Thank you, Commissioner. I think I've indicated the TWU's position with respect to the matters that are pressed by APTIA and it's probably sufficient just to go straight to the evidence. I call Robert Giddens.

PN591

THE COMMISSIONER: Thank you.

PN592

THE ASSOCIATE: Could you please state your full name and address.

PN593

MR GIDDENS: Yes. Robert Peter Giddens, (address supplied).

**<ROBERT PETER GIDDENS, AFFIRMED**

**[12.19PM]**

**<EXAMINATION-IN-CHIEF BY MR GIBIAN**

**[12.19PM]**

PN594

MR GIBIAN: Thank you, Mr Giddens. I think your full name is Robert Peter Giddens?---That's correct.

PN595

And you're a lead organiser or coordinator for the Transport Workers Union of Australia, Queensland branch.

PN596

I think you've indicated the history that you have in paragraph 3 of your first statement in relation to the bus industry?---That's correct.

PN597

You've made two statements for the purpose of the proceedings. Do you have those in front of you?---Yes, I do.

PN598

The first one is a statement that runs to some 41 paragraphs and was dated 5 February 2013?---Yes.

PN599

Do you have that?---That's correct.

PN600

I tender that statement, Commissioner. I note some of it does refer to the issues that are no longer pressed by the TWU but obviously the Commissioner will have no regard to those, to the extent that it's not necessary.

PN601

THE COMMISSIONER: Certainly. I will mark the statement of Robert Giddens dated 5 February 2013 as exhibit TWU2.

**EXHIBIT #TWU2 STATEMENT OF ROBERT GIDDENS  
DATED 05/02/2013**

PN602

MR GIBIAN: And a further statement headed Statement in Reply was made by you on 22 February I think of this year of 21 paragraphs?---Yes.

\*\*\*\* ROBERT PETER GIDDENS

XN MR GIBIAN

PN603

Do you have that?---That's correct.

PN604

And there's also one annexure to that, BG1?---That's correct.

PN605

I tender that statement, Commissioner.

PN606

THE COMMISSIONER: I will mark the supplementary statement or the statement in reply of Robert Giddens dated 22 February 2013, along with one annexure, as exhibit TWU3.

**EXHIBIT #TWU3 SUPPLEMENTARY STATEMENT  
HEADED "STATEMENT IN REPLY" OF ROBERT GIDDENS  
DATED 22/02/2013, WITH ONE ANNEXURE**

PN607

MR GIBIAN: That's the evidence, Commissioner.

PN608

THE COMMISSIONER: Thank you.

**<CROSS-EXAMINATION BY MR MacDONALD**

**[12.21PM]**

PN609

MR MacDONALD: Mr Giddens, if I could take you to your statement of - it's TWU2, your statement of 5 February 2013. Have you got that with you?---I have.

PN610

If I could take you to clause 10. In that you stated, "The majority of Queensland bus service providers have interpreted clause 10.5(d) of the PVRTA such that a casual school bus driver is entitled to the minimum payment of two hours pay for both morning and afternoon engagements." Do you see that clause?---Yes.

PN611

Can I just put to you that that isn't in fact the correct position of Queensland bus service providers?---That's my experience and I've based that statement on my experience. I have involvement with a large number of metropolitan companies and I have a limited involvement with rural companies and I'm only aware of one rural company and no metropolitan companies that don't observe that.

\*\*\*\* ROBERT PETER GIDDENS

XXN MR MACDONALD

PN612

Are you aware of how many rural contracts or how many rural operators operate in Queensland?---I'm not aware of the exact number but as I said, I'm not familiar with a lot of the contracts in the rural areas but the ones that I do have some knowledge of - and that is limited - as I say, I'm only aware of one company that actually pays one-hour minimum.

PN613

Would it be fair to say that it's more than a thousand operators?---It depends on how you define "operators". I am aware that there is close to probably 1500 companies that contract to the government and are paid for passenger services provided but a lot of those companies are single bus operators where the owner of the bus drives the bus, they don't actually employ people. There's a very large number of those. Included in those passenger payments are also taxis. They also include, to my knowledge, mum and dad that provide a transport service for a disabled child. They are also included in that listing, and I've been aware of that for some years.

PN614

Of those say 1500, are you able to estimate how many of those 1500 you had personal knowledge of how they pay their drivers?---In the rural area probably less than 10 per cent.

PN615

So can I put to you that your statement in relation to the majority of bus service providers in paragraph 10 primarily only relates to your understanding of the TransLink operators and a percentage of around 10 per cent of the rest of the operators in Queensland?---That's correct. I based the statement on my knowledge.

PN616

Can I put to you, therefore, that the total amount of operators who pay a minimum of two hours pay for the morning and afternoons could be very much in excess of what you've estimated?---Yes, I would agree with that statement bearing in mind my previous statement in relation to the type of operators that are covered under the passenger payment schemes from the Queensland government.

\*\*\*\* ROBERT PETER GIDDENS

XXN MR MACDONALD

PN617

And do you - - -?---But not all of them are actually bus operators that employ people.



PN618

You've also given evidence of the Fair Work Ombudsman and applications or cases where operators have been the subject of an interpretation of that provision. I think in clause 17 you refer to - Mr Ziske, is it - Mr Ziske, Z-i-s-k-e?---That's correct.

PN619

Z-i-s-c-k-e, sorry?---That's correct. That's the company that I state as paying by the hour. I don't believe I refer to anything to do with the Fair Work Ombudsman in relation to that.

PN620

No. Can I ask you whether or not that is the only matter of that nature that you're aware of?---I don't believe there's a matter involved in that, Mr MacDonald. I merely state in that statement that Ziske is a company that does currently pay a minimum of one hour per each engagement and if the variation was to fail then he would continue to pay that hour along with, I assume, a large number of other operators.

PN621

You have had a look at Mr Tape's statement, I presume?---Yes, I have.

PN622

And where he referred to 53 per cent in fact of surveyed members indicating they paid the two-hour minimum engagement for the day, do you accept that survey? ---That's Mr Tape's survey. I can't comment on it because I don't have those facts before me. They haven't quantified the survey that's been done.

PN623

So can I ask you about things you've got experience of and that relates to the TransLink enterprise agreement negotiations. I think you said you have but it's fair to say that you've been party to most of the negotiations for operators within that TransLink organisation?---The majority of the EBAs that have been put down in the last two years I have had some involvement and in some cases I've had fairly substantial involvement.

\*\*\*\* ROBERT PETER GIDDENS

XXN MR MACDONALD

PN624

And is it fair to say you've had a fair involvement with negotiations for the Transit Australia Group for which Ms Manley is employed?---That's correct. I would say I've had strong involvement in all except the Townsville agreement, the Cairns agreement and also the Marcoola, Sunshine Coast agreement on the basis that those three agreements - one was negotiated by our regional organiser in Cairns and the other two were very well progressed when we came into office and I was offered the position.

PN625

Have you had a chance to look at Ms Manley's statements as well?---I have scanned them briefly, yes.

PN626

And in those statements you've seen her evidence that in relation to Townsville, Rockhampton and Magnetic Island the drivers, the casual drivers, are paid similar

to their interpretation under the award, which is two hours for the day?---My recollection of those particular awards, during the negotiation periods, particularly - - -

PN627

I think rather than the awards I'm referring to the enterprise agreements?---Sorry, the EBAs. So referred to the EBAs. With the Rockhampton EBA, which was the last EBA, the undertakings that we had during those negotiations was that they would be paid the same as the Surfside agreement, which is paid on a four-hour per day basis. I can't recall whether the actual document reflects that entirely or whether it's the interpretation that's been taken by Ms Manley.

PN628

So you're not aware of the matters that Ms Manley has referred to in her evidence, that in fact two hours are paid under the award provisions for Townsville operators, Magnetic Island operators and the Rockhampton operators?---No, I believe what the Townsville - again, I will stay with the Townsville and Magnetic Island, which is the single enterprise agreement for those two sites - that that was fairly well progressed - it was very well progressed when I came into employment with the TWU this time around. In relation to Rockhampton, I'm pretty sure that we had fairly involved discussions in relation to that and the understanding that I have with Ms Manley was that they would be paid a minimum of two hours, or four hours for the day as with Surfside.

\*\*\*\* ROBERT PETER GIDDENS

XXN MR MACDONALD

PN629

In relation to your statements, they particularly refer to the TWU in Queensland. Would it be fair to say that you have no knowledge of the operations in other states relating to the payment of casual school bus drivers?---I have some knowledge of New South Wales. I do talk to the New South Wales guy quite regularly and I'm aware that the New South Wales agreements all pretty much have one-hour minimum engagement and that's longstanding from pre-the modern award and it's something that's negotiated and obviously it's been off-set by things like increased wages and there's other areas that it may have off-set as well. They do pay substantially higher than what they do in Queensland.

PN630

From your knowledge of the bus industry generally, you're aware that bus drivers do pre-departure checks?---Yes.

PN631

They monitor repairs, defects - - -?---Yes.

PN632

- - - irrespective of the type of vehicle?---That's correct.

PN633

I've got nothing further, Commissioner.

<RE-EXAMINATION BY MR GIBIAN

[12.31PM]

PN634

MR GIBIAN: Mr Giddens, you were asked about your experience and knowledge of the operations of operators in metropolitan and rural areas and I think in answer to those questions you said you had detailed knowledge of metropolitan operators - - -?---Yes.

PN635

- - - but perhaps had less interaction with those in rural areas. I just wanted to ask what was encompassed by "metropolitan" in your answer to those questions? ---Metropolitan area is classed as south-east Queensland. It's primarily the services that was contracted to the government under TransLink, which is the government contract provider, and it covers an area operating now from Gympie down to the New South Wales boarder and out almost to the Toowoomba Ranges.

\*\*\*\* ROBERT PETER GIDDENS

RXN MR GIBIAN

PN636

Thank you. Nothing further.

PN637

THE COMMISSIONER: Thank you. You're excused, Mr Giddens?---Thank you.

<THE WITNESS WITHDREW

[12.32PM]

PN638

THE COMMISSIONER: We might adjourn for lunch. We will resume at 2 o'clock.

<LUNCHEON ADJOURNMENT

[12.32PM]

<RESUMED

[2.09PM]

PN639

THE COMMISSIONER: Thank you. Mr MacDonald.

PN640

MR MacDONALD: Thank you, Commissioner. Commissioner, in my introduction I did refer to a very brief outline of the case that APTIA was presenting today before the commission and rather than go through the submissions, the supplementary submissions, and then the further supplementary submissions in toto I wanted to commend them to the commission for consideration when the matter is being decided by the Commissioner. There is also quite a deal of sworn statements now before you - six in fact - and in the submission there's also a letter addressed to the Office of the Fair Work Ombudsman which is in evidence and I also commend those to you as well.

PN641

My submissions now will just be pretty much in summary as to where APTIA stands in relation to the three changes that it's seeking to the award and I just wanted to very briefly draw your attention to some of the evidence in the sworn statements just to reaffirm the position of APTIA if I could, and that will be a very brief summary. If I could just refer firstly - and I'm doing this in no specific order, other than these are the documents that are in front of me - in the document

APTIA9, which is the statement of Melissa Manley, which is her first statement dated 19 December 2012, the thrust of her evidence related specifically to negate some of the comments made in the statements of Mr Giddens, particularly relating to the two-hour minimum engagement for school bus casuals. Her evidence was that in Townsville, on Magnetic Island and in Rockhampton in fact a two-hour minimum engagement was paid.

PN642

One of the issues that it appears to have been pursued by the TWU is the issue as to whether or not the industry actually paid two hours or four hours, what was the actual practice and whether there was an anomaly or a technical issue. It's our submission that the evidence clearly states that there is a technical issue. It's been the elephant in the room, Commissioner, since the PVT A or the award was actually introduced by the then Australian Industrial Relations Commission.

PN643

THE COMMISSIONER: It sounds like it was the elephant in the room prior to that.

PN644

MR MacDONALD: I think it was and I think it's been an elephant in the room for a long time. I think one of the things that we've tried to, in the evidence before you, Commissioner, is to give you as detailed an explanation as to the nature of the school bus driver. It is rather unique. Commissioner, we have an industry where we have casuals, permanent part-time and we have permanents, but we also have actually a fourth unacknowledged position and that is a permanent casual. It's an anomaly within the bus industry. It's a specific position and there's been evidence from Mr Ferris and there's been evidence from Ms Manley and virtually all of the proponents for APTIA have referred to the fact that the school bus driver generally works 201 days a year, which is the school year, and they do a shift in the morning and in the afternoon. Sometimes they do shifts in the middle of the day because those shifts relate to charters.

PN645

Commissioner, in the larger metropolitan areas and in the larger regional areas you have operators who have permanent drivers who actually do the school shifts, and then there's either route service work that's done in addition to the school work or charters that are done in addition to the route and the school work. I wanted to basically address you to this unique situation of dedicated school bus drivers and the AIRC did recognise that by making a separate provision for those dedicated school bus drivers in the award by providing that provision for the minimum engagement for two hours. It's the submission of APTIA that in fact the two-hour minimum engagement wasn't defined as being two engagements during the day, a full shift.

PN646

What's very relevant, Commissioner, is that the actual award itself refers to engagements. The term "engagement" is referred to in three different areas within the award. In clause 10.5(c) it's referred to as a term of minimum engagement, although in other parts - 10.5(c) being the one we're dealing with - although in other parts of 10 relating to minimum hours the PVT A or the award refers to other casuals in relation to a shift -

PN647

*for permanent employees a shift or a day, and for permanent part-time employees for each day engaged.*

PN648

In 10.2, for instance, engagement is referred to as a type of employment an employee has; ie, a permanent or casual. So it's referred to as the actual type of employee. In clause 15.2 the PVTA appears to refer to engagement as the commencement of employment. So it talks in terms of the engagement as the time in which the employee actually starts with the employer, Commissioner, not day by day but actually the engagement is when I employ you to start working for me, and the award talks in those terms.

PN649

Our submission - and we say it has been demonstrated by all those statements - that there is an anomaly or a technicality that requires your consideration to rectify the issues. What APTIA has tried to do, Commissioner, in its evidence is provide you with some of the impacts of a change in the current process which really is a toss of the coin; some pay two hours, some pay four hours. There's no doubt that there is evidence from Mr Tape, for instance, and I take you to his statement, which is APTIA8, his statement of 19 December where he talked in terms of his survey. Now, there hasn't been any evidence led to the contrary that that wasn't a genuine survey and Mr Tape is in a position as the executive director of the Queensland Bus Industry Council to seek indications from his members as to how they pay their drivers and the evidence, in our submission, Commissioner, is that 53 per cent of them pay the two hours, 47 per cent pay the four hours. That shows you clearly the anomaly that exists within the Queensland section of the industry.

PN650

THE COMMISSIONER: With a margin of error, you would probably say it's pretty well split, wouldn't you?

PN651

MR MacDONALD: It is, yes. We say a small majority. I'm not standing here today saying it's an overwhelming majority because it isn't. Where there is an overwhelming majority is found in Mr Threlkeld's statement and in Mr Ferris's statement where they gave evidence of the practices in New South Wales where even in the enterprise agreement negotiations the old Bus Award provision was in there that allowed for the payment of two hours for the day or one hour for each engagement, so that was the lower rate. Although - - -

PN652

THE COMMISSIONER: It's a bit dangerous though looking at what's occurring in enterprise agreements though, isn't it?

PN653

MR MacDONALD: Look, I agree. I agree and that's why I think the evidence of Mr Threlkeld which was outside of his statement where he referred to the number of what he called type A contracts and, Commissioner, Mr Threlkeld and Mr Ferris went to some lengths to explain the nature of contracting in New South Wales and to summarise those, the type A operators are the small one, two, three or four bus operators who run in fairly isolated rural regions in country areas

where the country town has a population of less than 7500 and in most cases the contracts are single bus route contracts, and in a rural or isolated area whilst operators and the state government seeks to try to amalgamate and get value for money out of their services, the reality of life is that in a country village, for instance, you may have a number of school children out west, out north, out south and out east all coming in to the same region and it's not possible for one bus, for instance, to get everybody in at the same time so there are four buses, four contracts, and the government seeks to minimise their payments based on those three circumstances which Mr Ferris has outlined in his evidence and that was the type of bus - because the bus varies.

PN654

If it's a small area and you've only got say 15 children then it's a category 2 bus. If you've got a need to bring in 40 or 50 school children then you've got a category 4 bus. Depending on the size of your bus your payments vary. It then varies on the kilometres you run and it varies on the hours that it takes you to do it. That's why the two-hour, four-hour issue is a critical component of the funding model. The decision that you make, Commissioner, will have an impact in relation to that circumstance, particularly if the TWU's application is successful which would effectively increase the circumstance to four hours.

PN655

Commissioner, there is also sworn evidence from Mr Lewis and Mr Doolan. Mr Lewis from Tasmania and Mr Doolan from Western Australia, which broadens the scope of the application. It would be my submission to you, Commissioner, that Mr Giddens' experience is effectively limited to the Queensland circumstance and really is only limited to the larger metropolitan or TransLink contract operators and some of the larger regional areas but not extended to the myriad of school bus operators in Queensland, which is a very vast area, as you know, and I think Mr Giddens in his evidence indicated that really there was only a 10 per cent knowledge of that overall circumstance. So I think insofar as the division of Mr Tape's survey goes, it's probably closer to the reality rather than Mr Giddens's evidence that traditionally the bulk of operators in Queensland pay the four hours, Commissioner.

PN656

Mr Lewis also - from Tasmania now I'm talking about; that's APTIA exhibit number 4 - he talked in terms of a number of issues and the first issue related to the school bus hours and the impact that it would have if there was a change to the structure of the hours which the Transport Workers Union are seeking. He also gave evidence in relation to the - and for Tasmania the most important operation - where they primarily pay under the award rather than through enterprise agreements. I'm not aware of any of their route or school drivers having enterprise agreements; they basically rely on the award. The concerns that they have had is that they have had representations that the pre-departure checks and the monitoring of vehicles should take the grading of all their bus drivers up to Grade 4.

PN657

What I've tried to show is that the impact effectively of that in the industry by not having that inclusion in Grade 2 which cascades it up to Grade 3 and then Grade 4 is it would add a significant increase to the drivers. So a decision potentially, for

instance, that - or if you found against us in relation to the undertaking departure checks and driver monitoring, there could effectively be up to a 9.4 per cent increase in drivers' wages from the Grade 2 to the Grade 4 and it would be 3.47 per cent for the Grade 3, Commissioner. So I would ask that you take that into account in relation to matters referred to by Mr Lewis.

PN658

Then finally Mr Doolan from Western Australia, his sworn evidence talks in terms of also the Western Australia NAPSA and in paragraph 12 of his statement, which is APTIA5, which is dated 20 December 2012, he talks about the previous NAPSA that was applicable to him, the Transport Workers Passenger Vehicle Award:

PN659

*Part-time and casual employee school bus drivers, the minimum payment for these employees shall be one and one half hour at the appropriate rate of wage prescribed in each of the periods before 6.00 and noon and noon and 6.00 on any day.*

PN660

So in that jurisdiction the previous NAPSA had a three-hour position. Commissioner, in our submission we say that there is definitely an uncertainty about what constitutes a payment for a school bus operator. It's further exacerbated by the fact that the definition refers solely to taking children to and from school. So the moment you go to the school and you stay there and you take the children to a swimming carnival or to something else, you fall outside the definition and then you come within the definition of a casual bus driver, which is a three-hour minimum requirement for their shift. So it in fact is so limited to the circumstances of a solely taking children to and from school that has created the further uncertainty as well.

PN661

There has been evidence, particularly from Mr Ferris and also Mr Threlkeld and Mr Tape particularly, about those persons who only want to work the shorter hours, Commissioner, and I would ask, in our submission, that if the Commissioner is favouring or moving towards the application of the Transport Workers Union, that the Commissioner at least accepts the submission from APTIA that there are circumstances and quite a few circumstances where there needs to be a degree of flexibility to protect jobs within the passenger transport industry. It's my submission that that has been identified by the evidence before you.

PN662

Commissioner, it's APTIA's contention, as I said, that school bus drivers have always had a clear understanding of what their work is. The reason why we haven't had a myriad of claims in this circumstance is that school bus drivers who have been driving the school buses for a long time - particularly the ones that have been receiving two hours - have understood that that's what their shift was. They turn up every day. They do a two-hour shift if it's an hour in the morning and an hour in the evening, and a lot of the times they get extra work through the charter and in the industry it's never really been an issue. Mr Ferris has given evidence about their practices. Their practices are they look to give their employees as

much work as the employees need, it's just that there are some who are only looking for that shorter period. To deny that opportunity means to deny potentially those persons the opportunity of having some work.

PN663

Commissioner, I don't want to say too much about the waiting time issue. The waiting time issue is one that our submission has always been that it's the Passenger Vehicle Transportation Award. To start distinguishing between coaches and buses and other forms of passenger transport when the award itself defines what is a passenger vehicle to incorporate buses, coaches and other vehicles, Commissioner, is almost staying in the past. It's a mechanism from the past that doesn't recognise the future.

PN664

In relation to the issue of the gradings, APTIA has demonstrated that pre-departure checks are an essential part and driver monitoring are an essential part and I think my friend at the earlier part of his address indicated that they understood that as well. The issue about Grade 3 and Grade 4 is simple, that we say under the award if you are a bus operator and you only employ charter drivers - and not every bus operator, Commissioner, has a contract. There are many bus operators out there that just run charter work - sometimes to schools, et cetera - but they're not government funded so they don't fall within the definition of the minimum engagement. They don't do 650 kilometres a day. They simply aren't covered by the award and to deny that coverage means that we've got that little technicality or anomaly where a driver or an employer will have to sort of figure out what he or she pays that person and that's the anomaly we say exists in relation to that, Commissioner.

PN665

On the question of broken shifts, again at the start of my address I talked in terms of the decision of the Full Bench in relation to the award modernisation process - at least this two-year award modernisation process. We say and we support the decision of the Full Bench in that decision of 29 June 2012 that in fact the nature of this review is one that should look at anomalies, should look at technicalities and should look at whether the modern awards are achieving the modern award objectives, Commissioner. We say that flexibility is therefore then denied if there is this definition as clause 21.6 of the TWU's application is requesting that effectively removes the opportunity - you've got to pay them two hours in the morning and two hours in the afternoon irrespective of what they do. If they do an hour in the morning and three hours in the afternoon because there's a late afternoon charter or there's something to be done, then they have absolutely lost that right and they get five hours. Whereas a casual is getting three hours, a school bus driver is getting five hours for a job like that. It simply removes the flexibility, which we would say in fact is contrary to the modern award objectives and it's also contrary, in our submission, to the mechanisms put in place for this two-year review under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.

PN666

Commissioner, those are the submissions of APTIA. If there is anything further I can assist the Commissioner with, I would be happy to do that but for the time being thank you, Commissioner.



PN667

THE COMMISSIONER: The only thing I would ask you about is under the definition of a Grade 4, under B.4(e) it talks about a coach driver driving a passenger vehicle.

PN668

MR MacDONALD: Yes, Commissioner, and that's what my submission is. My submission or our application is that that "coach driver" should read "passenger vehicle driver" because if you're a coach driver under Grade 3 - - -

PN669

THE COMMISSIONER: The whole purpose in B.3 - - -

PN670

MR MacDONALD: Yes, under B.3, Grade 3 - - -

PN671

THE COMMISSIONER: Yes, but B.4(e) also talks about a coach driver driving a passenger vehicle.

PN672

MR MacDONALD: They do, and there would be an argument to change that but very few route buses can travel 650 kilometres more than - they're not built to travel that. The thing is, in relation to the day charters as we'll call them, the evidence that's in the statements is it's about 95 per cent buses. In the Grade 4 you'd be lucky to find 1 per cent of buses do trips of more than 650 kilometres. They don't usually - - -

PN673

THE COMMISSIONER: But why would it not be an anomaly in B.3 but not in B.4. I guess my question is - - -

PN674

MR MacDONALD: It is, Commissioner.

PN675

THE COMMISSIONER: - - - why is a coach driver particularly singled out?

PN676

MR MacDONALD: It is, and we've only dealt with Grade 3 because that's the one that's specific to the industry; in other words, there is no mechanism for a bus driver who doesn't do route school work.

PN677

THE COMMISSIONER: Yes, okay. Thank you.

PN678

MR MacDONALD: Thank you.

PN679

THE COMMISSIONER: Mr Gibian.

PN680

MR GIBIAN: Thank you, Commissioner. Just before I come to the specific issues that are pressed, we would also like to commence just by making clear the limitations upon the review process which is currently being undertaken, which

are no doubt familiar to the commission, but item 6 of Schedule 5 makes it clear - of the transitional legislation - makes it clear that the principal matters to be addressed in the review are whether the award is meeting the modern award objective and whether there are anomalies or technical problems and, importantly, arising from the modernisation process rather than some other separate cause.

PN681

In that context, the decision of the Full Bench which Mr MacDonald has referred to made clear a number of matters: firstly, that there be a cautious approach adopted to considering matters others than those which are listed in item 6; that the legislation accepts that the starting point ought be that the existing provisions of modern awards make provision which is consistent with the modern award objective; and - well, perhaps there's four points. The first two are those. The third point would be that the Full Bench made it clear that where a matter was the subject of consideration as part of their modernisation process, there would have to be cogent reasons provided as to why that matter ought be revisited as part of the two-year review. What the Full Bench had in mind there was a circumstance when an issue had been directly addressed by the Full Bench as part of the award modernisation process the transitional legislation did not envisage that that matter would be revisited as a matter of merit as part of a two-year review. Finally, it was made clear - which is perhaps implicit in the point I've already mentioned - that this was not an opportunity to have a fresh assessment of the appropriateness of the award provisions; it was much more limited than that and limited to identifying anomalies and technicalities arising out of the modernisation process.

PN682

Now, if I could refer first then to the question of the minimum engagement of casuals engaged for the purposes of school transport. The principal submission that we would advance is that the existing provisions of the modern award are clear and that they require that the two-hour engagement is per start - that is, per occasion of continuous work - and cannot reasonably be interpreted as providing for two hours split one hour in the morning and one hour in the afternoon, and that that's clear when one looks at the terms of the award and it's clear that the Full Bench turned its mind to that question in making the modern award in the first place. We don't think that the pleas of uncertainty as to that matter, or confusion, are reasonably based.

PN683

First of all, in that regard can I just say that the concept of a minimum engagement of a casual employee is not a difficult concept and it is a common concept in awards generally speaking. Can I just provide the commission with one example. Commissioner, you'd be aware of the ongoing issues as to minimum engagements in the retail industry. This was the first round. It had a sequel so far as the merits of the matter were concerned but importantly what I've handed to your Honour is the first decision of the Full Bench in relation to an - referred to as an appeal by the National Retail Association v Master Grocers Australia Ltd. It dealt with, among other things, an appeal as to the minimum engagement period for casuals in the retail industry, including casuals who were school students. Can I just refer you, Commissioner, to page 262 of the report and specifically at paragraph 14 of the report. There the Full Bench reflected upon the

application to shorten the minimum period of engagements for casuals other than school students and noted that:

PN684

*No evidence was called in support of the reduction of the minimum period of engagement for casuals other than school students. It is hard to imagine a weaker evidentiary case for a general reduction in a minimum period of casual engagement. That deficiency is made more glaring by the applicant's failure to address the substantial evidentiary case put against it by the SDA through its witnesses. That evidence included a substantial statement by a noted academic dealing with the significance of minimum engagement periods as a protection for vulnerable employees; the relationship between minimum engagement and the time and expense of work-related travel; and the possibility that part-time employees might suffer -*

PN685

et cetera. There's reference then to the other evidence that was put forward in that matter.

PN686

Importantly, we would say that that reflects perhaps what is obvious and that is that the purpose of the minimum engagement is to ensure that there is a sufficient period of work in substantial part to compensate for the inconvenience to cost and the like of attending the workplace in order to perform that work. That is the very purpose of the minimum engagement provision. That purpose is entirely defeated if the minimum engagement period is then understood to be capable of being split up into a number of different elements, particularly as is proposed here, spread at the opposite ends of the day so that one has a period of six hours or so between what are proposed to be the engagements. As the term is generally understood, a minimum engagement is a period of continuous work and that's entirely consistent with the provisions of the award that we're dealing with here when one actually reads them.

PN687

Particularly when one looks at clause 10 of the award which deals with periods of employment one sees that - and this has been made clear in the submissions - but at clause 10.3(b) with respect to full-time employees the provisions requires for a minimum payment of four hours for each shift/day engaged. Similarly with respect to part-time employees at 10.4(g) the minimum payment required for a part-time employee is three hours for each day engaged. Where there's an intention in the award to provide for a minimum payment of a number of hours in a day that is expressly identified and made clear in the award. One then comes to 10.5 so far as it deals with casual employment and one would immediately note at (a) that a casual employee is an employee engaged as such and paid by the hour; that is, engaged on an hourly basis. That is the engagement that's being talked about.

PN688

When one then comes to (d) in 10.5, it provides that a casual employee is to be paid a minimum payment of three hours pay for each shift, and then that 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 and there's clearly distinct language and one would infer that that was intentionally chosen language to distinguish that the engagement being a continuous period of work from the minimum payment for a day as is made clear for full-time and part-time employees. We think that that was a matter that the Full Bench turned its mind to.

PN689

I might just say in passing the proposition that seems to be put in some of the materials is that discrete periods of work that are organised for a casual employee in advance, as it were, can be regarded as a single engagement because the employee is told in advance that they will be asked to work on a number of different periods. Now, what's put is that if the work on a particular day, albeit cut into two periods, is told to the employee in advance then that can be regarded as a single engagement. We don't think that that's an available interpretation of the concept of engagement for the purpose of a minimum engagement provision. Among other reasons, because if that were right then there's no reason why the engagement would be limited to one day either; that is, the engagement could be over a succession of days and we hear the evidence today that the so-called casuals here are in fact very regularly engaged on a continuous basis, indeed. If that were right, that would just destroy the purpose and effect of any minimum engagement provision because there's no reason why that engagement would even be limited to one day and that's why that is not and cannot be the correct interpretation of the award. The minimum engagement is one occasion of work.

PN690

As I've indicated, the Full Bench considered this issue in the award modernisation decisions. Can I just hand two extracts from the decisions to the commission. The first is the Award Modernisation Statement (2009) ARICFB 450 and the public transport sector, as it were, was dealt with from paragraph 177 on page 29. Relevantly can I just direct the commission's attention to paragraph 187 on page 31. Now, perhaps firstly at paragraph 186 there's reference to the rates of pay and including that the New South Wales rates were not adopted. At paragraph 187 the Full Bench noted that:

PN691

*The exposure draft contains minimum engagement provisions for full-time, part-time and casual workers and 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 will leave it to the parties to make further submission about this matter if they see fit.*

PN692

So it's clearly a matter that the Full Bench was cognisant of.

PN693

Now, as APTIA said in its submissions, it made its submissions on this point; that is, asking that the express provision allowing for one hour periods or a two-hour period split across the day. In the second statement that I've handed up - that is, the Award Modernisation Statement (2009) AIRCFB 826 which is referred to in

the submissions - the Full Bench addressed that matter and, Commissioner, you will see that on page 40. Again, it's an extract, excluding matters dealing with other awards. At paragraph 229 there's reference to this award and a number of issues are referred to. About five lines from the bottom of that paragraph the Full Bench said:

PN694

*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.*

PN695

So that to us seems to make clear that the Full Bench considered the issue and decided that two hours was the appropriate amount. It expressly identified the issue, invited submissions about it, submissions have been made and it had determined that issue. For that reason, this is a case such as was referred to in the review decision by the Full Bench where the issue has been raised and dealt with and now really the attempt by APTIA is to alter the outcome of that consideration by reducing the minimum engagement from two hours in effect to one hour by allowing that two hours to be split across the day.

PN696

Now, I handed up previously a bundle of extracts from the previous award provisions. We think that the context of the previous provisions also assists in demonstrating that the Full Bench was deciding upon an approximation of what was appropriate having regard to the pre-existing provisions that had existed in the various states. Just briefly here - if I can just refer to that document briefly - the New South Wales provisions at page 2 of what was then the New South Wales Transport Industry and Motor Bus Drivers and Conductors (State) Award and it provided at clause 6(ii)(a) for casual employees to be engaged by the hour and paid for all time worked to the nearest minute, with a minimum engagement of one hour.

PN697

The commission has heard some evidence about the history of that provision, that that's essentially a collective bargaining provision, even when it was part of the award; that is, it's not an arbitrated provision as such. It was always a collective bargaining provision, essentially, made originally as part of a consent state award and now translated into a number of enterprise agreements that operate within the industry of New South Wales. Now, the first thing we'd understand that is clear about that is that the concept of the engagement for an hour was not the subject of any mystery there. What the bus operators really want is for that provision to be in the modern award and Mr Threlkeld made clear that they had no difficulty in understanding that that provision of the minimum engagement for one hour was for one hour in the morning and one hour in the afternoon, not for half an hour at each time, and that the concept of the engagement didn't have any particular mystery to it, it was an occasion of work.

PN698

As I say, what appears to us is occurring is a desire to have that provision as part of the modern award in circumstances where that was considered by the Full Bench as part of the modernisation process and not adopted. Now, as I say, the

consent state awards were in the nature of bargaining instruments, instruments arising out of perhaps an industry-wide collective bargain or at least a substantial industry-wide collective bargain rather than as a result of arbitrated award proceedings. Again, to the extent that those provisions or similar provisions have found their way into enterprise agreements that subsequently exist, one can imagine the reaction of the employer groups if the union were seeking to have their collective agreements or the parts of those collective agreements that they liked incorporated into the modern award, but that appears to us to be what is sought here.

PN699

(indistinct) the agreements in New South Wales, as is clear, have different provisions. They have substantially higher rates of pay. The fact that they have a shorter casual engagement is perhaps a trade-off to that; who knows. That's a matter that is dealt with as part of the collective bargaining process. It's not a matter that would be drawn across into a modern award provision. Indeed, it's clear that the Full Bench did not accept the wage rates from New South Wales as part of the modernisation process. The reasoning is perhaps abbreviated but presumably in part for that reason and one would not draw across other aspects of that award.

PN700

If one comes then to the other pre-existing provisions, we don't think that there's uncertainty with respect to those provisions either. At page 5 there's the northern division Queensland award which at the bottom of that page in clause 4.2.1 it refers to -

PN701

*a minimum period of employment shall be not less than four hours and then provided that a casual employed by a non-profit charitable organisation or for school purposes for not more than two hours on any engagement shall be paid a minimum period of two hours.*

PN702

Now, again the period of employment seems to us to be significant there; that is, one is talking about a period of employment, not some minimum payment for a day, which is the provisions applicable for full-time and part-time employees, but for casuals we're talking about a period of employment. We think that that provision can only be reasonably understood as requiring two hours in any period of work.

PN703

The same with the southern division at page 7, which at clause 4.3.3 refers perhaps in more abbreviated terms simply to two hours for each engagement. Again, it just refers to the general concept of what one would understand is engagement in that context. To the extent that Mr Tape suggested that he had some uncertainty about that provision and had a different understanding of what engagement means, I suppose we'd say a couple of things about that. The first is, we don't think there's reasonable grounds for that view but in any event Mr Tape didn't say that that was a difficulty that arose out of the modernisation process. In his view it was a pre-existing difficulty. Now, we don't accept that. We think the

concept of an engagement is a clear one but even if he's uncertain about it, it's not an uncertainty that has arisen from the modernisation process in his mind.

PN704

Briefly, I've also included in that bundle a Western Australian provision which is at the top of page 11 of the bundle which contains a different substantive provision but clear in its effect; that is, one and a half hours for each period between either 6 am and noon or noon and 6 pm. That is, it's made clear that it's a different provision historically - one and a half hours instead of two hours - but it's clear that what's envisaged there is a minimum of one and a half hours in the morning and one and a half hours in the afternoon for school bus drivers, I should say.

PN705

Finally, there's the pre-existing federal award, the Transport Workers Passenger Vehicle Award. That contained a number of parts dealing with different parts of Australia. There's two relevant provisions and the first is within Part A at clause 13.3 which commences at the bottom of page 13 of the bundle that I've handed up. Now, there's there in clause 13.3.2 a minimum payment for four hours but a different provision made in 13.3.3 for a casual employee who is solely engaged in the carriage of school children to and from school in various circumstances; the substance of which is that there be a minimum payment of two hours. The final (c) seems to run into what follows from each of those subclauses but the concluding words at the bottom line make provision for a two-hour payment in that situation.

PN706

Part C which (indistinct) principally in Victoria contained at clause 12 a different provision, which appears at page 15. There is therefore different provisions: in 12.1, regular service drivers and conductors; in 12.2, charter bus drivers; and in 12.3 school bus drivers. The commission will see that 12.3.1 with respect to school bus drivers that:

PN707

*A casual employed as a driver shall perform a minimum of three hours work and receive such payment for each start on any day Monday to Friday, inclusive.*

PN708

Then there's an explanation as to what "start" means and:

PN709

*The start of work shall mean the commencement of work for the day and each resumption of work after a break on any day, except a break for a meal interval as otherwise provided in the award.*

PN710

I mean, the proposition is that that provision was reduced from three to one by the Full Bench in the modernisation process and we don't think that that's a permissible or reasonable interpretation of what occurred.

PN711

In summary, with respect to the pre-existing provisions there was different standards, as one might expect, and was encountered in the modernisation process

generally speaking - different minimum periods in some different states. But we don't see there's anything inconsistent in the pre-existing provisions with the concept that an engagement is one period of work. In fact we see it consistently in those provisions in our submission. What we understood the Full Bench did was to arrive at what it considered a median of two hours for each engagement; that is, each occasion of work, not going down essentially to one by providing one hour in the morning and one hour in the afternoon, which would have been the bottom of the available standards in the various states being that adopted in the consent arrangements in New South Wales.

PN712

Now, we say all of that is consistent with the way in which one would ordinarily read the award in any event, having regard to the ordinary meaning of the concept of an engagement of a casual employee and the distinction that's made between the reference to minimum payments for a day for a full-time and a part-time employee and the reference to engagements for casual employees. In that circumstance we think that it's clear that the award properly interpreted requires two hours minimum engagement.

PN713

Now, the TWU has suggested an additional provision in clause 21 of a proposed clause 21.6. If it need be made clearer, to make clear that what's proposed there - that what the award provides is not a change, not some - we're not proposing some increase or alteration in the arrangements but to make clear what we say the award currently means and the words that were selected in 21.6 to apply to for broken shifts for school drivers is that -

PN714

*a casual employee solely engaged for the purpose 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 the two engagements per day.*

PN715

That's an attempt to make clear that what the award is providing in the case of school bus drivers is two hours for each occasion of work.

PN716

There was one thing that was said about that in APTIA's submissions which was that what this clause proposes is that there be four hours pay even if only a morning is worked - so only a morning is worked and not the afternoon is worked. Now, that's not the intention of the provision. It's headed Broken Shifts, so it's a circumstance in which there's a broken shift. We accept it would be available for a school bus driver - leaving aside other drivers - but for a driver solely engaged in transporting children to and from school to be engaged just for the morning, albeit for a minimum period of two hours as should be necessary. But if there's two engagements then it would be two hours in the morning and two hours in the afternoon.

PN717

THE COMMISSIONER: Mr Gibian, doesn't this proposed 21.6 just muddy the waters even further because it suggests that a casual employee is engaged for a shift, the shift is a broken shift but it is only one shift. It is an engagement for one



shift but then you suggest that there are two engagements within that one-shift engagement.

PN718

MR GIBIAN: Yes. The concept of a shift doesn't readily have application to - a rostered shift doesn't readily have application to a casual employee who is engaged by the hour. So I take what you've said, Commissioner. What we were trying to do was make clear that it's two hours per occasion of work and I mean, having looked at the matter, probably the provisions in Part C of the previous modern award make it as clear as could be; that is, it's each start. That's probably the clearest way to put it if there be need for greater clarity. That is, it's each start is two hours and one starts again if one resumes work with a break that's other than a scheduled meal break. I think that seems to me to be the clearest way in which one would make it clearer, and perhaps it's better than what we've proposed. But what we've proposed was intended to make that as clear as possible.

PN719

THE COMMISSIONER: Yes. I wouldn't like to try and clear it up and create a bigger problem.

PN720

MR GIBIAN: Indeed.

PN721

THE COMMISSIONER: Or another problem.

PN722

MR GIBIAN: In that regard I would say that what APTIA has proposed is also not clear either because they have simply proposed changing the word "engagement" to word "shift". Now, what they say is that shift includes broken shift and for that reason that can have two parts to it. Certainly as a matter of ordinary language that is not free from potential ambiguity or misunderstanding. Indeed, Ms Manley's evidence is couched in terms of a shift in the morning and a shift in the afternoon. That's the way she understood the concept of shift and coming to this could one could well understand why one would understand it in that way. APTIA's proposal doesn't seem to us to be free from difficulty. We understand what they want. They want an hour in the morning and an hour in the afternoon but we don't think what they have proposed by way of the wording is at all clear either.

PN723

Can I just briefly deal with the evidence that's been put forward and I can probably do so by way of general overview. Firstly, as I say, there would have to be cogent reasons advanced to revisit something which we say was a matter that was addressed as a matter of substance by the Full Bench in the modernisation process and we don't think there's anything that approaches that in this case. So far as the evidence as current practice is concerned - firstly, so far as New South Wales is concerned the evidence is firstly that the operators, at least those who operate under BusNSW, are under enterprise agreements that provide for one-hour starts. So to the extent that - one-hour minimums, I should say. Now, if those agreements provide higher rates and other trade-offs and the like which enable them to satisfy the better off overall test, they have been in place and those

operators will not be affected by a refusal of the commission to change the award as APTIA asks the commission to.

PN724

To that extent one can't say that there would be any difficulty presented. So far as there's evidence of what in fact occurs in New South Wales is scant to say the least. Now, the best we've got is evidence which came to light for the first time this morning in oral evidence from Mr Threlkeld about the number of contracts with the New South Wales government which contract A is type A contracts which it is said were for routes of less than four hours per day. Firstly, we have no information about how much less than four hours per day in any of those routes. We don't know whether any of those routes are synonymous with the work that a driver actually does; that is, that the driver only does that route. So one really doesn't draw any particularly great conclusions from that material. Secondly, that's only one type of contract of four types of contract that Mr Threlkeld gave evidence about. The only other type of contract that the evidence has actually referred to is the type B rural and regional contract, which doesn't operate on the basis of hours at all; it operates on the basis of a head count. In that context, one can draw no conclusions about the way in which those operators operate.

PN725

So in that sense one doesn't have any picture within New South Wales as to the way in which rosters are structured. So far as Queensland is concerned the evidence seems to be mixed. I think Mr MacDonald relies substantially on what Mr Tape said in this survey that was said to have been conducted. I think it must be made clear as to the way that that evidence was phrased and that is that it was said that 53 per cent of operators - now, it's not clear the size of the operators so the 47 per cent could have been 95 per cent of routes because the operator may have one route - and some are quite small, as was made clear - or they might be substantial operators that run hundreds of routes. Getting a proportion of operators tells one nothing about the proportion of routes or the number of employees that are involved in being paid in a particular way. So that's the first thing, it's reasonably useless information.

PN726

Secondly, to the extent it's information about operators, it was only put - and I think that has to be made clear - that 53 per cent of operators paid on the basis of a minimum of two hours, not that drivers did work only two hours and were paid for only two hours. The evidence seems clear that in most cases - and Mr Ferris's information made this clear - that in the majority of cases it takes more than two hours or more to do the work in any event. So we don't get to a situation in which (indistinct) either a majority of operators but certainly a majority of individual employees are rostered in some way that they're only paid two hours a day. The commission really has before it no information as to what actually happens so far as the work is concerned and if it's put that these are the cogent reasons why the award ought be altered to provide for one hour in the morning and one hour in the afternoon, it fails that test clearly.

PN727

Again, Ms Manley's evidence was that they had a number of enterprise agreements that provided for a minimum of four hours in the day. In other

circumstances the enterprise agreements referred to the award and some evidence was given as to the routes that were said to be less than two hours but again no information as to how much less - whether we're talking about an hour 45 or what. No such evidence was given.

PN728

So far as Western Australia was concerned, Mr Doolan asserts what we say is an erroneous interpretation of the award; that is, that they can pay one hour in the morning and one hour in the afternoon but says that that's rarely done in any event. So at its highest it's not suggested that that occurs on a frequent basis. With respect to Tasmania, Mr Lewis says that operators have adopted the interpretation put forward by the Fair Work Ombudsman; that is, that they are required to pay two hours in the morning and two hours in the afternoon and the practice there seems consistent with the way in which we have approached the award. In those circumstances, it can't be suggested that the interpretation that TWU adopts of the award - which we say is correct - has led to any difficulty or any failure to meet the modern award objective or indeed any anomaly or technical difficulty.

PN729

Finally, there was some reference to the need that some employees have expressed for flexibility and that some employees don't want to work a large number of hours. That appears to - because of their circumstances or they don't wish their earnings to affect benefits. We think that, with respect, is simply a furphy. If employees wished to work less hours, they could work less days per week or only do the mornings rather than the afternoons as well, and all of those types of arrangements are available and can be requested of employers and accommodated if appropriate. We don't think that the current framing of the award presents any difficulty in that regard.

PN730

Unless there's anything further on that issue - the principal position we put forward is that the award, properly interpreted, requires two hours payment in the morning and two hours payment in the afternoon for school bus drivers. That's clear from the way in which the award is drafted. If it needs to be made clearer then it can be made clearer. I accept what you've put, Commissioner, as to the way in which we've framed it and, as I say, it seems to me that the old Part C of the previous federal award is probably the way to make it as 100 per cent clear as it can be.

PN731

The second issue that's advanced is the proposed change to clause 21.5 of the award which seeks to alter the reference in the first line of that provision to "coach driver" to refer to any "passenger vehicle driver". Now, that's not an alteration which is opposed. Clause 21.5 appears to us to be a provision which is a specific provision designed to apply to specialised coach drivers and not to bus drivers who are engaged in charter work in addition to usual route work. The proposed variation would produce very substantial reductions in the earnings of bus drivers who are engaged in charter work and Mr Giddens' evidence is that, as far as he's concerned, bus drivers would not undertake that work if such a change was made. He's also included by way of example evidence as to the effect on a particular driver of a charter work that that driver has undertaken in the past and a

calculation which indicates that for that work there would be a reduction in earnings from \$1389 to \$511 if this 50 per cent waiting time was incorporated for all drivers and not just for coach drivers and one would not, as part of this review process and in the absence of evidence to support it, alter the award so as to give rise to such a drastic effect upon the earnings of bus drivers engaged in charter work.

PN732

The third point that we raise in that regard that Mr Giddens has referred to in his evidence is that any such change may have significant unintended consequences, including impact upon coach operators that would seriously affect their competitiveness and viability for charter work if bus operators were able to impact upon that market, paying substantially less than is currently required by the award. Finally in that regard, we really note that other than evidence that suggests that bus drivers do do charter work, there's no evidence to suggest any difficulties being presented by the current provisions of the award. There's no evidence of any difficulties of any operators encountered in applying the award or any anomaly or technical difficulty in this regard. It's really an attempt to alter the provision so as to allow bus drivers to be paid less when engaged on charter work. When the bus drivers engage on the charter work, the bus drivers are required to be with the bus. The bus driver is on duty and subject to meal breaks if they can be arranged. The bus driver is on duty and is not free to do what they wish and ought be paid their ordinary wage during those periods.

PN733

Finally, the alterations that are sought with respect to the classification structures, as was indicated earlier the alteration to Grade 2 is solely, as we understand it, to incorporate a reference to vehicle inspection. Now, we've indicated that we don't have anything really to say about that. We accept that all drivers need to inspect vehicles and ought do so. The change to Grade 3, however, that is proposed is not supported by the TWU. The effect of it appears to be to remit a bus driver who is engaged on a charter to be paid at Grade 3 even if otherwise the employee would be paid classified in accordance with their other work as a level 4 or Grade 4 employee. That is not consistent with the way in which the award operates. The classifications are referred to in clause 13 and the minimum wages are set out in clause 14. That provision sets out the minimum wage for a full-time employee, for example, as by reference to a grade and the part-timer gets a proportion of that as according to their hours, as does the casual employee get a proportion of that grading for all work, plus an allowance in that case.

PN734

The award does not operate on the basis that a person is one grade for some purposes and another grade for other purposes. That's made clear when one goes to Schedule B to the award as well. Those classifications operate, at least from Grade 2 onwards, on the basis of the skills that the employee is required to apply in the course of his or her employment. If the driver, for example, is engaged ordinarily in driving a passenger vehicle with a carrying capacity of 25 or more passengers on a specified route, as is referred to in Grade 4 - confusingly - (d), then that person is a Grade 4 employee. Now, if they then undertake a charter which is less than 650 kilometres they can't, in our submission, be paid a Grade 3 for undertaking that work in addition to their usual route work, and that appears to

us to be the effect of what's proposed by removing the reference to "coach driver" in Grade 3 in Schedule B of the award.

PN735

Unless there's anything further, those are our submissions.

PN736

THE COMMISSIONER: Thank you. Mr MacDonald.

PN737

MR MacDONALD: Just quickly, there's one issue which is the supplementary submissions, APTIA3. I raised them during the witnesses and that was in relation to my friend's - he took you through some relevant pre-modern awards. I just wanted to make the point for clarity that if you go to APTIA3 it's the further supplementary submissions of 2 April and just in relation to - if I take you to page 3, paragraph 9, in terms of the definition of the minimum engagement the Part C of the Transport Workers Passenger Vehicle Award, which is the old federal award, it talked in terms of -

PN738

*a casual driver employed as a driver shall perform a minimum of three hours of work and receive payment for each such start at work on any Monday to Friday, inclusive.*

PN739

In paragraph 9 I have stated:

PN740

*A start of work is defined as the commencement of work for each day and the resumption of work after a break, except a meal break -*

PN741

which I think my friend acknowledged that was the obvious answer -

PN742

*at the same time to attract the three hours of work it must be performed.*

PN743

So the actual terminology of the definition is different and the way it's interpreted is different under the old mechanism. I just draw that to your attention.

PN744

Then finally in the same document, at paragraph 14, reference wasn't made to the Public Vehicles Award in Tasmania and I think the evidence was that in Tasmania - or in my submissions, in Tasmania the bulk of casual employees are employed under the award. Just going to the last part of that, it talks in terms of -

PN745

*minimum engagements for casual employees being four hours for work or payment for each start of the day, except in the case of an employee employed in the transport of school children where a minimum of one hour's payment for each start of work on any day shall be paid.*

PN746

I just wanted to put in the proper context. The circumstances with which the industry has been dealing with over the last couple of years as a consequence of

the decision to declare the Passenger Vehicle Transportation Award,  
Commissioner - I just wanted to add clarity to that in your determinations. Thank  
you, Commissioner.

PN747

THE COMMISSIONER: Thank you. I will just mark - because I haven't yet -  
the outline of submissions of the TWU - - -

PN748

MR GIBIAN: Thank you.

PN749

THE COMMISSIONER: - - - from 7 January as TWU4.

**EXHIBIT #TWU4 RESPONDENT'S OUTLINE OF  
SUBMISSIONS DATED 07/01/2013**

PN750

THE COMMISSIONER: I think that covers everything off. If there's nothing  
else, I will reserve my decision.

PN751

MR GIBIAN: Thank you, Commissioner.

**<ADJOURNED INDEFINITELY**

**[3.20PM]**

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