

**IN THE FAIR WORK COMMISSION  
ANNUAL WAGE REVIEW 2021-2022**

**RESPONSE TO QUESTIONS CONTAINED IN THE COPIED STATE AWARD**

**BACKGROUND PAPER**

**1. QUESTION 1: DO THE PARTIES AGREE WITH THE DESCRIPTION IN SECTIONS 1.1 -1.3 OF THE LEGISLATIVE FRAMEWORK APPLYING TO COPIED STATE AWARDS?**

1.1 Busways agrees with the description in Sections 1.1 -1.3 of the legislative framework applying to copied state awards.

**2. 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?**

2.1 Busways agrees 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.

**3. QUESTION 3: WHAT CONSIDERATIONS IN SS.284(1)(A)-(E) ARE RELEVANT TO THE APPLICATIONS AND SUBMISSIONS MADE BY THE PARTIES?**

3.1 As previous Panel decisions have made clear, no particular primacy is to be given to any of the specific factors that the Panel must take into account in section 284 of the Fair Work Act (**FW Act**).<sup>1</sup> The following are the considerations that are relevant to the submissions made by Busways with respect to copied State awards applicable to Busways.

**Business competitiveness and viability**

3.2 Section 284(1)(a) of the FW Act requires the Panel to consider the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, information and employment growth.”

3.3 It is important therefore that the Panel consider the fact that the standard contractual terms covering the transfer of an asset between a state public sector entity and a private business typically legally constrains the business from being able to take steps to ameliorate unplanned additional labour cost that may arise as a result of the minimum wage decision, as may otherwise typically exist for private sector operators. This is a

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<sup>1</sup> Annual Wage Review 2016-17 Decision, [129].

matter addressed in detail at paragraph 75 of the Busways Submissions dated 1 April 2022 (**Initial Busways Submissions**).

- 3.4 This effect is heightened for many businesses in the current high inflationary economic period, during which business viability and competitiveness is already under significant strain and pressure, particularly in industries like the bus industry which are exposed and impacted by ever rising fuel prices, which are predicated to stay elevated for some time.<sup>2</sup>

### **Relative living standards**

- 3.5 Section 284(1)(c) requires the Panel to consider “the relative living standards and the needs of the low paid” when setting minimum wage rates.
- 3.6 The assessment of relative living standards requires a comparison of the living standards of workers reliant on minimum wages with those of other groups that are deemed to be relevant and requires “an examination of the extent to which low-paid workers are able to purchase the essentials for a decent standard of living to engage in community life”.<sup>3</sup>
- 3.7 In assessing relative living standards, the comparison the Panel should focus on is other employed workers, especially non-managerial workers.<sup>4</sup>
- 3.8 The basic calculation of living standards is the "median equivalised disposable household income" for a single person household, which is derived from household income surveys conducted by the ABS every two years. The most recent estimate of the national median was published in April 2022; Household Income and Wealth, Australia, 2019-20, cat. no. 6523.0. The median equivalised disposable household income is \$959.00 per week, with the current poverty line defined as 60 per cent of median equivalent household disposable income or \$575.40 per week.
- 3.9 In the current circumstances the Panel should therefore consider the relative living standards of those on copied State award minimum wages with the current median income of all other workers as reflected in the median equivalised disposable household income per week.<sup>5</sup> This is reflected in the below tables, which show a sample of the weekly rate of income for workers under the lowest classification in each of the three Busways copied state awards, when compared to the current national median equivalised disposable household income.

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<sup>2</sup> Australian Bureau of Statistics, Consumer Price Index, Automotive fuel in the CPI, 23 March 2021.

<sup>3</sup> Annual Wage Review 2017-18 FWCFB 3500, [31]

<sup>4</sup> Ibid, [365]

<sup>5</sup> Annual Wage Review 2014-15 FWCFB 3500, [85]

### **Copied State Transit Authority Bus Operators Enterprise (State) Award 2021**

<b>Classification</b>	<b>Weekly Rate</b>	<b>Difference</b>
<b>Bus Operator, Trainee</b>	\$1036.60	+8.09%
<b>Bus Operator level 1</b>	\$1075.90	+12.20%
<b>Bus Operator level 2</b>	\$1,119.10	+16.69%

### **Copied State Transit Authority Senior and Salaried Officers Enterprise (State) Award 2021**

<b>Classification</b>	<b>Weekly Rate</b>	<b>Difference</b>
<b>Clerk grade 1, 1<sup>st</sup> year</b>	\$955.63	-0.35%
<b>Clerk grade 2, 1<sup>st</sup> year</b>	\$1,150.90	+20.01%
<b>Clerk grade 3, 1<sup>st</sup> year</b>	\$1,187.46	+23.82%

### **Copied State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020**

<b>Classification</b>	<b>Weekly Rate</b>	<b>Difference</b>
<b>Engineering Repair Assistant, Level 1</b>	\$985.10	+2.72%
<b>Storeperson Level 1</b>	\$1138.80	+18.74%
<b>Engineering Repair Tradesperson, Level 1</b>	\$1231.10	+28.37%

3.10 The above tables reflect the fact that all but one minimum rate of pay in the lowest classifications in the three Busways copied State awards are above or substantially above the current median equalised disposable household income in terms of the relative living standards of workers covered by the copied State awards.

3.11 To this end the Panel should be satisfied that the workers covered by the Busways copied State awards receive wages which allow for a living standard which is equivalent to or better than the average Australian worker.

#### **4. QUESTION 4: WHAT OTHER CONSIDERATIONS ARE RELEVANT TO THE APPLICATIONS AND SUBMISSIONS MADE BY THE PARTIES?**

4.1 The FW Act requires the Panel to take into account all of the relevant statutory considerations.<sup>6</sup> Therefore, the Panel is required to conduct an 'evaluative exercise' informed by the objectives of the FW Act in section 3 and sections 577 and 578 of the FW Act.

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<sup>6</sup> Annual Wage Review 2018-19 Decision, [11]

## **Fairness**

- 4.2 In addition to the minimum wage objectives requiring the Panel to “*establish and maintain a safety net of fair minimum wages*” the Fair Work Act objectives require the Panel to take into account whether it is ensuring a guaranteed safety net of fair minimum terms and conditions through the national minimum wage orders.
- 4.3 The Panel has noted in previous decision:
- ... ‘fairness’ in the context of the modern awards objective and the minimum wages objective includes the perspective of employees and employers.<sup>7</sup>

### Double dip wage increase

- 4.4 To this end the Panel should also consider the potential result of applying an increase to copied State awards where it will result in an employer operating under a copied State award facing two wage increases in a year. One under state award determinations and the other through the adoption of the Annual Wage Review to copied State awards. This ‘double dip’ impact is addressed in detail at paragraphs [73] to [80] of the Initial Busways Submission.
- 4.5 As ABI and Business NSW<sup>8</sup> explained in their reply submission at [14] and [15], such an approach not only results in double dipping but when an initial increase is then subject to a further wage increase in the same 12 months, the increases “*compound upon each other, such that the monetary cost of the two increases is greater than their combined sum had they been applied at the same time*”. Both the compounding effect and the double dip increase is inconsistent with the objectives directed towards ensuring the maintenance of fair minimum terms and conditions through national minimum wage orders.

### Comparison between copied state award wages and modern award wages

- 4.6 Moreover, a consideration of providing a fair safety net of minimum wages must have regard to how the copied state award wages interact with the modern wages that apply to the same work.
- 4.7 This is a matter addressed in detail at paragraphs [81] to [83] of the Initial Busways Submissions.

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<sup>7</sup> Annual Wage Review 2018–19 [2019] FWCFB 3500, [10].

<sup>8</sup> ABI and NSW Business Chamber, Reply Submission at [14] – [16].

## **Collective bargaining**

- 4.8 An additional consideration is the promotion of harmonious and cooperative workplace relations<sup>9</sup> and the object of “*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining*” (section 3(f) of the Fair Work Act).
- 4.9 These factors considerations support the promotion of enterprise bargaining.
- 4.10 As the Panel has previous made clear and endorsed, there is truth in the proposition that the gap between minimum wages and bargained wages is likely to increase a party’s incentive to bargain.
- 4.11 At a practical level, state awards already transfer over to the national system with a finite life of up to five years, with the intention to encourage parties in the interim to seek to bargain for an enterprise agreement.<sup>10</sup> However, as was outlined in the Initial Busways Submission:

*“if wages under the Three Copied State Awards already leapfrogged equivalent arrangements in similar business/industries (due to the impact of two wage increases in a 6 months period), any incentive to Busways to bargain will be dissolved. In fact, such an approach is likely to render any interest from Busways in operating under an enterprise agreement significantly less attractive and less economically viable.”<sup>11</sup>*

## **5. 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?**

- 5.1 This question is not applicable to Busways.

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<sup>9</sup> S577(d) Fair Work Act

<sup>10</sup> Fair Work Amendment (Transfer of Business) Act 2012, second reading speech, Bill Shorten, 1 November 2012

<sup>11</sup> Busways Initial Submission, 1 April 2022, [87].

**6. 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?**

6.1 This question is not applicable to Busways.

**7. 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?**

- 7.1 At the outset, the use of the phrase 'top-up' by the Background Paper is an interesting choice given the significant extent to which the copied state award wages applying to Busways presently exceed the modern award wages. Busways does not accept that it is possible to 'top-up' a shortfall in this scenario. Indeed, it is the modern award wages that have a shortfall. This is a matter dealt with in further detail in response to Question 7(b) below.
- 7.2 To turn to the focus of Question 7(a), in short, there is no agreement amongst the parties on a 'top up' approach to any annual wage review decision.
- 7.3 As set out in Attachment 1 to the Background Paper, all submissions from the bus industry parties propose as their preferred approach that the Panel should not flow on the Review increase to modern awards to the copied State awards.
- 7.4 Whilst a number of the bus industry parties initial submissions proposed alternative approaches should the Panel decide to flow on the Review increase, only one submission (that of Keolis Downer), actually proposed that the Panel 'top up' the increases under copied State awards to match the Review's increase.<sup>12</sup>
- 7.5 Conversely, several other bus industry parties propose different alternative approaches, including increasing wage rates to the rate of pay for the same work under the relevant modern award<sup>13</sup> and a tiered approach as was previously adopted by the Panel between the 2012-13 and 2016-17<sup>14</sup>.
- 7.6 Hence, the Background Paper could have first asked to what extent there is in fact agreement over applying any minimum wage increase to modern awards to copied State

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<sup>12</sup> Keolis Downer, initial submission, 1 April 2022, [10].

<sup>13</sup> Transit Systems, initial submission, 1 April 2022, [4]

<sup>14</sup> Transdev, initial submission, 1 April 2022, [17]

awards and if an alternative proposal is to be adopted which approach would be most preferred among the parties.

7.7 To this end, it is Busways view that should the Panel see value in increasing the wages in copied state awards contrary to the submission of the bus industry participants, Busways agrees with the alternative proposal contained in Transit Systems initial submission<sup>15</sup>, that any increases to wage rates in any classification level in a copied State award should not exceed the rate of pay for the same work under the relevant modern award. I

**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?**

7.8 The term 'top up' is defined in the Oxford dictionary as meaning "a payment that you make to increase an amount of money, etc. to the level that is needed"<sup>16</sup>.

7.9 In the current Annual Wage Review with respect to applicable copied state awards and equivalent modern awards, it is unclear how such a concept can be logically applied and extrapolated to wage rates in copied State awards which are already far in excess of the rates contained in modern awards.

7.10 For example, as is set out in the Initial Busways Submission at paragraphs [81] to [83], the wages contained in the three Busways copied State awards are already between 16.8% and 52.24% higher than the equivalent modern award rates. Similar figures exist for Transit Systems<sup>17</sup>.

7.11 Thus, in order to "top up" the wages contained in the Busways copied State awards, it logically follows that the Panel would need to be considering an increase to the rates in modern awards in excess of 16.8%. As any increase below this figure would still result in Busways copied State awards rates remaining in excess of their modern award comparator.

7.12 In addition, it is important to emphasise that the purpose of the Annual Wage Review is not to determine a wage increase which is to apply to the wages of all workers no matter their income. Its purpose is to determine an increase to the wages of workers earning minimum rates of pay in classification under modern awards. Consequently, applying a "top up" to workers already earning far in excess of minimum rates in equivalent modern

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<sup>15</sup> Transit Systems, initial submission, 1 April 2022, [4]

<sup>16</sup> Hornby, Albert Sydney. Oxford Advanced Learner's Dictionary of Current English, Oxford University Press, 2000

<sup>17</sup> Transit Systems initial submission, 1 April 2022, Minimum weekly rates comparison.

awards would not only deviate from the purpose of the Review but would be contrary to the objectives of the Fair Work Act<sup>18</sup> and the minimum wages objectives.<sup>19</sup>

- 7.13 In considering the validity of any “top up” approach it is also important to recognise that the wages in many copied state awards, are not of equivalent or comparable value to minimum wages contained in modern awards. As detailed in Busways initial submission at [63] to [72] there is a critical distinction and disparity between the wages contained in the three Busways copied State awards set by the New South Wales Industrial Relations Commission on the basis that they were “fair and reasonable”<sup>20</sup>, compared with the rates contained in equivalent modern awards which reflect the Fair Work Commission setting a “relevant minimum safety net”<sup>21</sup>. This distinction is important when considering the concept of “topping up” to increase copied State awards to match the Review increase, because it both ignores this distinction and failures to recognise that the three Busways copied State awards already provide for wages far in excess of the rates contained in equivalent modern award.
- 7.14 Accordingly, it is Busways view that any “top up” be calculated by reference to the existing disparity between the rates in copied State awards and equivalent modern award classification, such that an increase would not apply to Busways and its employees covered by copied state awards unless the increase applied to modern awards is in excess of 16.8%.
- 7.15 Finally, should the Panel seek to increase modern award rates at a figure below 16.8% and apply it to copied State awards without the rate being calculated by reference to the disparity with comparable modern award rates, it is Busways view that in doing so the Panel should revert to the position adopted prior to the 2017-18 Annual Wage Review decision and apply a tiered approach to any such increase. The tiered approach Busways recommends as an alternative approach is outlined at paragraphs 29 to 31 of the Initial Busways Submissions.

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<sup>18</sup> Fair Work Act, section 3.

<sup>19</sup> Fair Work Act section 284.

<sup>20</sup> Industrial Relations Act 1996 (NSW) section 10.

<sup>21</sup> Fair Work Act, section 284(1).

## 8. SUBMISSIONS IN REPLY TO UNIONS SUBMISSIONS

### Currency of NSWIRC wage determination

- 8.1 At paragraph 22 of the ARTBIU, AMWU and ASU submissions dated 6 May 2022 (**Combined Union Submissions**), the unions contend that the mere fact that the New South Wales Industrial Relations Commission (**NSWIRC**) is required to set “*fair and reasonable wages*” does not mean the wages “*remain so indefinitely*”.
- 8.2 This is true.
- 8.3 However, what the unions fail to grapple with is that the NSWIRC has provided for wage increases in all three relevant awards affecting Busways in 2022. The three relevant awards are outlined in paragraph [80] of the Background Paper (**the Relevant Awards**).
- 8.4 Accordingly, at the time of the Fair Work Commission’s annual wage review, the wages set in the Relevant Awards should be assumed to be “*fair and reasonable wages*”, having just been increased pursuant to a determination made by the NSWIRC.
- 8.5 Should an enterprise agreement not be in place for the 2023 calendar year, there would be greater force in the Combined Unions Submission at that time (ie. the time of the 2023 annual wage review) that the NSWIRC determination of “*fair and reasonable wages*” in the Relevant Awards is no longer current.

### Double dipping addressed by absorbing wage increase into annual wage review

- 8.6 The Combined Union Submissions assert that the double dipping issues identified by Busways are addressed by absorbing the 2022 wage increases set in the Relevant Awards into the annual wage review increase.
- 8.7 However, this does not address the double dipping issue. Employees covered by the Relevant Awards will already receive wage increases in 2022 as follows:
- (a) 2021 Senior and Salaried Officers Award - 1 January 2022
  - (b) 2020 Bus Engineering and Maintenance Award - 1 April 2022
  - (c) 2021 Bus Operations Award - 1 January 2022
- 8.8 Employees accordingly will have received a wage increase in 2022.
- 8.9 To further apply a wage increase to these employees is to provide the employees with a windfall gain above that which was determined as “*fair and reasonable wages*” for 2022 by the NSWIRC.
- 8.10 By ‘absorbing’ the 2022 wage increases into the 2022 Fair Work Commission annual wage review, the Commission would be again increasing employee wages in 2022. This

action inherently assumes that the wages set by the NSWIRC for the Relevant Awards in 2022 are not an appropriate safety net.

8.11 Such an assumption or inference could not be drawn without:

- (d) assessing the work value of the services performed by the relevant employees; and
- (e) grappling with why the wages under the Relevant Awards are not a fair and relevant safety net when they already substantially exceed the wages contained in the modern award covering exactly the same work.

### **Modern award rates not properly set**

8.12 The union's third submission is a flippant attempt to deal with the disparity between the Relevant Award wages and the modern award wages.

8.13 Busways has demonstrated, by reference to specific examples, wage disparities of between **16% - 50%** between the Relevant Awards and the applicable modern awards.

8.14 The disparities are easily explained by Busways - the Relevant Awards are 'paid rates' awards which reflect amounts actually paid to employees, whilst the modern awards rates are part of a minimum safety net.<sup>22</sup>

8.15 This is the reason for the disparity, not the union's contention that the modern awards rates have somehow fallen up to 50% below their appropriate value - in circumstances where no union has ever previously made a claim (to Busways' knowledge) that:

- (a) the modern award rates are not reflective of their work value; or
- (b) that modern award rates should be increased on work value grounds through a work value claim.

### **Employees left without increase for 18 months; this disincentives collective bargaining**

8.16 The unions contend that acceding to Busways' submissions will leave the employees without a wage increase for 18 months.

8.17 This is not necessarily true and is not likely to be the outcome experienced by employees covered by the Relevant Awards.

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<sup>22</sup> See discussion at [63]-[68] of the Busways Submissions dated 1 April 2022

8.18 **Firstly**, Busways has already commenced bargaining with the ARTBIU for an enterprise agreement to replace the 2021 Bus Operations Award.<sup>23</sup> This is not in dispute. Busways also intends to bargain with respect to the other two workforces this year. Given:

- (a) the prevalence of enterprise agreements in the industry<sup>24</sup>;
- (b) the availability for unions to take industrial action presently; and
- (c) Busways' stated intentions,

there is every likelihood that enterprise agreements will be in place for the relevant workforces by the end of 2022.

8.19 **Secondly**, to the extent that enterprise agreements are not agreed before the next annual wage review (and therefore employees experience 18 months without a pay rise), the relevant unions can make submissions to the 2023 annual wage review about the appropriate way to address any financial detriment suffered by employees. That way, employees covered by the Relevant Awards can still be compensated in the unlikely event that their wages are not increased over the next 18 month period. This is a better means of addressing a hypothetical scenario than imposing a windfall gain on employees presently as part of the 2022 annual wage review.

**Filed on behalf of Busways North West Pty Ltd by Australian Business Lawyers & Advisors:**

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<sup>23</sup> Witness Statement of Will O'Neill dated 30 March 2022 at [32]

<sup>24</sup> Witness Statement of Will O'Neill dated 30 March 2022 at [29]-[30]