

BACKGROUND PAPER – COPIED STATE AWARDS



Fair Work Act 2009

s.285 – Annual wage reviews to be conducted

Annual Wage Review 2021–22 (C2022/1)

MELBOURNE, 25 MAY 2022

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1. The legislative framework

1.1. What are copied State awards?

[1] Prior to December 2012, the *Fair Work Act 2009* (Cth) (**FW Act**) only preserved an employee’s employment terms and conditions in the circumstances of a transfer of business, when the transfer was between 2 national system employers.

[2] Part 2-8 of the FW Act applies to transfers of business between Commonwealth, Australian Capital Territory, Northern Territory and Victorian public sector employers¹ and another national system employer. It does not apply to transfers of business between a public sector employer in other States and a national system employer.

[3] The *Fair Work Amendment (Transfer of Business) Act 2012* (Cth) inserted Part 6–3A into the FW Act and commenced on 5 December 2012.

[4] Part 6-3A of the FW Act largely reflects the transfer of business provisions in Part 2-8 of the FW Act. It provides for the transfer of certain terms and conditions of employment when there is a transfer of business from a non-national system employer that is a State public sector

¹ As those employers are national system employers due to the Commonwealth’s power to legislate with respect to the Territories and to give effect to Victoria’s referral of matters to the Commonwealth and so extend application of the FW Act to most of the Victorian public sector.

employer² (called ‘**the old State employer**’) to a national system employer (called ‘**the new employer**’).³ Part 6-3A applies where there is a transfer of business from a State public sector employer in New South Wales (NSW), Queensland, South Australia, Tasmania or Western Australia to a national system employer.

[5] There is a transfer of business between the old State employer and the new employer if the following requirements are satisfied:

- the employment of a person who is a public sector employee of the old State employer has terminated
- within 3 months after the termination, the person becomes employed by the new employer
- the person performs the same, or substantially the same, work (the ‘**transferring work**’) for the new employer as they performed for the old State employer, and
- there is a connection between the old State employer and the new employer as described in ss.768AD(2) to (4) (in broad terms, where the old State employer transfers assets or outsources work to the new employer, or the new employer is an associated entity of the old State employer).⁴

[6] A transfer of business involves the ‘transfer of employment’ of one or more employees of the old State employer to the new employer. Each of those employees is a ‘**transferring employee**’.⁵

² Section 12 of the FW Act contains the following definitions:

‘**State public sector employer**’ of a State, means a non-national system employer that is:

- (a) the State, the Governor of the State or a Minister of the State; or
- (b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (c) a body corporate in which the State has a controlling interest; or
- (d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (e) any other employer in the State of a kind specified in the regulations;

and includes a non-national system employer of law enforcement officers of the State but does not include a local government employer of the State.

‘**State public sector employee**’, of a State, means:

- (a) an employee of a State public sector employer of the State; or
- (b) any other non-national system employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State but does not include a local government employee of the State.

³ See FW Act s.768AD(1).

⁴ FW Act ss.768AD(1)(a)-(d). Section 768AD is closely modelled on s.311 in Part 2-8 of the FW Act.

⁵ FW Act ss.768AE(1) and 768AD(1)(a).

[7] The Explanatory Memorandum to the *Fair Work Amendment (Transfer of Business) Bill 2012 (EM)* outlines the scheme of the Bill as follows:

‘Currently, where a non-national system employee transfers to employment with a national system employer due to a transfer of business (e.g. an outsourcing arrangement due to a restructure or pursuant to an arrangement for the sale of the employer’s assets), the employee’s terms and conditions of employment are determined by the industrial instrument governing employment with the new employer. This means that the employee loses the benefit of the terms and conditions in the industrial instrument with the non-national system employer. This will be the case even though they are performing the same work. The amendment Bill will ensure that a State public sector employee will continue to enjoy the terms and conditions of employment with the non-national system employer through the preservation of those terms and conditions where they become transferring employees in a transfer of business to a national system employer ...’⁶

[8] Where there is a transfer of business, Part 6-3A provides for certain employment terms and conditions of the transferring employee’s employment with the old State employer to be transferred to their employment with the new employer. This is achieved by the creation of a new instrument—a **‘copied State instrument’**—for each transferring employee. The new instrument is a federal instrument and is enforceable under the FW Act.⁷

[9] The EM states:

‘18. The transfer of those terms and conditions is achieved by creating a new federal instrument (a copied State instrument), that ‘copies’ the terms and conditions in the State award and/or State employment agreement for the employee as they were immediately before the time of her or his termination of employment with the old employer.

19. The general rule is that each transferring employee will have his or her own copied State instrument(s) because they may have different terms and conditions to each other at the time their employment is terminated (e.g. because each termination of employment may occur at different times).’⁸

[10] There are 2 types of copied State instruments—a **‘copied State award’** and a **‘copied State employment agreement’**.⁹ A copied State award copies the terms of a State award¹⁰ that covered the transferring employee and the old State employer immediately before the termination of the employee’s employment with the old State employer.¹¹ The copied State award is taken to come into operation immediately after the **‘termination time’**—the start of the day the employment of the employee is terminated by the old State employer¹²—and to

⁶ Explanatory Memorandum to the *Fair Work Amendment (Transfer of Business) Bill 2012* p.4.

⁷ FW Act s.768AG.

⁸ Explanatory Memorandum to the *Fair Work Amendment (Transfer of Business) Bill 2012* [18]–[19].

⁹ FW Act s.768AH.

¹⁰ In simple terms, ‘State award’ is defined in s.768AJ as an instrument that regulates the terms and conditions of employment made under a State industrial law by a State industrial body and is referred to in that law as an ‘award’.

¹¹ FW Act s.768AI. A copied State employment agreement copies the terms of a State employment agreement that covered the transferring employee and the old State employer immediately before the termination of the employee’s employment with the old State employer: s.768AK.

¹² FW Act ss.768AI and s.768AE(2).

include the same terms as were in the original State award immediately before the termination time.¹³

[11] While a copied State award for a transferring employee is in operation and covers the employee, or an employer (whether the new employer or another national system employer) or another person in relation to the employee, a modern award will not cover any of them in relation to the employee.¹⁴

1.2 When is a copied State award in operation?

[12] A copied State award for a transferring employee comes into operation immediately after the employee's termination time.¹⁵

[13] Generally, the copied State award *covers* the transferring employee and the new employer in relation to the transferring work from the employee's '**re-employment time**'.¹⁶ It will *apply* to the transferring employee/new employer (and be enforceable by them) if the copied State award covers the employee/new employer and is in operation, no other provision of the FW Act has the effect that the copied State award does not apply, and immediately before the employee's termination time, the employee/old State employer would have been required to comply with the terms of the original State award or have been entitled to enforce it.¹⁷

[14] A copied State award can be terminated only in limited circumstances,¹⁸ but will cease to cover the transferring employee if, after the employee's re-employment time, an enterprise agreement starts to cover the employee in relation to the transferring work.¹⁹

[15] Unless terminated earlier, a copied State award ceases to operate at the end of 5 years (the **default period**), starting on the day the employee's termination time occurred (or such longer period prescribed in regulations or extended by the Fair Work Commission (**Commission**) in accordance with regulations).²⁰ After that time, the transferring employee generally reverts to the fair work instruments that apply at the new employer's workplace.²¹

[16] Where a copied State award ceases to operate through effluxion of time and as a result a modern award applies to the transferring employee, this is not intended to result in a reduction

¹³ FW Act s.768AI(2), and subject to other provisions in Part 6-3A.

¹⁴ FW Act s.768AS(1). The exception to this is that for the purposes of determining whether an enterprise agreement passes the better off overall test in relation to a transferring employee, the enterprise agreement is to be compared against the modern award.

¹⁵ FW Act s.768AO(1).

¹⁶ FW Act s.768AN. 'Re-employment time' of a transferring employee is the start of the day the employee becomes employed by the new employer: s.768AE(3).

¹⁷ FW Act ss.768AM and 768AG.

¹⁸ See FW Act s.768AY.

¹⁹ FW Act s.768AU(2).

²⁰ FW Act s.768AO(2)(a). Section 768AO(2) provides for regulations to be made to prescribe a longer period of operation for a copied State award or to allow the Fair Work Commission to make an order extending the period of operation of a copied State award. No such regulations have been made.

²¹ The copied State award will cease to cover the transferring employee (s.768AN(6)), so that s.768AS(1) will no longer exclude modern award coverage and s.768AU will no longer exclude coverage by a pre-existing enterprise agreement.

in take-home pay of the employee.²² Where an employee does suffer a reduction in take-home pay as a result, the Commission may make a take-home pay order to remedy this.²³ The take-home pay order will continue to apply to the employee for so long as the modern award continues to cover the employee.²⁴

1.3 When can a copied State award be varied?

[17] Section 768AW specifies the circumstances in which the Commission may vary a copied State instrument (including a copied State award). It provides:

768AW Variation in limited circumstances

A copied State instrument for a transferring employee cannot be varied except under:

- (a) section 768AX;²⁵ or
- (b) item 20 of Schedule 3A to the Transitional Act (which deals with variation of discriminatory instruments) as that item has effect because of section 768BY; or
- (c) item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY;
- (d) Division 4 of Part 3 of Schedule 11 to the Transitional Act (which deals with transfer of business) as that Division has effect because of section 768BY.

[Emphasis added]

[18] Item 20 of Schedule 9 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Transitional Act)* provides:

20 Variation of Division 2B State awards in annual wage reviews under the FW Act

- (1) In an annual wage review, the FWC may make a determination varying terms of a Division 2B State award relating to wages.
- (2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a Division 2B State award relating to wages in the same way as it applies to a modern award.

[19] Section 768BY of the FW Act modifies relevant provisions of the Transitional Act. As a result, item 20 in Schedule 9 to the Transitional Act has effect in relation to a transferring employee as if a reference to a 'Division 2B State award' is a reference to a 'copied State award for the transferring employee'. Accordingly, item 20 of Schedule 9, as modified by s.768BY of the FW Act, is to be read as follows:

²² FW Act s.768BR(1). Section 768BR(3) sets out where a transferring employee suffers a 'reduction in take-home pay'.

²³ FW Act s.768BS(1).

²⁴ FW Act s.768BU. The note under this section observes that the take-home pay order will continue to apply even if an enterprise agreement starts to apply to the employee.

²⁵ FW Act s.768AX allows the Commission to vary a copied State instrument in certain circumstances including to resolve ambiguities or uncertainties or to better align the instrument with the working arrangements of the new employer's enterprise.

20 Variation of copied State awards for the transferring employees in annual wage reviews under the FW Act

- (1) In an annual wage review, the FWC may make a determination varying terms of a copied State award for the transferring employee relating to wages.
- (2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a copied State award for the transferring employee relating to wages in the same way as it applies to a modern award.²⁶

[20] Item 20 of Schedule 9 to the Transitional Act applies in relation to a copied State award in the same way as it applies to a Division 2B State award, from the transferring employee's re-employment time.²⁶ Item 20(2) provides that for the purpose of making a determination in an annual wage review to vary minimum wages in a copied State award, Division 3 of Part 2-6 of the FW Act (other than s.292, relating to the publication of varied wage rates) applies. Division 3 of Part 2-6 deals with annual wage reviews.

[21] Sections 285(2)(a)(i) and (b), in Division 3 of Part 2-6, provide that in an annual wage review the Commission must review modern award minimum wages and 'may make one or more determinations varying modern awards to ... vary ... modern award minimum wages'. As the provisions for an annual wage review apply to copied State awards (except s.292), in an annual wage review the Expert Panel must review copied State awards and may make a determination varying minimum wages in copied State awards.²⁷

Question 1: Do the parties agree with the description in Sections 1.1–1.3 of the legislative framework applying to copied State awards?

1.4 Can a determination made in an annual wage review that varies wages in a copied State award be varied or revoked?

[22] The source of the Commission's power to vary or revoke its decisions is s.603(1) of the FW Act, which provides:

603 Varying and revoking the FWC's decisions

- (1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

[23] However, the types of decisions that may be varied or revoked under s.603(1) are limited by s.603(3), which relevantly provides:

- (3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

- ...
- (d) a decision under Part 2-6 (which deals with minimum wages);

²⁶ See FW Act s.768BY, including item 2 of the table in s.768Y(1) and column 3 of item 14 of the table in s.768BY(2).

²⁷ See further *Annual Wage Review 2016-17* [2018] FWCFB 2 [14].

[24] It follows that the Commission cannot under s.603 vary or revoke a decision made under Part 2-6 of the FW Act.²⁸

[25] In *Annual Wage Review 2016-17* [2018] FWCFB 2 (**2016-17 Review correction decision**), the Expert Panel contrasted the Commission’s power to correct an obvious error in a decision under s.602 of the FW Act²⁹ with its power to vary or revoke a decision under s.603:

‘Section 602 gives statutory effect to the ‘slip rule’ utilised by courts to correct errors arising from an accidental slip in a judgment. The scope of the power is limited; it does not empower the Commission to reopen or reconsider the correctness of an order made or to vary an order in light of subsequent circumstances. It is intended to avoid injustice by permitting the correction of inadvertent mistakes. The limited nature of the power in s.602 may be contrasted with the broader power to vary or revoke a decision pursuant to s.603. We note that decisions under Part 2-6 (which deals with minimum wages) are expressly excluded from the scope of s.603 and wish to make it clear that we are not purporting to make a variation or revocation of the kind proscribed by s.603(3)(d).’³⁰

[26] The *2016-17 Review correction decision* concerned an application under s.602(2)(b) of the FW Act to correct an error in *Annual Wage Review 2016-17*³¹ (**2016-17 Review decision**), in respect of the method for adjusting wages in copied State awards.³²

[27] In that matter, the union parties made submissions as follows:

‘The CPSU submitted that an order varying a copied State award made pursuant to s.768AW of the Act is not a decision made under Part 2-6 of the Act as Item 20(2) of Schedule 9 to the Transitional Act only applies Division 3 Part 2-6 of the Act (dealing with annual wage reviews) to copied State awards, and the balance of Part 2-6 does not apply. Accordingly, it submitted that “there is nothing in s.603 of the Act that prevents s.602 ... being utilised in these proceedings to correct an obvious error in the [2016-17 Review Decision].”

Similarly, the ACTU submitted that a decision to vary minimum wages in a copied State award is a decision made under Item 20(1) of Schedule 9 to the Transitional Act, and not a decision made under Part 2-6 of the Act.’³³ [Footnotes omitted]

[28] In response, Water NSW submitted the Expert Panel did not have jurisdiction to correct the 2016-17 Review decision as this would contravene s.603(3)(d):

‘the nature of the alleged error means that the correction would amount to a variation of the AWR 2017 and consequent wages outcome for those covered by copied State awards.’³⁴ [Footnotes omitted]

²⁸ See also [2020] FWCFB 3500 [220].

²⁹ The Commission may correct errors in modern awards and national minimum wage orders under ss.160 and 296 of the FW Act.

³⁰ [2018] FWCFB 2 [37].

³¹ [2017] FWCFB 3500.

³² The words ‘on and before 1 July 2016’ were used rather than the formulation used in the 2012-13 Review decision (‘after 1 July 2016 and before 1 July 2017’). This resulted in the unintended effect of precluding all employees covered by copied State awards who had received an increase any time before 1 July the previous year from receiving the Review increase of the current year.

³³ [2018] FWCFB [23]-[24].

³⁴ Ibid [28].

[29] The Expert Panel held:

‘In our view an obvious error has been made by the use of the words ‘on and before 1 July’, rather than the words ‘after 1 July 2016 and before 1 July 2017.’ A correction order would not result in ‘double-dipping’ and we propose to make such an order, pursuant to s.602, to correct the error in the 2016–17 Review decision.’³⁵ [Footnotes omitted]

[30] Item 20(2) of Schedule 9 to the Transitional Act, as applied by s.768BY of the FW Act, provides that, in an annual wage review, for the purpose of making a determination varying terms of a copied State award relating to wages, ‘Division 3 of Part 2-6 of the FW Act ... applies to terms of a copied State award ... relating to wages in the same way as it applies to a modern award.’ [Emphasis added]

[31] The *Fair Work Amendment (State Referrals and Other Measures) Bill 2009* (Cth) amended the Transitional Act to insert item 20 into Schedule 9. The [Revised Explanatory Memorandum](#) to the Bill relevantly states:

New item 20 – Variation of Division 2B State awards in annual wage reviews under the FW Act

393. This item allows FWA to vary the terms of a Division 2B State award relating to wages as part of an annual wage review.

394. With the exception of section 292 of FW Act (which relates to publication of varied wage rates), all of Division 3 of Part 2-6 of the FW Act applies to the terms of a Division 2B State award relating to wages in the same way as it applies to a modern award. [Emphasis added]

[32] In *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd (No 2)*,³⁶ (*ARTBIU v Transit Systems [No. 2]*) Rares J referred to his decision in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd*³⁷ (*ARTBIU v Transit Systems*) and observed that:

‘Transit Systems was liable to increase the employees’ wages by the amounts in the 2018-2019, 2019-2020 Annual Wage Review decisions made by the Fair Work Commission pursuant to Pt 2–6 of the Fair Work Act, and item 20 in Sch 9 of the Transitional Act, as well as the 2020-2021 decision.’³⁸ [Emphasis added]

[33] In *ARTBIU v Transit Systems*, Rares J commented that ‘[t]he table in s 768BY(2) modifies Pt 5 Sch 9 in the *Transitional Act*, relevantly, in item 14 in respect of base rates of pay for a transferring employee from the time of his or her re-employment and item 20 in Div 2 of Pt 5 of Sch 9 of the *Transitional Act*’³⁹. His Honour then observed:

‘That takes one back to the function of the Commission in determining annual wage reviews under Div 3 of Pt 2-6 of the Fair Work Act. The minimum wage objective set out in s 284(1) of the Fair Work Act requires the Commission to establish and maintain a safety net of fair minimum wages, taking numerous criteria into account. Under s 284(3), modern award

³⁵ Ibid [41].

³⁶ [2022] FCA 389.

³⁷ [2021] FCA 1436.

³⁸ [2022] FCA 389 [3].

³⁹ [2021] FCA 1436 [16].

minimum wages are defined as the rates of minimum wages in modern awards. Relevantly, ss 285 and 286(1) provide ...'⁴⁰ [Emphasis added]

[34] The above suggests that when in an annual wage review the Commission makes a decision to vary wages in a copied State award, that is a decision 'under' Division 3 of Part 2-6 of the FW Act as applied to the copied State award by item 20(2) of Schedule 9 to the Transitional Act (modified by s.768BY). If this is correct, as a result of s.603(3)(d) the Commission cannot vary or revoke a decision to adjust wages in copied State awards in an annual wage review.

1.5 What statutory criteria apply to variation of copied State award wage rates in an annual wage review?

[35] In *Annual Wage Review 2020-21*,⁴¹ the Expert Panel observed:

'The Review is conducted within the legislative framework of the Act, particularly the object of the Act in s.3, the modern awards objective in s.134(1) and the minimum wages objective in s.284(1).

The Panel must make a NMW order and may set, vary or revoke modern award minimum wages ... These tasks are undertaken by reference to the particular statutory criteria applicable to each function, particularly the minimum wages objective in s.284(1), the modern awards objective in s.134(1) and the considerations specified in s.578.'⁴²

[36] Sections 577 and 578 provide respectively:

577 Performance of functions etc. by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).'

578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and

⁴⁰ [2021] FCA 1436 [17].

⁴¹ [2021] FWCFB 3500.

⁴² Ibid [2]-[3].

- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

[37] Section 3 of the FW Act provides:

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing 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; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.'

[38] The modern awards objective is defined in s.134(1) of the FW Act. So far as may be relevant for present purposes, the modern awards objective 'applies to the performance or exercise of the ... [Commission's] ... functions or powers under Part 2-6, so far as they relate to modern award minimum wages' (s.134(2)).

[39] The minimum wages objective is defined in s.284 of the FW Act:

What is the minimum wages objective?

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
 - (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
 - (b) promoting social inclusion through increased workforce participation; and
 - (c) relative living standards and the needs of the low paid; and
 - (d) the principle of equal remuneration for work of equal or comparable value; and
 - (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.

When does the minimum wages objective apply?

- (2) The minimum wages objective applies to the performance or exercise of:
 - (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

Meaning of modern award minimum wages

- (3) **Modern award minimum wages** are the rates of minimum wages in modern awards, including:
 - (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
 - (b) casual loadings; and
 - (c) piece rates.

Meaning of setting and varying modern award minimum wages

- (4) **Setting** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. **Varying** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

[40] So far as may be relevant for present purposes, s.284(2)(a) (above) provides that the minimum wages objective 'applies to the performance or exercise of ... the ... [Commission's] functions or powers under ... [Part 2-6]'.⁴³

⁴³ See also *ARTBIU v Transit Systems* [17], extracted at [33] of this Background Paper.

Question 2: Do the parties agree with the description in Section 1.5 of the statutory criteria applying to the variation of wage rates in copied State awards in an annual wage review?

Question 3: What considerations in ss.284(1)(a)-(e) are relevant to the applications and submissions made by the parties?

Question 4: What other considerations are relevant to the applications and submissions made by the parties?

2. How have copied State awards been dealt with in previous annual wage reviews?

[41] In the first annual wage review decision dealing with copied State awards—the Annual Wage Review 2012–13 (**2012–13 Review**)—the Expert Panel took into account the Australian Council of Trade Unions’ (ACTU) submission that the variation of copied State award wage rates should be differentiated depending on when wage increases under copied State awards came into effect:

‘The ACTU ... submitted that any increase to these rates should be differentiated on the basis of when they came into effect (as some copied State awards may include rates of pay that have been increased as a result of state Industrial Relations Commission minimum wage determinations in the previous 12 months). The ACTU therefore submitted that a flow on of the increase awarded in this decision should only apply to those copied State awards that do not include a minimum wage increase awarded by a state Industrial Relations Commission in the past 12 months, with those that include a state increase awarded in the second half of 2012 to receive 50 per cent, and those awarded in the first half of 2013 to receive no increase.’⁴⁴

[42] The Panel introduced a ‘tiered approach’ to increasing wages in copied State awards to prevent ‘double-dipping’:

‘We have decided that for copied State awards currently in operation, in order to limit the impact of any “double-dipping” as a result of this decision and minimum wage increases previously awarded by state Industrial Relations Commissions, a tiered increase will be applied to these instruments ...’⁴⁵

[43] In the 2012–13 Review decision, the tiered approach was applied to copied State awards as follows:

- the full minimum wage increase was applied to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 July 2013
- half the minimum wage increase was applied to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 January 2013, and

⁴⁴ [2013] FWCFB 4000 [559].

⁴⁵ Ibid [560].

- no increase was applied to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2013 and before 1 July 2013.⁴⁶

[44] This tiered approach was applied by the Expert Panel in subsequent annual wage reviews, up to and including the 2016–17 Review decision.⁴⁷

[45] As related earlier, in the *2016-17 Review correction decision*⁴⁸ an error in the 2016-17 Review decision was corrected under s.602 of the FW Act. In that decision, the Panel also proposed to address any ‘double dipping’ concerns on a case-by-case basis rather than by the tiered approach previously applied:

‘It is our provisional view that AWR adjustments should generally apply to copied State awards, subject to a different outcome being determined in respect of particular copied State awards. In other words, rather than seeking to apply a tiered approach as a decision rule to mitigate “double dipping” we propose to address any “double dipping” on a case by case basis.’⁴⁹

[46] Parties were invited to comment on this *provisional* view in the context of the Annual Wage Review 2017-18 (**2017-18 Review**) proceedings.⁵⁰ As related by the Expert Panel in those proceedings:

‘The ACTU submitted that “the Commission’s provisional view is consistent with the function of distinct Reviews in each year and is a more orderly approach, notwithstanding that it does rely on parties to come forward should they contend for a different outcome.”

However, the ACTU also submitted that:

“The difficulty from our perspective is the lack of certainty regarding how a future Panel might deal with an application that a different increase, or no increase, apply to employees to whom a particular copied state award applies. If the Panel were inclined to confirm its provisional view, it would in our view be usefully supplemented by an expression of support for the merits of the approach adopted in the 2012–13 decision - and re-applied to the 2016–17 decision by the correction order issued this year – when dealing with requests for an exemption.”

The CPSU submitted that:

“... the current Annual Wage Review should make a fresh determination in relation to copied State awards such that

- wages increases mandated by Annual Wage Review decisions apply as a matter of course to copied State awards; and
- should a party to a copied State award make an application to vary (by reducing) the Annual Wage Review increase applied to a copied State award, then (and only then) the tiered approach developed by the Commission in the 2012-2013 Annual Wage Review decision should be applied.”

⁴⁶ See *ibid.*

⁴⁷ [2014] FWCFB 3500 [572]; [2015] FWCFB 3500 [536]; [2016] FWCFB 3500 [593]; [2017] FWCFB 3500 [699].

⁴⁸ [\[2018\] FWCFB 2](#).

⁴⁹ [\[2018\] FWCFB 2](#) [43].

⁵⁰ *Ibid.*

ABI submitted that the rates in the relevant transitional instruments be increased consistent with any increase determined for modern award minimum wages and made no submissions about the variation of copied State awards arising from this Review.

On 29 March 2018 we published a question on notice noting that the ACTU had invited the Panel to confirm its provisional view and asking if any other party took a different view.

No party took a contrary view to that expressed by the ACTU. ACCI observed that “[w]here there are concerns regarding ‘double dipping’ there should be scope for an employer or employer representative to raise this with the Commission.” No employer or employer representative raised any concern regarding ‘double ‘dipping’ in the event that we varied copied State awards consistent with the increase determined for modern award minimum wages.’⁵¹ [Footnotes omitted]

[47] As no party objected to the proposed approach, the Expert Panel in the 2017-18 Review confirmed the provisional view expressed in the *2016-17 Review correction decision* and determined that the adjustment to the rates in modern awards determined in the 2017-18 Review would be applied to copied State awards.⁵²

[48] The Commission applied a similar methodology and reasoning in its next 3 annual wage reviews, to vary minimum wages in copied State awards by the same amount as modern award minimum wages:

- 3 per cent in the *Annual Wage Review 2018-19*⁵³
- 1.75 per cent for the *Annual Wage Review 2019-20*,⁵⁴ and
- 2.5 per cent for the *Annual Wage Review 2020-21*.⁵⁵

[49] Until this Review, no party had sought to have the Expert Panel apply a different increase, or no increase, to particular copied State awards. Accordingly, the Panel has not needed to address the considerations it may take into account in determining such applications.

3. What applications have been made with respect to copied State awards in the Annual Wage Review 2021-2022?

3.1 The Transit Systems applications to vary or revoke previous annual wage review determinations

[50] In this Annual Wage Review 2021-22 (**2021-22 Review**), Transit Systems West Services Pty Ltd (and its related entities) (**Transit Systems**) has applied to the Commission to retrospectively vary or revoke determinations made in the 2018-19 and 2019-20 Review decisions so they do not apply to copied State awards applying to Transit Systems. These copied State awards are derived from the following 3 awards made by the Industrial Relations Commission of New South Wales (**State Commission** or **IRCNSW**), as in force at 1 July 2018:

⁵¹ [2018] FWCFB 3500 [446]-[451].

⁵² Ibid [452] and [495].

⁵³ *Annual Wage Review 2018-19* [2019] FWCFB 3500 [405] and [460].

⁵⁴ *Annual Wage Review 2019-20* [2020] FWCFB 3500 [411] and [471].

⁵⁵ *Annual Wage Review 2020-21* [2021] FWCFB 3500 [309].

- State Transit Authority Bus Operations Enterprise (State) Award 2018 (the **2018 Bus Operations Award**)
- State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2018 (the **2018 Senior and Salaried Officers Award**), and
- State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018 (the **2018 Bus Engineering and Maintenance Award**).

[51] Transit Systems' applications are in the following terms:

1. Vary or revoke the Commission's 2018-19 and 2019-20 Annual Wage Review (AWR) determinations to provide that the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively do not apply to the following copied State instruments:
 - a. [2018 Bus Operations Award]; and
 - b. [2018 Senior and Salaried Officers Award].
2. Further or in the alternative to 1, vary the Commission's 2018-19 and 2019-20 AWR determinations to provide that, in lieu of the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively, the Commission's tiered system developed in its 2012-13 AWR decision should be applied to the [2018 Bus Operations Award] and the [2018 Senior and Salaried Officers Award] as copied State instruments.
3. Vary or revoke the Commission's 2018-19 AWR determination to provide that the minimum wage increase of 3% in the 2019-20 financial year does not apply to the [2018 Bus Engineering and Maintenance Award] as a copied State instrument.
4. Further or in the alternative to 3, vary the Commission's 2018-19 AWR determination to provide that, in lieu of the minimum wage increase of 3% in the 2019-20 financial year, the Commission's tiered system developed in its 2012-2013 AWR decision should be applied to the [2018 Bus Engineering and Maintenance] as a copied State instrument.'

[52] Transit Systems holds the view that the 2.5 per cent annual wage increases provided for in the copied State awards were in substitution for any annual wage review increases of the Commission.⁵⁶ Accordingly, Transit Systems paid the increases provided for in the copied State awards but did not pay any additional Review decision increases.⁵⁷

[53] We note that of Keolis Downer, Transdev Australasia Pty Ltd (**Transdev**), Busways North West Pty Ltd (**Busways**) and Transit Systems (the **Employer parties**), only Transit Systems is affected by previous annual wage review determinations varying copied State awards, as Keolis Downer, Transdev and Busways became subject to their copied State awards after 1 July 2021.

⁵⁶ Transit Systems submission, 1 April 2022 [11].

⁵⁷ Transit Systems submission, 1 April 2022 [12].

3.2 Context of the Transit Systems variation/revocation applications

[54] Transit Systems' applications follow the recent Federal Court decision in *ARTBIU v Transit Systems*,⁵⁸ where Rares J held that Transit Systems had to flow-on the increases awarded in the 2018-19, 2019-20 and 2020-21 Review decisions to its transferred employees.

ARTBIU v Transit Systems

[55] Transit Systems successfully tendered to operate bus region 6 in NSW on and from 1 July 2018. Bus region 6 was formerly operated by the NSW State Transit Authority. The arrangements for the transfer of business included Transit Systems employing around 1,100 transferring employees, who were covered by the 2018 Bus Operations Award.⁵⁹ The applicant, the Australian Rail, Tram and Bus Industry Union (**ARTBIU**), represents the industrial interests of Transit Systems' employees who were covered by the 2018 Bus Operations Award.

[56] The parties were in dispute as to how the Commission's 2017-18, 2018-19, 2019-20 and 2020-21 Review decisions operated (if at all), in light of cl.15 of the 2018 Bus Operations Award.

[57] Clause 15 of the 2018 Bus Operations Award provides:

15.1 Subject to this clause, wage rates at Part B – Table 1 Weekly Wage Rates (Table 1) – for classifications listed in Table 1, incorporate the following wage increases:

- (i) 2.5% from the first full pay period commencing on or after 1 January 2018;
- (ii) 2.5% from the first full pay period commencing on or after 1 January 2019;
and
- (iii) 2.5% from the first full pay period commencing on or after 1 January 2020.

15.2 **The wage increases contained in this Award are in substitution of any State Wages decisions.** Any arbitrated safety net adjustments may be offset against any equivalent amount in the rates of pay received by employees covered under this Award.⁶⁰ [Emphasis added]

[58] Since 1 July 2018, Transit Systems had increased the wages of the transferring employees in accordance with the pay increases in cl.15.1, but did not flow-on any increases from annual wage review decisions. After the Commission's 2020-21 Review decision came into effect on 1 July 2021, Transit Systems did not pay its employees any increase at all.⁶¹ However, Transit Systems subsequently accepted that this approach was in error and has taken steps to pay all employees an increase of 2.5 per cent, backdated to 1 July 2021 (in accordance with the 2020-21 Review).⁶²

⁵⁸ *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436.

⁵⁹ Transit Systems still employs around 600 of the transferring employees: [2021] FCA 1436 [2].

⁶⁰ [2021] FCA 1436 [5].

⁶¹ Clause 15.1 does not contain wage increases for 2021 (or thereafter).

⁶² *Ibid* [28].

[59] The ARTBIU submitted that, despite cl.15.2 of the 2018 Bus Operations Award, Transit Systems was bound by each of the Commission’s 4 annual wage review determinations to pass on the Review increases in minimum wage rates to the employees covered by the copied State awards derived from the 2018 Bus Operations Award.⁶³

[60] Transit Systems counter-argued that cl.15.2 operated to exclude any wage increases beyond those prescribed in cl.15.1.⁶⁴ It contended that cl.15.2:

‘reflected a bargain struck between the NSW State Transit Authority (as the old employer) and the ARTBIU, under which both parties had agreed that the transferring employees would receive increases of 2.5% on 1 January of each of the three years 2018, 2019 and 2020 in substitution for any increases that might be awarded later in any decision by the State Commission pursuant to ss.48–52 of the NSW Industrial Relations Act . The maximum increase in wages that the State Government, as a matter of policy, had allowed its authorities to provide employees for each of these calendar years was 2.5%.’⁶⁵

[61] Rares J identified 3 issues for consideration:

(a) whether the 3.5 per cent increase that the Commission determined in its 2017-18 Review decision applied to the copied State awards (**the 2018 decision issue**)

(b) whether cl.15.2 exempted Transit Systems from paying any wage increases beyond those in cl.15.1 of the copied State awards (**the clause 15 issue**), and

(c) when the 2.5 per cent increase under cl.15.1 of the copied State awards should begin to be offset against any increase under the annual wage review decision that comes into force in the same calendar year (**the timing issue**).⁶⁶

The 2018 decision issue

[62] Rares J noted that when the Commission made its annual wage review decision on 1 June 2018, the copied State awards had not yet come into existence and the 2018 Bus Operations Award was not a Division 2B State award under the FW Act. As such, it was not subject to the operation of the FW Act or item 20 of Schedule 9 to the Transitional Act at the time the Commission made the 2017-18 Review decision⁶⁷ and Transit Systems was not bound to apply the 2017-18 Review decision increase to wages payable under the copied State awards.⁶⁸

The clause 15 issue

[63] In considering whether cl.15.2 exempted Transit Systems from paying any wage increases beyond those in cl.15.1 of the copied State awards, Rares J reasoned:

⁶³ Ibid [6].

⁶⁴ Ibid.

⁶⁵ Ibid [31].

⁶⁶ Ibid [29].

⁶⁷ Ibid [36].

⁶⁸ Ibid [42].

'I reject Transit Systems' argument that cl 15.2 should be read as in some way affecting the operation of a variation determination made in the exercise of the Commission's discretionary power under s 768AW(c) and item 20. The power to make such a variation to a copied State instrument is expressly conferred on the Commission by force of s 768AW(c) and item 20. That power exists, and can be exercised, despite the Fair Work Act leaving other aspects of a copied State award intact.

...

Obviously, the genesis of the Award becoming a copied State instrument and being removed from its previous legislative setting under the Industrial Relations Act [NSW] is fundamental to understanding how, in its new legislative setting under the Fair Work Act, the Parliament intended that it would continue to regulate the employment relationships of Transit Systems, the transferring employees and the Union ...

Here, cl 15.2 has to be construed in a common-sense way as a provision in a copied State instrument for the purposes of the Fair Work Act, bearing in mind, as the Union put, that the Parliament contemplated that parties could apply to the Commission to vary it under s 768AX where any possible construction was unworkable. The reference in cl 15.2 to "any State wages decisions", clearly enough, in the context of the Industrial Relations Act, would have applied to a State decision the subject of ss 50–52 that gave the State Commission power to apply, wholly or in part, a decision of the Fair Work Commission in an annual wage review. In addition, the Industrial Relations Act and cl 15.2 contemplated that there would be situations in which the parties could arbitrate safety net adjustments that would vary wages payable under cl 15.1.

In my opinion, cl 15.2 can be read sensibly, and as the Parliament intended that a copied State instrument would be read, without rendering the expression "any State wages decisions" as unintelligible. Once the Award is read as a copied State instrument, that expression can be understood to refer to an annual wage review (being a National decision as defined in s 49 of the Industrial Relations Act) ...

Accordingly, cl 15.2 can sensibly be understood as seeking to provide that the parties to the Award intended that wage increases contained in cl 15.1 were to be in substitution for any variation of minimum wages that otherwise would be payable under a National decision, being an annual wage review variation decision that the State Commission might decide to adopt under ss 50 and 52 of the Industrial Relations Act, much like it could make a State decision under s 51 that set principles or provisions for the purposes of State awards or other matters under that Act. Nonetheless, that intention could not have the effect of overriding a variation determination by the Commission that varies the Award as a copied State instrument, pursuant to its powers under item 20 and s 768AW(c), which has the force of law.

Here, the Commission's annual wage reviews for 2019–20, 2020–21 and 2021–22 varied every copied State instrument in exercise of its discretionary power to do so under item 20 and s 768AW(c) of the Fair Work Act. The Commission left it to any party that may have been affected to apply to it to vary the impact of any of those determinations, as it explained (at [443]–[452]) when it introduced by the general process of variation to all copied State instruments in its 2018 decision at [443]–[452] (see [25] above).'⁶⁹ [Emphasis added]

[64] Accordingly, Rares J held that the Commission's 2018-19 and 2019–20 annual wage review variation determinations applied to the copied State awards and, thus, increased the wages payable to the transferring employees by 3 per cent and 1.75 per cent respectively.⁷⁰

⁶⁹ Ibid [43], [48]–[52].

⁷⁰ Ibid [53].

The timing issue

[65] The timing issue concerned when the 2.5 per cent increase under cl.15.1 of the copied State awards should begin to be offset against the increases awarded in the annual wage review decisions that came into force in the same calendar year. Rares J observed:

‘Both Transit Systems and the Union accepted that the 2.5% increases that Transit Systems had paid to the transferring employees, in accordance with cl 15.1, should be offset against any liability that Transit Systems may have to pay any sums pursuant to the Commission’s annual wage review variation determinations. However, they are in dispute as to whether the starting time for applying such an offset is, as Transit Systems argued, the January preceding the coming into operation on 1 July of the year of a variation determination, or, as the Union contended, that the offset of 2.5% should be applied from 1 January in the subsequent financial year. That difference will affect the calculation of what might be due.’⁷¹

[66] Rares J subsequently held:

‘Both parties accepted, correctly in my opinion, that the payments that Transit Systems made in accordance with the Award variations under cl 15.1 should be taken into account, albeit at different times, as offsetting any failure of Transit Systems to pay any larger sum as determined in the Commission’s annual wage review for the relevant financial year. The consequence is that it will be necessary to allow an offset of some of the 2.5% increases, which Transit Systems paid under cl 15.1.

The consequence of the Commission’s abandonment of its tiered system in the 2018 decision was to treat all copied State instruments on the basis that, whenever they provided for any increases in wages in the previous financial year and those increases had commenced to be paid, the new wage would be the rate of pay used as the reference point for calculating the increased wages that would be paid in the next financial year with the determined uplift.

I am of opinion that the wages to which a variation determination under item 20 must be those being paid on and from 1 July in the new financial year immediately following the Commission’s annual wage review required under ss 285 and 286(1) of the Fair Work Act. Here, cl 15.1 of the Award required Transit Systems to pay an additional 2.5% to employees from the previous 1 January. In the present case, Transit Systems was an employer bound by a copied State instrument at the relevant times (1 July 2019, 2020 and 2021) when the Commission made its variation decisions for the relevant financial years.’⁷² [Emphasis added]

[67] Rares J also observed that Transit Systems ‘could have applied, but did not apply, to the Commission in any of those three years to exercise its discretionary power under item 20 to vary the impact of either the impact of its annual wage review determination on the [copied State awards] or to take account of the relevant increase under cl.15.1 in another way.’⁷³

[68] In his April 2022 decision *ARTBIU v Transit Systems [No. 2]*, Rares J held that it would be inappropriate to order Transit Systems to make payments of compensation with interest

⁷¹ Ibid [35].

⁷² Ibid [54]-[56].

⁷³ Ibid [57].

under ss.545 and 547 of the FW Act to employees at that time, only later to require them to repay money:⁷⁴

‘In the present case, if, as the Union seeks, I were to make an immediate order for the payment of the moneys calculated, or yet to be calculated, by Ms McCormack, there is a possibility that those employees will be paid money that they have to repay or have set-off against later payments or wages if, in the forthcoming annual wage review, the Commission were to grant Transit Systems’s application for a variation or revocation of its earlier decisions.

...

In my opinion, it is preferable, in the interests of justice, to postpone making any final orders as to the sums, if any, due to the affected employees, because of the need to await the outcome of Ms McCormack’s supplementary [audit of underpayments] report and the possibility of Transit Systems’s application to the Commission being successful in whole or in part.

In my opinion, the appropriate course is to make one set of orders for payment, with effect from the last payday in June 2022, of all moneys due to the affected employees with interest, based on the calculations in Ms McCormack’s existing report and any supplementary report if its conclusions are accepted, or any dispute in respect of it is resolved prior to that time, so that those orders will operate in a self-executing way. Those orders also would take effect in the event that the Commission dismisses Transit Systems’s application to review its earlier determinations. In the event that the Commission accedes to Transit Systems’s application, or any conclusion in the supplementary report is contested, the position as to what orders ought be made can be determined in light of the new position, including having regard to any judicial challenge to the Commission’s finding.’⁷⁵

3.3 The other applications and summary of the parties’ positions

[69] In the 2021-22 Review, Keolis Downer, Transdev, Busways and, as related above, Transit Systems have made submissions for the Expert Panel to address specific copied State awards on a case-by-case basis.

[70] From the submissions, it appears the Employer parties commenced employing transferred employees on and from the following dates:

- Transit Systems – 1 July 2018
- Keolis Downer – 31 October 2021
- Busways – January 2022, and
- Transdev – 4 April 2022.

[71] The Employer parties submit that in this Review, the Expert Panel should take account of the wage increases already provided to their transferred employees under copied State awards.⁷⁶ A summary of the parties’ positions in the 2021-22 Review is at **Attachment 1**.

3.3.1 Keolis Downer

⁷⁴ [2022] FCA 389 [59].

⁷⁵ Ibid [56]–[61].

⁷⁶ See, for example, Keolis Downer submission, 1 April 2022 [9]–[10]; Busways submission, 1 April 2022 [72]; Transdev submission, 1 April 2022 [17] and Transit Systems submission, 1 April 2022 [38] and [53]–[54].

[72] Copied State awards derived from the following State awards, as in force at 31 October 2021, are in operation and apply to Keolis Downer's transferred employees:

- State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021 (the **2021 Senior and Salaried Officers Award**), and
- State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020 (the **2020 Bus Engineering and Maintenance Award**).⁷⁷

[73] These copied State awards conferred wage increases on transferring employees as follows:

2021 Senior and Salaried Officers Award

10. Wage Increases

10.1 A wage increase will apply to employees covered by this Award payable as follows:

- (i) From the First Full Pay Period commencing on or after 1 January 2021: 0.3%, which is equivalent to the outcome of the Public Sector Wage Case 2020; and
- (ii)
 - (a) From the First Full Pay Period commencing on or after 1 January 2022: 2.5 per cent, inclusive of the Superannuation Guarantee Charge ("SGC") increase.
 - (b) With SGC scheduled to increase from 10 per cent to 10.5 per cent from 1 July 2022, the increase to wages and allowances is 2.04 per cent from the First Full Pay Period commencing on or after 1 January 2022.
 - (c) In the event that there is no increase to the SGC in July 2022, the increase to wages and allowances shall be 2.5 per cent from the First Full Pay Period commencing on or after 1 January 2022.
 - (d) If the SGC is varied by a quantum other than 0.5 per cent in July 2022, the parties are to review the increase to wages and allowances to ensure a total increase of 2.5 per cent (inclusive of wages and allowances and any SGC increase) applies from the First Full Pay Period commencing on or after 1 January 2022.

10.2. The wages increases contained in this Award are in substitution of any State Wages decisions. Any arbitrated safety net adjustment may be offset against any equivalent amount in the rates of pay received by Employees covered under this Award. [Emphasis added]

2020 Bus Engineering and Maintenance Award

58. Wage Increase

58.1 The Parties agree to an increase of employee-related costs by 2.5% per annum, for a nominal period of three years, commencing from 1 April 2020.

⁷⁷ Keolis Downer submission, 1 April 2022 [5]. It is understood that copied State awards derived from the *State Transit Authority Bus Operations Enterprise (State) Award 2021* have ceased to cover relevant transferred employees following commencement of the *KDNB Bus Operations Enterprise Agreement 2021*.

58.2 The employee-related costs include increases to the minimum superannuation payment to be made for the benefit of employees. For the nominal duration of this Award, this includes a scheduled increase to the current superannuation contribution rate of 9.5% to 10% from 1 July 2021, then to 10.5% from 1 July 2022.

58.3 Given the scheduled increases to superannuation referred to above, the following wage increases will apply to Employees covered by this Award:

- 2.50% increase will apply from 1 April 2020
- 2.15% increase will apply from 1 April 2021
- 2.04% increase will apply from 1 April 2022

58.4 In the event there are changes to the scheduled increases to the minimum superannuation payment, the parties are to review the wages increases referred to in subclause 58.3 to ensure compliance to subclause 58.1.

58.5 The wage increases contained in this Award are in substitution for any State Wage Case decisions. Any arbitrated safety net adjustments may be offset against any equivalent amount in rates of pay received by Employees. [Emphasis added]

[74] Keolis Downer submits that to prevent double-dipping, transferred employees who have received pay increases in 2022 under the above terms of the 2021 Senior and Salaried Officers Award and the 2020 Bus Engineering and Maintenance Award, should be excluded from any minimum wage increase awarded in the 2021-22 Review.⁷⁸

[75] If the Panel does not agree to this approach, Keolis Downer submits that any increase should only be what is required to ‘top up’ the increase under the copied State awards to match the Review decision’s minimum wage increase.⁷⁹

[76] In its submission in reply, the ARTBIU, Australian Manufacturing Workers' Union (AMWU) and Australian Services Union (ASU)⁸⁰ (the **Unions**) submit that modern award wage increases should be flow-on to copied State awards, but ‘accept that wage increases that have occurred in this financial year should be taken [into] account to avoid any double dipping.’⁸¹ Accordingly, ‘wages should be “topped up” to the difference between those internal increases (which were subject to the NSW Government’s 2.5% cap regardless of merit considerations, and were in most cases actually lower) and whatever is awarded by the Commission, in order to avoid windfall bargains for the operators.’⁸²

[77] The Unions submit that, as suggested (in the alternative) by Keolis Downer, the minimum wage increase awarded in the 2021-22 Review should be reduced by 2.04 per cent for the copied State awards applying to Keolis Downer’s transferred employees⁸³. This

⁷⁸ Ibid [9].

⁷⁹ Ibid [10].

⁸⁰ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [5].

⁸¹ Ibid [5].

⁸² Ibid.

⁸³ Ibid [17]; [31].

‘removes any aspect of “double-dipping”; [but] to go further would instead provide a windfall to the employer for no good reason.’⁸⁴

[78] The Unions submit this approach would ‘have the advantage of bringing the copied state awards into line with the financial year wage increase basis used in the Annual Wage Review’.⁸⁵

‘It is far more desirable that these employees, absent bargaining, continue to be provided with an annual wage increase like any other award covered employee, rather than enduring up to 18 months without one.’⁸⁶

[79] The Unions also note this increase of 2.04 per cent in the copied State awards relates to only part of the financial year, such that inflationary pressures after January 2023 have not been taken into account in the wage fixing exercise.⁸⁷

3.3.2 Transdev and Busways

[80] Copied State awards derived from the following State awards are in operation and apply to Transdev’s and Busways’ transferred employees:

- 2021 Senior and Salaried Officers Award
- 2020 Bus Engineering and Maintenance Award, and
- *State Transit Authority Bus Operations Enterprise (State) Award 2021 (the 2021 Bus Operations Award)*.⁸⁸

[81] The wage increase clauses in the 2021 Senior and Salaried Officers Award and the 2020 Bus Engineering and Maintenance Award are at [72] above. Wage increases are provided for in cl.15 of the 2021 Bus Operations Award as follows:

15. Wages and Wage Increases

15.1 Subject to this clause, wage rates at Part B - Table I Weekly Wage Rates (Table 1) - for classifications listed in Table 1, incorporate the following wage increases:

- (i) From the First Full Pay Period commencing on or after 1 January 2021: 0.3%, which is equivalent to the outcome of the Public Sector Wage Case 2020; and
- (ii)
 - (a) From the First Full Pay Period commencing on or after 1 January 2022: 2.5 per cent, inclusive of the Superannuation Guarantee Charge ("SGC") increase.

⁸⁴ Ibid [17].

⁸⁵ Ibid [18].

⁸⁶ Ibid.

⁸⁷ Ibid [17].

⁸⁸ Transdev submission, 1 April 2022 [5]; Busways submission, 1 April 2022 [2]. The copied State awards apply to Transdev transferred employees from 4 April 2022 and to Busways’ transferred employees from January 2022.

- (b) With SGC scheduled to increase from 10 per cent to 10.5 per cent from 1 July 2022, the increase to wages and allowances is 2.04 per cent from the First Full Pay Period commencing on or after 1 January 2022.
- (c) In the event that there is no increase to the SGC in July 2022, the increase to wages and allowances shall be 2.5 per cent from the First Full Pay Period commencing on or after 1 January 2022.
- (d) If the SGC is varied by a quantum other than 0.5 per cent in July 2022, the parties are to review the increase to wages and allowances to ensure a total increase of 2.5 per cent (inclusive of wages and allowances and any SGC increase) applies from the First Full Pay Period commencing on or after 1 January 2022.

15.2 The wage increases contained in this Award are in substitution of any State Wages decisions. Any arbitrated safety net adjustments may be offset against any equivalent amount in the rates of pay received by Employees covered under this Award... [Emphasis added]

[82] Transdev and Busways submit that the Panel should not apply any 2021-22 annual wage review increase to their copied State awards derived from these 3 State awards as the transferring employees have already had the benefit of the increases awarded by the IRCNSW. These copied State awards include a wage increase that commenced on or after 1 January 2022 and before 1 July 2022.⁸⁹ For example, Busways submits:

‘As at the time of this year’s annual wage review decision, 1 July 2022, the Busways employees covered by the Three Copied State Awards will have already had the benefit of the following wage increases within the last 6 months:

- a. employees operating under the Copied [2021 Bus Operations Award], a 2.5% wage increase on 1 January 2022;⁹⁰
- b. employees operating under the Copied [2020 Bus Engineering and Maintenance Award], a 2.04% wage increase on 1 April 2022; and
- c. employees operating under the Copied [2021 Senior and Salaried Officer Award], a 2.04% wage increase on 1 January 2022.’⁹¹

[83] Busways submits that if an increase in minimum wages were to be applied to these copied State awards, its transferring employees will receive 2 wage increases in a period of 6 months or less, resulting in double-dipping.⁹²

[84] The Unions submit in reply that the double-dipping issue is adequately addressed by simply reducing the 2021-22 Review increase by the increase awarded under the copied State

⁸⁹ Transdev submission, 1 April 2022 [16]-[17], [19]-[20]; Busways submission, 1 April 2022 [4(i)] and [59].

⁹⁰ We note that cl.15 provides for a 2.04 per cent increase from the first full pay period commencing on or after 1 January 2022, provided the Superannuation Guarantee Charge (SGC) is increased from 10 per cent to 10.5 per cent from 1 July 2022. In the event that there is no increase to the SGC in July 2022, the increase to wages and allowances shall be 2.5 per cent per cent from the first full pay period commencing on or after 1 January 2022.

⁹¹ Busways submission, 1 April 2022 [59].

⁹² Ibid [4(j)(i)].

awards in the preceding financial year,⁹³ and note that Busways' submission mistakes the relevant period as being the 2022 calendar year.⁹⁴ The Unions submit Busways' proposal would leave employees, absent bargaining, without an increase to their wages for up to 18 months. The Unions submit 'the preferable and appropriate course [is] to ... bring these federal employees in line with the timing used in the federal system.'⁹⁵

[85] Busways submits that the copied State awards applying to it 'contain wage rates that were determined under a different jurisdiction where the wage rates were not intended to be a minimum safety net, but rather, were intended to create *fair and reasonable conditions of employment*.'⁹⁶ Busways further contends that the approach to setting and increasing wages in NSW State awards is different to the national minimum wage setting approach as:

- NSW State awards are largely determined by the IRCNSW by consent between the parties and enterprise specific awards tend to be 'paid rates awards' rather than 'minimum wage awards',⁹⁷ and
- there is no general overriding minimum wage decision made by the IRCNSW that automatically affects all NSW State awards. Since 2010, all adjustments to awards ordered as part of State Wage Cases have been made only to minimum wage awards and the State awards were not subject to the NSW State Wage Case but were subject to their own specific wage rate increases.⁹⁸

[86] The Unions submit in reply that Busways 'cannot say that these rates were ever properly set, or adequately recognise the value of the relevant work.'⁹⁹ The Unions further submit that even if it is assumed that the IRCNSW 'succeeded in its task of setting "fair and reasonable wages", this does not lead to a conclusion that the rates *remain so indefinitely*.'¹⁰⁰

[87] Busways also expresses concern that applying the Panel's existing approach to copied State awards may have the effect of disincentivising bargaining in cases where wages have 'already leapfrogged equivalent arrangements.'¹⁰¹

[88] In response, the Unions submit in reply that if Busways' claim is granted, 'it will enjoy both a binding industrial instrument tailor-made for its operations *and* a 18 month period with no risk of being required to increase wages. This itself could be equally seen as a disincentive for Busways to bargain.'¹⁰²

⁹³ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [23].

⁹⁴ Ibid, citing as an example Busways submission, 1 April 2022 [88].

⁹⁵ Ibid [23].

⁹⁶ Busways submission, 1 April 2022 [4(j)(ii)]. See also [66]-[70].

⁹⁷ Ibid [68].

⁹⁸ Ibid [69]-[70].

⁹⁹ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [24].

¹⁰⁰ Ibid [22].

¹⁰¹ Busways submission, 1 April 2022 [87]. See also ACCI submission in reply, 10 April 2022 [192].

¹⁰² ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [25].

[89] In response to Busways' argument that any Review increase the Panel may grant will be costly,¹⁰³ the Unions submit that 'these calculations assume the full increase, rather than the reduced amount sought by the Unions to remove double-dipping ... and ... are made without any *context*: the number itself is meaningless without an understanding of what it really means within the business, and there is no support for the proposition that this will affect Busways' viability.'¹⁰⁴

[90] The Unions further observe that the risk was 'an entirely foreseeable one':

'Notwithstanding its claims of surprise and a particular expectation, Busways knew it was moving into the federal system, and at least ought to have known that the instruments would be subject to review, and possible (indeed likely) increase by the Annual Wage Review.'¹⁰⁵

[91] In relation to Transdev's submission that no increase should be applied to its copied State awards, the Unions submit that '[f]or the same reasons as those submitted above [in relation to the other Employer parties], this is not the appropriate or reasonable course, and instead the wages should be "topped up" to match the AWR increase.'¹⁰⁶ The Unions submit that the Panel should increase the wages in the copied State awards applying to Busways and Transdev by the full amount determined in the 2021-22 Review as applicable to modern awards, less 2.04 per cent.¹⁰⁷

3.3.3 Transit Systems

[92] Copied State awards derived from the following State awards currently apply to Transit Systems' transferred employees:

- 2018 Bus Operations Award, and
- 2018 Senior and Salaried Officers Award.¹⁰⁸

[93] The *Transit Systems West Services Engineering and Maintenance Enterprise Agreement 2021* commenced operation on 27 May 2021.¹⁰⁹ From that date, copied State awards derived from the 2018 Bus Engineering and Maintenance Award ceased to apply to transferred employees of Transit Systems covered by this agreement.¹¹⁰

[94] Clause 15 of the 2018 Bus Operations Award is set out at [56]. The wages clauses in the 2018 Senior and Salaried Officers Award and the 2018 Bus Engineering and Maintenance Award, as in force at 1 July 2018, provided as follows:

2018 Senior and Salaried Officers Award

10. Wage Increases

¹⁰³ Busways submission, 1 April 2022 [56], [75].

¹⁰⁴ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [26].

¹⁰⁵ Ibid [27].

¹⁰⁶ Ibid [30].

¹⁰⁷ Ibid [31].

¹⁰⁸ Transit Systems submission, 1 April 2022 [7].

¹⁰⁹ [2021] FWCA 2905, Transit Systems submission, 1 April 2022 [23].

¹¹⁰ Transit Systems submission, 1 April 2022 [37].

10.1. A wage increase will apply to employees covered by this Award payable as follows:

2.5% from the first pay period on or after 1 January 2018

2.5% from the first pay period on or after 1 January 2019

2.5% from the first pay period on or after 1 January 2020

10.2. The wages increases contained in this Award are in substitution of any State Wages decisions. Any arbitrated safety net adjustment may be offset against any equivalent amount in the rates of pay received by employees covered under this Award. [Emphasis added]

2018 Bus Engineering and Maintenance Award

54. Wage Increase

54.1 The following wage increases will apply to Employees covered by this Award:

2.5% increase will apply from the first full pay period on or after 1 January 2019.

54.2 The wage increases contained in this Award are in substitution for any State Wage Case decisions. Any arbitrated safety net adjustments may be offset against any equivalent amount in rates of pay received by Employees.¹¹¹ [Emphasis added]

[95] As related earlier,¹¹² Transit Systems asks the Panel to deal with the copied State awards applying to it as follows:

1. to vary or revoke the Commission's 2018-19 and 2019-20 Review determinations so that the modern award wage increases of 3 per cent and 1.75 per cent do not apply to copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award. Further or in the alternative, to apply the Commission's tiered approach developed in its 2012-13 Review decision to those copied State awards instead of flowing-on the wage increases, and
2. to vary or revoke the Commission's 2018-19 Review determination so that the modern award wage increase of 3 per cent does not apply to copied State awards derived from the 2018 Bus Engineering and Maintenance Award. Further or in the alternative, to apply the Commission's tiered approach developed in its 2012-13 Review decision to those copied State awards instead of flowing-on the wage increases.¹¹³

[96] The effect of applying the tiered approach as proposed by Transit Systems would be that wage rates in copied State awards applying to its transferred employees would not be increased as a result of the 2018-19 and 2019-20 Review decisions.¹¹⁴

¹¹¹ This Award came into force from the 29 June 2018: cl.4.1:

www.ircgazette.justice.nsw.gov.au/irc/ircgazette.nsf/LUPublications/CC62E256C85772E4CA258353000FF441?OpenDocument.

¹¹² See Section 3.1.

¹¹³ Transit Systems submission, 1 April 2022 [2].

¹¹⁴ Ibid [36].

The Commission’s power to vary or revoke annual wage review determinations adjusting wages in copied State awards

[97] Section 1.4 of this Background Paper discussed the legislative framework relevant to whether the Commission has power to vary or revoke annual wage review determinations adjusting wages in copied State awards.

[98] Transit Systems submits that ‘[t]here is clear precedent for the Commission exercising its powers to overcome the effect of a Federal Court decision interpreting award provisions’, and that the Panel can ‘make, vary or revoke its own decisions as it sees appropriate in the circumstances’.¹¹⁵ Transit Systems contends that ‘[f]airness should be a key determinant of whether the Commission’s AWR determinations should be varied or revoked in this matter’ and that ‘[t]he variation or revocation ... is necessary to avoid the impact of double dipping.’¹¹⁶

[99] Transit Systems submits that a decision to vary minimum wages in copied State awards is not a decision made under Part 2–6 of the FW Act, but a decision made under item 20(1) of Schedule 9 to the Transitional Act, as that item relates to copied State awards because of s.768BY of the FW Act.¹¹⁷

[100] The Unions oppose Transit Systems’ approach and submit that as the 2018-2019 and 2019-2020 Review decisions were made under Part 2-6, the Panel is prevented from making the variations sought by s.603(3)(d) of the FW Act.¹¹⁸

[101] The Unions submit that ‘decisions made under Part 2-6 provide employees with substantive rights as to the minimum wages they must be paid: ‘Certainty is critical ... decisions of this kind are not conventionally amenable to retrospective variation.’¹¹⁹

[102] The Unions submit that each of the 2018-2019 and 2019-2020 Review decisions were made by the Expert Panel constituted under s.617(1)(a) for the purposes of the annual wage review required under Part 2-6, and in their terms, were determinations made under ss.285(1)(b) and (c).¹²⁰

[103] The Unions submit that s.768AW restricts the Commission’s power to vary a copied State instrument, and the general power granted by s.603 is fettered by its specific restrictions.¹²¹ The Unions submit that the only power to vary copied State award wage terms is that provided by s.768AW(c), ‘*per item 20 of Schedule 9 to the Transitional Act, which deals with variation of copied State awards in annual wage reviews*’.¹²²

‘It is difficult to read this as reflecting a legislative intention other than that copied state instruments, insofar as the wages they contain are concerned could be varied, and could only be

¹¹⁵ Ibid [48]-[49], citing *Re Mitsubishi Motors Australia Ltd Award 1998* (the *Vehicle Industry Public Holidays case*) 3 October 2001, Print T1300.

¹¹⁶ Ibid [53].

¹¹⁷ Ibid [42].

¹¹⁸ FW Act s.603(3)(d). ARTBIU, AMWU and ASU submission in reply to Transit Systems 2018-19 and 2019-20 Retrospective Variations, 6 May 2022 [24]-[36].

¹¹⁹ Ibid [26].

¹²⁰ Ibid [27].

¹²¹ Ibid [29].

¹²² Ibid [30].

varied, by the Commission exercising its wage review powers under Part 2-6. It is wholly inconsistent with the idea that a stand-alone variation power is instead created by s.768AW(c).¹²³

‘[T]he text alone is not apt to support an interpretation that a completely separate power to vary is created. The better interpretation is that Item 20 simply operates to *expand* what the Commission can do under Part 2-6: but its exercise of those powers still, in substance, involves making a decision under that Part.’¹²⁴

[104] The Unions submit this interpretation is reinforced by the following:

‘a. Schedule 9 itself is preoccupied with annual wage reviews, and amending that particular process, rather than creating any new system or systems; and

b. the Transitional Act itself functions to amend and modify the Act’s application, not to create entirely new obligations or powers.’¹²⁵

[105] The Unions submit that their interpretation is consistent with ‘basic common sense’ and the ‘policy objectives’ it has discussed – ‘there is fundamentally no reason that decisions about the wage rates in copied state instruments could be retrospectively varied within a scheme that permits this for minimum wage decisions for *no other kind of instrument*.’¹²⁶

[106] In the alternative, the Unions submit that even if the Commission has the power to make the variations sought, it should not do so as ‘[i]t is a matter of basic principle that the discretion to make such orders should not be exercised where the orders interfere with substantive rights.’¹²⁷

[107] The Unions submit that in both the 2018-2019 and 2019-2020 Review decisions, the Commission intended to, and did, vary the wage rates in all copied State awards¹²⁸ and the Panel made a ‘deliberate choice to abandon’ the tiered system in its 2017-18 Review decision.¹²⁹

[108] Transit Systems submits that the 2018-19, 2019-20 and 2020-21 Review decisions ‘have resulted in windfall gains for employees amounting to approximately \$3.5 million.’¹³⁰ It submits that ‘this was the very kind of situation that the Commission had always intended to avoid when it developed the tiered methodology’,¹³¹ and that:

¹²³ Ibid [31].

¹²⁴ Ibid [33].

¹²⁵ Ibid [34].

¹²⁶ Ibid [35].

¹²⁷ Ibid [37] and see [38]-[43], citing *Hartley Poynton Ltd v Ali* (2005) 11 VR 568, *RTBU v Metro Trains* [2020] FCAFC 81, *Mealing v P Chand t/as Fastfix* (2003) 57 NSWLR 305, *Castle Construction Pty Ltd v North Sydney Council* [2007] NSWCA 164 [97], *Esso Australia v AWU* (2017) 263 CLR 551 and distinguishing the *Vehicle Industry Public Holidays Case 3* October 2001, Print T1300.

¹²⁸ Ibid [46].

¹²⁹ Ibid, citing [2018] FWCFB 2 [43].

¹³⁰ Ibid [19]-[21], [55]. As a result of the Court decision in *ARTBIU v Transit Systems*, Transit Systems has facilitated an independent audit to determine the quantum of wages arising from the Court’s decision, including the compounding effect of earlier decisions. The McCormick Report identifies the total liability as \$3,475,696.72, made up of \$3,273,597.72 in wages and \$202,099.00 in superannuation (but excluding any order for interest).

¹³¹ Ibid [55].

‘Fairness ... dictates that the unions should be held to the bargains that were struck when the State Awards were made by consent in the IRCNSW, namely that the 2.5% wage increases provided in cl 15 of the Copied State Award were “*in substitution of*” of minimum wages decisions and increases.’¹³²

[109] The Unions submit in reply that Transit Systems’ claim for retrospective variations will reduce the rate of pay to which employees are currently entitled, and ‘expunge an existing entitlement to backpay for the underpaid amounts enjoyed by each employee.’¹³³

[110] The Unions submit that Transit Systems had an opportunity to make submissions in the 2018-2019 and 2019-2020 Reviews but did not do so.¹³⁴ The Unions submit that while ‘[t]he outcome may well be inconvenient to Transit Systems ... [t]hat inconvenience is hardly an “exceptional circumstance”; it is not nearly a sufficient basis to justify the extraordinary interference in long-standing decisions of this Commission.’¹³⁵ Further, granting Transit Systems’ claim ‘would do little more than diminish public confidence in the certainty of the Commission’s decisions on crucial matters i.e. wages’.¹³⁶

[111] The Australian Council of Trade Unions (ACTU) supports the Unions’ submissions ‘in relation to the lack of jurisdiction and justification for varying the past decisions of the Panel.’¹³⁷

Question 5: Noting the analysis at Section [1.4] of this Background Paper and in particular at [34]:

- a) does Transit Systems press its claim that the Commission has power to vary or revoke previous annual wage review determinations adjusting minimum wages in copied State awards?**
- b) if yes, what is the source of the Commission’s power to do so?**

Transit Systems’ claim for the 2021-22 Review

[112] In relation to this 2021-22 Review, Transit Systems submits that if the variations or revocations sought in relation to copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award *are not* granted, no increase should be awarded to these copied State awards. However, if the variations or revocations sought *are* granted, any increased wage rates in any classification level in its copied State awards should not exceed the rate of pay for the same work under the relevant modern award.¹³⁸

¹³² Ibid [57].

¹³³ ARTBIU, AMWU and ASU submission in reply to Transit Systems 2018-19 and 2019-20 Retrospective Variations, 6 May 2022 [19].

¹³⁴ Ibid [47]-[48].

¹³⁵ Ibid [51].

¹³⁶ Ibid.

¹³⁷ ACTU submission in reply, 8 May 2022 [159]-[160].

¹³⁸ Transit Systems submission, 1 April 2022 [4].

[113] The Unions submit that the Panel should increase wages in the copied State awards applying to Transit Systems by the full amount determined in the Review as applicable to modern awards.¹³⁹ The Unions submit:

‘The wages in these awards have not been increased since the last Annual Wage Review. The real value of employees’ wages has dropped in the interim and will, if not increased, drop further; wages which were once set as fair and reasonable will cease to be so.

There is no principled reason why these employees should not receive the same increase as any other award-covered employee.’¹⁴⁰

[114] Finally, the Unions submit that Transit Systems neglected to mention that it is presently bargaining with its employees for an enterprise agreement to replace the existing applicable copied State awards, and ‘[g]ranting the applications would give it an enormous collateral advantage in that process.’¹⁴¹

[115] In its submission, Transit Systems says that it has commenced bargaining with the ARTBIU and the Transport Workers’ Union for an enterprise agreement to replace copied State awards derived from the 2018 Bus Operations Award.¹⁴²

Question 6: What is the status of enterprise bargaining negotiations to replace the copied State awards applying to Transit Systems and its transferred employees derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award?

3.4 Parties’ views on the Panel’s approach to copied State awards going forward

[116] We note that none of the copied State awards applying to the Employer parties appear to provide for wage increases after 1 July 2022. Therefore, adjustments to wage rates in these copied State awards will not raise the same concerns in future reviews.

[117] The Australian Chamber of Commerce and Industry (ACCI) and Australian Business Industrial and NSW Business Chamber Ltd (ABI) propose the Commission adopt a new approach to adjusting wages in copied State awards. They submit the Panel should only apply the Review decision to copied State awards on a case-by-case basis, following submissions by parties.¹⁴³ ABI submits that to the extent that the Commission wishes to adopt a default approach to increasing copied State award minimum wages, it should only seek to increase such wages to align with modern award rates.¹⁴⁴

[118] ABI submits that the current default approach of applying the Review increases to all copied State awards has a disproportionately negative impact on NSW businesses.¹⁴⁵ ABI submits that NSW has been ‘the biggest divestor of state assets by total value over the past five

¹³⁹ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [31a].

¹⁴⁰ Ibid [10]-[11].

¹⁴¹ ARTBIU, AMWU and ASU submission in reply to Transit Systems 2018-19 and 2019-20 Retrospective Variations, 6 May 2022 [53].

¹⁴² Transit Systems submission, 1 April 2022 [25].

¹⁴³ ACCI submission in reply, 10 April 2022 [188], [203] and ABI submission in reply, 6 May 2022 [4], [5] and [19].

¹⁴⁴ ABI submission in reply, 6 May 2022 [19].

¹⁴⁵ Ibid [7]-[11].

to ten years, divesting an estimated \$19.54 billion in assets between 2014 and 2019 alone’, and that this trend is likely to continue.¹⁴⁶ ABI submits that ‘it is reasonable to conclude that the current lion’s share of copied State awards in operation apply to businesses operating in NSW.’¹⁴⁷

[119] ABI submits that it would be unfair to force the businesses covered by the relevant copied State awards to provide 2 wage increases – one imposed by the IRCNSW and the other through annual wage review decisions.¹⁴⁸ Further, the Panel should consider the compounding effect of wage increases, where ‘the monetary cost of the two increases is greater than their combined sum had they been applied at the same time.’¹⁴⁹ ABI submits that it is ‘particularly unfair on businesses which, as a result of standard contractual terms surrounding the sale of a state asset, are often legally constrained from taking measures to ameliorate unplanned labour cost increases.’¹⁵⁰

[120] ABI also submits that the NSW-based awards provide employees with 16 to 52 per cent more remuneration than the relevant modern awards would for the same work, which ‘is of fundamental importance when it comes to the Commission exercising a discretion to vary a minimum payment safety net.’¹⁵¹ Accordingly, ABI submits that the Panel’s current approach fails to properly take into consideration the jurisdictional differences that exist in the setting of federal and State award wage rates.¹⁵²

[121] ABI submits that the Commission’s current approach (since the 2017-18 Review decision) has placed an ‘unrealistic expectation’ on employers to be aware of and understand the history and the interaction between copied State awards and Review decisions.¹⁵³

[122] Similarly, ACCI submits that the Commission’s current approach ‘places the entire burden and obligation onto those covered by copied State awards to have to argue the case year by year in order to avoid potentially being subjected a double wage increase hit’.¹⁵⁴

‘This seems particularly unfair and burdensome ... to require individual employers to have a deep and thorough understanding and awareness of both statutory and case law history, that even Justice Rares in the recent Federal Court decision in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd*, acknowledged “descends into considerable complexity”, and in circumstances where those covered by a copied State award have very little to no control or ability under the FW Act to amend wage increases already predetermined to apply to them under a State award.’¹⁵⁵

[123] ACCI observes that ‘the Panel is not in a position to know with certainty how many copied State awards are in operation, how many will be affected by a decision to exercise

¹⁴⁶ Ibid [9].

¹⁴⁷ Ibid.

¹⁴⁸ Ibid [14].

¹⁴⁹ Ibid [15].

¹⁵⁰ Ibid [16] and see also Busways submission, 1 April 2022 [72].

¹⁵¹ Ibid [12].

¹⁵² Ibid [7], [11].

¹⁵³ Ibid [18].

¹⁵⁴ ACCI submission in reply, 10 April 2022 [189].

¹⁵⁵ Ibid [190].

discretion and how those individual copied State awards subject to its decision will be affected by the uniform application of the Annual Wage Review decision to all copied State awards.’¹⁵⁶ ACCI submits that this issue is heightened by the lack of requirement for the Panel to publish Review variations to copied State award rates.¹⁵⁷

[124] Accordingly, ACCI submits that the inability of the Panel ‘to be able to identify and understand who is affected by its decision should warrant greater discretion in applying the Annual Wage review decision to copied State awards and should in ACCI’s view, warrant the FWC amending its currently uniform approach in favour of a far more cautious and risk averse position going forward.’¹⁵⁸

[125] In their reply submission, the Unions argue that parties cannot claim ignorance of the law, and that the effect of the Panel’s Review decisions on copied State awards was ‘entirely foreseeable’.¹⁵⁹

[126] In respect of the copied State awards applying to each of the Employer parties, the Unions advocate that the adjustment to the rates in modern awards in the 21-22 Review be applied to those copied State awards but taking into account wage increases that have already been made in this financial year to avoid double-dipping.¹⁶⁰ The ACTU supports the Unions’ submissions ‘in relation to the appropriate increase to be awarded in this Review.’¹⁶¹

Question 7:

- a) To what extent is there agreement among the parties on ‘topping up’ any shortfall between wage increases awarded in copied State awards and annual wage review adjustments?**

- b) What are the parties’ positions as to how any ‘top-up’ should be calculated including how the timing of any wage increases under copied State awards should be taken into account?**

¹⁵⁶ Ibid [200], citing [2018] FWCFB 2 [10].

¹⁵⁷ Ibid [201].

¹⁵⁸ Ibid [202].

¹⁵⁹ See for example ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [27] (in response to Busways submission, 1 April 2022) and ARTBIU, AMWU and ASU submission in reply to Transit Systems 2018-19 and 2019-20 Retrospective Variations, 6 May 2022 [47]-[48] (in respect of Transit Systems).

¹⁶⁰ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 [5].

¹⁶¹ ACTU submission in reply, 8 May 2022 [159]-[160].

ATTACHMENT 1: Summary of the parties' positions in the 2021-22 Annual Wage Review – copied State awards

Party	<i>Proposed approach in relation to copied State awards derived from the following State awards</i>
Keolis Downer	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should not flow on the Review increase to modern awards to its copied State awards. - Alternatively, if the Panel decides to flow on the Review increase, it should only be to 'top up' the increase under copied State awards to match the Review's increase.
Transdev	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Bus Operations Award</i> <i>2021 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should not flow on the Review increase to modern awards to its copied State awards. - The Commission should apply the tiered approach to its copied State awards, such that no wage increase is awarded under the Review.
Busways	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Bus Operations Award</i> <i>2021 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should not apply any federal minimum wage increase to its copied State awards.
Transit Systems	<p><i>2018 Bus Operations Award</i> <i>2018 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should vary or revoke the Commission's 2018-19 and 2019-20 Review decisions so that the modern award wage increases granted do not apply to copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award. Further or in the alternative, the Panel should apply the Commission's tiered approach to these copied State awards. - In relation to this 2021-22 Review, if the variations or revocations sought above are not granted, no increase should be awarded to copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award. However, if the variations or revocations sought are granted, any increase to wage rates in any classification level in these copied State awards should not exceed the rate of pay for the same work under the relevant modern award.

	<p><i>2018 Bus Engineering and Maintenance Award</i></p> <ul style="list-style-type: none"> - The Panel should vary or revoke the Commission’s 2018-19 Review decision so that the modern award wage increase of 3 per cent does not apply to copied State awards derived from the 2018 Bus Engineering and Maintenance Award. Further or in the alternative, the Panel should apply the Commission’s tiered approach to these copied State awards.
ARTBIU	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Bus Operations Award</i> <i>2021 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should increase the wages in the Keolis Downer, Busways and Transdev copied State awards by the full amount determined in the 2021-22 Review as applicable to modern awards, less 2.04 per cent. <p><i>2018 Bus Engineering and Maintenance Award</i> <i>2018 Bus Operations Award</i> <i>2018 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel cannot, and should not, vary or revoke previous annual wage review determinations adjusting minimum wages in copied State awards applying to Transit Systems. - In this Review, the Panel should increase the wages in the copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award by the full amount determined in the Review as applicable to modern awards.
ACCI	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Bus Operations Award</i> <i>2021 Senior and Salaried Officers Award</i></p> <p><i>2018 Bus Operations Award</i> <i>2018 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should not automatically apply increases in Review decisions to copied State awards. - The Panel should apply Review increases to copied State awards only on application, considered on a case-by-case basis following submissions from affected parties.
ABI	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Bus Operations Award</i></p>

	<p><i>2021 Senior and Salaried Officers Award</i></p> <p><i>2018 Bus Operations Award</i> <i>2018 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should not automatically apply increases in Review decisions to copied State awards. - The Panel should only apply the Review decision to copied State awards on a case-by-case basis following submissions by parties. - To the extent that the Commission wishes to adopt a default approach to increasing copied State award minimum wages, it should only seek to increase such wages to align with modern award rates.
<p>ACTU</p>	<p><i>2020 Bus Engineering and Maintenance Award</i> <i>2021 Bus Operations Award</i> <i>2021 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel should increase the wages in the Keolis Downer, Busways and Transdev copied State awards by the full amount determined in the 2021-22 Review as applicable to modern awards, less 2.04 per cent. <p><i>2018 Bus Engineering and Maintenance Award</i> <i>2018 Bus Operations Award</i> <i>2018 Senior and Salaried Officers Award</i></p> <ul style="list-style-type: none"> - The Panel cannot, and should not, vary or revoke previous annual wage review determinations adjusting minimum wages in copied State awards applying to Transit Systems. - In this Review, the Panel should increase the wages in the copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award by the full amount determined in the Review as applicable to modern awards.