

Public Transport – An Essential Service

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Abstract

This paper titled, “Public Transport – An Essential Service”, asks the questions:

- (a) Is the contracting out of bus services by Government a truly competitive process?
- (b) Do the processes provide real competition, which ensures continuing and reliable transport services, which are cost efficient and which provide value for money to the tax payer?
- (c) Is it possible to provide real competition through the competitive tendering of transport services in such a labour intensive industry as public transport?
- (d) Does employment law in Australia and bus service contract terms limit true competition for transport services?
- (e) Would a declaration that public transport was an essential service make the process more competitive or would it infringe upon the internationally accepted human right to freedom of association?

The paper looks at the legislative and contractual regimes in Australia and seeks to answer the questions posed above.

An analysis is made of the process of tendering bus service contracts in Australia, including offering transport service contracts, formerly operated by public utilities, to private enterprises and the process of testing the market by way of tender in the renewal of existing privately operated service contracts.

The proposition presented by this paper is that the contracting out process limits real competition, especially when passenger transport contracts in Australia require a successful tenderer to take on all the existing employees and all existing employment conditions, including rates of pay, rostering and hours of work.

Furthermore, the paper espouses the view that the industrial laws of Australia hinder the ability of an incoming transport operator to negotiate with their work force for greater work productivity and cost efficiencies.

It is suggested that Australian industrial laws, supported by the unalienable right to freedom of association make it almost impossible for an transport operator to negotiate a new industrial agreement (an enterprise agreement) without disruption to the transport services, placing the transport Operator potentially into default through unchecked industrial strike action (protected action) from Trade Union members, which causes an unacceptable disruption to services.

A conclusion is provided which suggests that the current contracting out process is flawed because it propagates the problem and that a solution for true competition would be for public transport to be considered an essential service and therefore any successful contracted operator would be able to bid for a transport contract knowing that costs efficiencies would be able to be achieved through enterprise bargaining, unimpeded by the threat of stop work, which disrupts the transport services.

Key Words: Competitive Tendering, Protected Action, Enterprise Bargaining, Industrial Relations, Freedom of Association, Public Transport an Essential Service.

1. Background

1.1 In Australia the tendency in the major capital cities is for the respective public transport authorities to look at the tendering out of bus service contracts rather than performance based renegotiation with existing transport providers.

1.2 Currently the process of competitive tendering of bus service contracts occurs in Sydney, Melbourne (part), Adelaide, Darwin and Perth.

1.3 Governments in Victoria, Northern Territory, New South Wales, Victoria, South Australia and Western Australia have also sought to privatise their public transport services through a public tender process. Only Sydney, Brisbane and Hobart retain a Government bus transport provider.

1.4 The reform process, whereby Government transitions from performance based renewal of bus service contracts to tendered contracts, takes the initial form of amendments to passenger transport legislation. Usually that legislation provides greater powers to the transport regulator, removes goodwill as a component of the business, removes any inference of contract renewal rights and introduces strict operating performance regimes underpinned by penalties for non-compliance.

1.5 Following legislative reform comes contract reform, which introduces contract terms, which gives to the Regulator greater control over transport planning, ownership of assets and provides guarantees for continuity of service.

1.6 With the barriers to tender removed by legislative reform and contract reform successive State Governments in Australia have sought to use the tender process for contracting out.

1.7 Governments seek to justify this policy as a value for money proposition. Government argues that to achieve real cost efficiency and productivity it is necessary to go to the market by way of competitive tender.

1.8 The flaw in this argument arises when successful contractors are:

1.8.1 Contracted to accept in most cases the existing employees of an outgoing and unsuccessful service provider or a recently tendered public utility.

1.8.2 Contracted to retain the same employment conditions of the outgoing operator which includes accepting the current employment contract or enterprise agreement.

1.8.3 Constrained by their ability to renegotiate industrial agreements with employees, because industrial laws within Australia allow for protracted protected action (i.e. strike action), which can threaten the continuity of services and give rise to default under the transport contract.

1.8.4 Provided with transport contracts, which penalize for breaches such as protracted industrial action of which an operator is almost powerless to stop. Such contracts also provide for potential contract default where transport services are withheld by employees as part of the protracted stop work action.

1.8.5 Restricted by industrial laws which allow an almost unfettered right for employees and trade unions to take protected action in support of a log of claims which may contain ambit claims and in most cases those logs of claim seek greater financial commitments from the contractor or the Government, which is funding the services through the contract.

1.9 Since 2009 Australia's industrial laws have been governed by the Fair Work Act 2009 (the Act), which has had the effect of bringing corporations and most individually owned businesses under the federal umbrella. Only the crown utilities remain within their own State jurisdictions, although in Western Australia individuals and partnerships remain within the State's jurisdiction.

1.10 The stated objects of the Act are to provide workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth

for Australia's future economic prosperity and take into account Australia's international labour obligations. **(Reference: Fair Work Act 2009; section 3)**

1.11 However it can be argued in the case of public transport that the need to provide continuing transport services to the public is substantially impacted by the ability of trade unions to take protracted protected action which threatens continuity of service.

1.12 It could also be argued that unless public transport is declared an essential service, which would have the effect of limiting such disruptive action that it is almost impossible for a contracted operator to achieve true cost efficiencies through negotiation and therefore value for money for taxpayers, who are principally funding those transport services.

1.13 It has been argued by transport advocates that public transport should be recognized as an essential service. In their paper contained in Journey 1 in November 2011, Hensher and Wong first proclaimed the principle in their abstract:

"Public Transport is an essential service and ensuring its effective and efficient provision is a priority of many governments"

(Reference: Different Approaches to Public Transport –David A. Hensher and Gabriel Wong, Journeys 1 November 2011)

1.14 Hensher and Wong went on further to comment on the need for public transport to be declared an essential service but not all Governments have not heeded their call.

"Because of its economic and social importance, public transport is considered an essential service in most cities, much like electricity, water and telecommunications. Hence effective and efficient provision of public transport services is a priority of most governments."

(Page 31 Different Approaches to Public Transport – David A. Hensher and Gabriel Wong, Journeys 1 November 2011)

2. Bus Service Contracts in Australia

2.1 The justification for contracting out bus services in Australia seems to center around two major factors, both of which are passenger related, that being:

2.1.1 Continuity of service, and

2.1.2 Value for money to the tax payer

2.2 To achieve this end Governments in the various States of Australia offer transport service contracts which:

2.2.1 Contain terms which allow Governments to step into the contracted areas in the event of serious default, which includes circumstances in which services are disrupted for more than 24 hours.

2.2.2 Includes the power to step into a bus depot and to operate the bus fleet to maintain services.

2.3 Further, in keeping with the continuity of service theme bus service contracts contain clauses which require transport operators to:

2.31 Comply with all relevant industrial laws during the term of the contract, including guaranteeing the right to freedom of association i.e. the right of its employees to be members of a trade union;

2.32 Refrain from negotiating any new employment agreements which extend beyond the date of the contract; and

2.33 Offer up for re-employment their entire work force to any incoming operator at the end of the term.

2.4 To this extent most tender documents in a contracting out process require an incoming operator to take on all existing employees irrespective of their employment status and upon the same terms and conditions as they were experiencing under the previous employee. This can include accepting responsibility for all employee entitlements including leave (including sick leave accruals), annual leave and long service leave.

2.5 Examples of some of these types of clauses are set out below **(Reference: New South Wales Metropolitan Bus System Contract 2005)**

Freedom of Association (Clause 17.2 (d))

The Operator and the Director-General also acknowledge that:

(i) *consistent with the principles of Chapter 5, Part 1 of the Industrial Relations Act 1996 (NSW), the freedom of association rights of each Driver are not affected by the operation of Clause 17.2(e) and, in particular, each Driver is entitled to join, but may not be compelled to join, the Relevant Union; and*

(ii) *Clause 17.2(e) provides a mechanism to formalize the Relevant Union's access to the workplace and the provision of information to Drivers consistent*

with the principles of section 297 of the Industrial Relations Act 1996 (NSW).(Clause 17.2 (d))

Step in Rights (Clause 23.1)

If:

- (i) a Termination Event has occurred and is subsisting; or*
- (ii) a Non-Compliance Event occurs which is not cured to the satisfaction of the Director-General in accordance with Clause 24, and which, in the opinion of the Director-General:*
 - (A) materially adversely affects the performance of all or any of the Bus Services;*
 - (B) disrupts, restricts or prevents the operation of all or any of the Bus Services for more than 24 hours;*
 - (C) disrupts, restricts or prevents the performance of all or any of the Bus Services for more than 24 hours;*
 - (D) gives rise to a right of a party to a Bus Lease or Depot Lease to terminate the Bus Lease or Depot Lease;*
 - (E) increases the risk of imminent death or imminent injury to passengers and Staff involved in the enjoyment and performance of the Bus Services or the other traffic in the Contract Region or on the Traversing Route;*
 - (F) directly or indirectly avoids or materially prejudices or frustrates the tender or contracting of the performance of the Bus Services at the end of the Contract Term to a Successor Operator; or*
 - (G) is likely to give rise to any of the above, and*
- (iii) the Director-General has given notice to the Operator in accordance with Clause 23 (1)(b), then, a Step-in Party may exercise all or any of the Powers set out in Clause 23 (2) (in this Clause 23, the **Step-in Powers**) in an endeavour to remedy the Termination Event or the Non-Compliance Event or to overcome any risk or mitigate the consequences resulting from the Termination Event or the Non-Compliance Event.*

Successor Operators to Make Offers (Clause 26.8)

- (a) *The Director-General must procure that any Successor Operator makes offers of employment on equivalent terms and conditions (including all accrued entitlements) to Contract Region Employees (other than the persons named in Schedule 16). Offers made by a Successor Operator must take effect from the expiry or termination of this Contract.*
- (b) *On termination or expiry of the Contract the Operator must deliver to the Director-General or a Successor Operator a schedule setting out against each Acquired Employee the respective amounts for accrued annual leave, long service leave and sick pay.*

Variation of Terms and Conditions of Employment (Clause 28.1)

The Operator must not, without the prior written consent of the Director-General (which may not be unreasonably withheld or delayed), vary, or purport or promise to vary, the terms or conditions of employment (including superannuation entitlements) of any Contract Region Employee.

Engagement of New Staff (Clause 28.2)

In the End of Contract Period, the Operator may not engage new Staff (other than to replace existing employees) without the prior written consent of the Director-General (which consent must not be unreasonably withheld or delayed where the Operator can demonstrate to the reasonable satisfaction of the Director-General that new Staff are necessary for the provision of the Bus Services).

2.6 The ultimate effect of these contract clauses is to:

- 2.6.1 Reduce the ability of a new contracted player to negotiate cost efficiencies through the tender process when it is almost impossible to make any meaningful changes to labour costs when all employees must remain and an existing operator is powerless to negotiate better terms beyond the term of the current contract term.
- 2.6.2 These New South Wales transport contracts even prevent new employees from being employed without the authority of the Regulator at the end period of the term of the contract.
- 2.6.3 The guarantee in the contract that employees are able to become members of the trade union (freedom of association) and allow for protected action during any negotiations for new employment conditions means that any prolonged protected action (i.e. stop work action) might give rise to powers of step in by the Government

on the basis of the disruption of services envisaged by **clause 23. 1(c)** in the Metropolitan Bus System Contract referred to above.

2.7 Underpinning contract terms, which are part of the contracting out processes in Australia are industrial laws which further erode the ability of an existing contracted bus service operator and any incoming new operator to provide cost savings for labour costs, which in most cases represents up to fifty (50%) percent of total operating costs.

3 Industrial Relations In Australia

3.1 Australia's industrial system is governed mostly by the **Fair Work Act 2009 (No. 28, 2009)**. The Act regulates industrial relations for corporations and most single entities and partnerships. The Act does not regulate those employees who are employed by the various State utilities. Those employees are still employed within the jurisdiction of the State industrial legislation.

3.2 However in circumstances where a State instrumentality is privatised through a competitive tender those employees who become employed by a new privately owned corporation other than a Government entity come within the provisions of the Act.

3.3 Similarly, if an existing corporation loses the right of renewal or sells their interests in the transport service business then the provisions of the Act provides a similar requirement to the New South Wales contract system, whereby any new employer must take on any transferring employees on the same terms and conditions that applied to the previous employment.

3.4 Furthermore the right to freedom of association, which guarantees an almost unlimited right to take industrial action without suspension or termination makes it very difficult for an incoming contract provider to effect labour costs efficiencies through the enterprise agreement negotiation process.

3.5 Negotiations for an enterprise agreement are the result of fair bargaining between employers and employees and their representatives, usually a trade union. The commencement of negotiations for a new enterprise agreement however triggers the ability of employees to take strike action (protected action) in support of their negotiations.

3.6 Protected action takes place after orders are made by the Fair Work Commission allowing for a ballot to be taken from the Union members, only, to see if those members want to take industrial action against their employer during the negotiations for an enterprise agreement. Once protected action occurs and this may a number o forms

from wearing Union identifying tee-shirts, handing out Union leaflets, 2, 4 and 8 hours stop work action and then longer industrial action up to 24 hours and 48 hours.

3.7 In this environment where the trade union members are exercising their rights to better work conditions and invariably higher wages a contracted operator has little or no chance to negotiate productivity savings from the work force which would allow for costs efficiencies which are a requirement in any tender process.

3.8 This process is even more pronounced with the privatisation of public utilities in which trade unions have achieved major gains for their employees over many years of combative action against encumbant Governments. Employees in these circumstances are reluctant to give up any of those gains in the name of productivity or cost efficiency.

3.9 Examples of how the legislative process hinders effective bargaining for productivity gains are set out below (Reference: Fair Work Act 2009, No 28 2009, as amended) :

Protected Action Ballots – Objects (Section 436)

The object of the Division (Division 8 – Protected Action Ballots) is to establish a ‘fair, simple and democratic process to allow a bargaining representative to determine whether employees must engage in particular protected industrial action for a proposed enterprise agreement.’

Suspending Protected Action (Section 425)

(1) *FWA must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if FWA is satisfied that the suspension is appropriate taking into account the following matters:*

- (a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue;*
- (b) the duration of the protected industrial action;*
- (c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;*
- (d) any other matters that FWA considers relevant.*

(2) *FWA may make the order only on application by:*

- (a) a bargaining representative for the agreement; or*
- (b) a person prescribed by the regulations*

Suspend or Terminate Protected Act (Section 424)

(1) FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

- (a) is being engaged in; or
- (b) is threatened, impending or probable;

if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
- (d) to cause significant damage to the Australian economy or an important part of it.

Transmission of Business in the Private Sector (Section 313)

(1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:

- (a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the **transfer time**) the transferring employee becomes employed by the new employer; and
- (b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.

(2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.

(3) This section has effect subject to any FWA order under subsection 318(1).

Transfer of Business from the Public Sector (Section 768AD)

When there is a transfer of business

(1) *There is a transfer of business from a non-national system employer that is a State public sector employer of a State (the old State employer) to a national system employer (the new employer) if the following requirements are satisfied:*

(a) the employment of a person who is a State public sector employee of the old State employer has terminated;

(b) within 3 months after the termination, the person becomes employed by the new employer;

(c) the work (the transferring work) the person performs for the new employer is the same, or substantially the same, as the work the person performed for the old State employer;

(d) there is a connection between the old State employer and the new employer as described in subsection (2), (3) or (4).

Transfer of assets from old State employer to new employer

(2) There is a connection between the old State employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old State employer, or an associated entity of the old State employer , has outsourced the transferring work

3.10 The right to take protected action is regularly upheld by the Fair Work Commission and the effect of such support for the right to take action hinders and ultimately prevents a contracted operator from negotiating an effective employment contract with their employees which allows for productivity savings to offset higher wages and better employment conditions.

3.11 The position in the Australian industrial environment was no better establish than by the decision in the Transit Australia case (**Reference: Transit Australia Pty Ltd v Transport Workers' Union of Australia [2011] FWA 5006**) by Commissioner Ian Cambridge in refusing to suspend protected action on the Sunshine Coast of Queensland where stop work action had occurred for over six months disrupting the entire population of the Sunshine Coast. Commissioner Cambridge emphatically stated:

“There is some basis to support the proposition that the public interest would be served by suspension of the protected industrial action as is relevant to paragraph (c) of subsection

425 (1) of the Act. It would seem however that support for this proposition is largely contingent upon a public interest test confined to the travelling public of the Sunshine Coast as opposed to the broader concept of public interest.” [18]

“In that respect the objects appear to be confined to providing ‘clear rules governing industrial action’. There is no specific object relating to avoiding or minimizing protected industrial action.” [19]

“The legislative regime has been constructed with a clear intention to facilitate the taking of protected industrial action. Although I personally find such an approach to be inconsistent with other objects regarding the promotion of productivity and economic growth, it would appear that the suspension of the protected industrial action by way of Order under s.425 would in this instance, be likely to be inconsistent with the objects of the Act.” [19]

3.12 In the contracting out environment where a contracted operator is required to take on all existing employees with their existing employment contracts the opportunity for real competition in the tender process is substantially reduced and limited to other costs ignoring the fact that at least 50% of the total operating costs are labour costs.

3.13 **The Australian Public Transport Industrial Association**, which is the industrial arm of the Bus Industry Confederation, the peak industry body in Australia, representing bus and coach operators, bus and chassis suppliers, body manufacturers and associated suppliers has been calling for public transport to be recognized as an essential service, which would have the effect of lowering the bar to suspend or terminate industrial action and thereby allow for better implementation of the contracting out process by providing the opportunity for contract transport providers to negotiate better employment contracts which provided cost efficiencies and allow for the contracting out process to be truly competitive.

3.14 Any consideration of the effect of having public transport declared an essential service also requires an assessment of the universally supported right to freedom of association.

4 Public Transport an Essential Service – the case ‘For’ and ‘Against’

4.1 A declaration by Regulators that Public transport is an essential service would allow transport providers, when they competitively tendered for either private or public transport contracts they would be able to factor into the tender a cost efficiency for

labour costs provided they had the expertise to negotiate fair and reasonable employment terms whilst at the same time providing productivity savings which might achieve the intention of the contracting out process to provide value for money to tax payers.

4.2 Such a declaration would significantly reduce the ability of industrial action being taken and therefore a contracted operator would be able to negotiate cost efficiencies without the threat of industrial action and without the contractual threat of breaching a contract terms which requires continuity of service.

4.3 Public Transport Industry is a labour intensive industry and bus and coach drivers are employed either under an Industrial Award or in most cases under negotiated Enterprise Agreements. Most bus operators in the States and Territories in Australia operate Government contracted route and school bus services. The public is therefore dependent upon the continuity of these regular scheduled bus services. A break down or a series of stoppages in those services, which occurs from time to time, creates considerable inconvenience to the public but more importantly:

- Places the public in harm's way as they try to get to their destinations without access to their public transport
- Impacts in the ability of the public to access medical assistance, hospital services, shopping centres and family
- Discriminates against those who are unable to access any other form of transport, especially the young of school age and the elderly
- Impacts on the economy of a region if the break down in services is protracted.

Long distances travel, day charters, tourist ravel are generally deregulated and dependent upon the number of passengers carried to provide services. Movement therefore in wage rates without commensurate productivity savings would cause such operators to question their viability. On the other hand with the Government contracted services are funded by the Government and unrealistic wage claims can lead to extra government costs followed by reduced services.

4.4 All of these factors contribute to the premise that prevents true competitive tendering which would be substantially alleviated by a limitation on the taking of industrial action which stop the services.

4.5 The debate about which industries should be declared as essential has raged for many years and is tied up in Australian Labour law and in the powers given to the Fair Work Commission under the Fair Work Act 2009 to suspend or terminate protected action if

that action endangers the life, personal safety or health or welfare of the population or part thereof.

4.6 What works against the argument for public transport being declared an essential service is the consequential on-flow which is to limit or prevent the right to take industrial action in support of better working conditions. Most Trade unions would argue that it is the right to strike and to take other industrial action to disrupt industry and in the bus transport case services to the public brings the parties to the negotiation table much better.

4.7 If you assume however that trade unions will never or at least very rarely reduce wage rates or terms and conditions that are beneficial to their members it is hard to see how any real change can occur because in most cases productivity may mean a right is watered down such as reduced personal leave or the like.

4.8 The argument against public transport being declared an essential service is fortified by international labour laws which upholds the right to freedom of association as paramount although some industries are considered as essential such as health and safety services such as the ambulance service, nursing, postal and telecommunications.

4.9 Other jurisdictions have also declared public transport as essential such as in the State of New York where it is against the law to take stop work action to prevent the daily operation of the New York City Transport subway system. In Singapore public transport is deemed an essential service with a heavy reliance upon public transport.

4.10 It is highly unlikely into the future that public transport will be recognised as an essential service in Australia, although in 2011 when the Executive Director of Qantas, Australia's main airline transport carrier decided to ground all of his aeroplanes as a response to continued industrial action the Fair Work Commission acted quickly to deem that Australia's international reputation was at risk and its citizens who became stranded overseas in danger that the industrial action should be terminated immediately and the issue arbitrated in the Fair Work Commission.

5. A Conclusion

5.1 It is the conclusion of this paper that the contracting out process does not provide true competition as the process is restricted by the terms of the proposed tender documents which includes the proposed contract for services.

- 5.2 The conclusion is that the contract terms, which require all successful or renewing contracted Operator to take on all existing employees on the same terms and condition of employment make it almost impossible to propose cost efficiencies which will see a reduction in labour costs.
- 5.3 This is no better exemplified by the contracted Operator, who considers that they could undertake the contracted transport task with less drivers and at a lower cost to the business by reducing or re-allocating work which would reduce wages.
- 5.4 To achieve these savings an Operator and Employer would have to negotiate with a potentially intransigent workforce which is support by contract terms which makes it a termination event, giving rise to step in by Government if the services are in any way impeded by more than 24 hours.
- 5.5 The industrial laws further prevent such efficiency as the right of employees to associate and to take industrial action in the form of stop work action for protracted periods is imbedded in the culture of the judicial body the Fair Work Commission and into the Fair Work Act itself.
- 5.6 The only way in which this dynamic could be altered in support of Government's stated intention in contracting out through the tender process would be to:
- 5.6.1 Amend the Fair Work Act by repealing the provisions that require incoming private transport providers to take on the existing public employment agreements
- 5.6.2 Further amend the Fair Work Act to support the premise that public transport is an essential service and that during a protracted industrial dispute which entails lengthy stoppages of service that the public is not only inconvenienced but also the impact of a loss of service is vital to the proper working of a modern society.
- 5.6.3 Remove contract conditions in proposed tender documents which require a successful operator to take on 100% of existing employees and allow the successful tender to encapsulate an offer which addresses existing employees but also allow for staff reductions.
- 5.6.4 Provide a relaxation of the step in rights for a lack of continuity of service when industrial action does take place, especially in circumstances where the parties are involved in lengthy negotiations for a new employment agreement.
- 5.7 Only the adoption of such changes may give rise to a real competitive environment to justify the tendering out of transport service contracts.

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