BEFORE THE FAIR WORK COMMISSION **MATTER NO. C2023/1**

ANNUAL WAGE REVIEW 2022-23

ACTU REPLY SUBMISSIONS – COPIED STATE AWARDS

Introduction

1. These submissions are made in response to those filed on behalf of Busways North West Pty Ltd, ACCI, Ai Group and ABI & the NSW Business Chamber Ltd (collectively, "the Employers").

2. The approaches urged upon the Panel by the Employers involve, variously:

   - Not flowing on wage increases determined for modern awards to copied state awards by default;[1]
   - Determining increases to copied state awards only where applications have been made[2] or submissions have been made[3] seeking an increase in respect of particular copied state awards;
   - Making any default determination exclusive of copied state awards that derive from awards of the NSW Industrial Commission;[4] and
   - Limit any determinations to vary copied state awards to a ceiling fixed by the classifications contained in equivalent modern awards.[5]

3. The ACTU does not support the approaches set out in the Employers' submissions. We continue to support the approach set out in paragraphs 4-5 of our initial submission.

4. Notwithstanding that there are differences in the ultimate approaches preferred by some of the Employers, there are similarities in the reasons advanced for those approaches. We deal with these purported justifications in turn below.

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[1] ABI at [2.1], Busways at [6(a)], Ai Group at page 1.
[2] ACCI at [41]
[3] Busways at [6(b)], Ai Group at p. 2, ABI at [2.2].
[4] ABI at [2.3(a)], Busways at [6(c)(i)]
[5] ABI at [2.3(b)], Busways at [6(c)(ii)]

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Protecting NSW businesses

5. ABI and Busways seek to differentiate and exempt copied state awards that derive from NSW awards based on the claimed jurisdictional uniqueness of NSW, the disparity between wages in copied state awards and "comparable" modern awards, and a "disproportionate negative effect on NSW business"[6]. Paragraphs 19-25 and 30-32 of ACCI's submissions also raise some of those matters, suggesting that the adjustment of wages in copied state awards derived from NSWRIC awards "warrants particular caution".

6. For the reasons already advanced in our initial submissions, the jurisdictional differences and wage rate disparities between NSW and federal awards should not be decisive factors that lead to their wage rates not being reviewed and varied, or being reviewed and varied subject to an effective cap by reference to in rates modern awards. A fair and relevant safety net can embrace inherent differences in the instruments which constitute it, and as the Full Federal Court has observed, the maters listed in the modern awards objective do not "..pose any questions or set any standard against which a modern award could be evaluated"[7].

7. The principal complaint which Busways and ABI & the NSW Business Chamber advance is essentially that the NSW system permits awards to be paid rates awards and for their contents to be set by consent. This, so the argument goes, sets the NSW system apart and means that for employers and employees elsewhere, the retention of state award wages through copied state awards during a privatisation is inconsequential. We disagree. Our affiliates and their members certainly attach significance to the award wages and conditions they have established through state industrial relations systems and which underpin the wages and conditions enjoyed in state public sector employment.

8. NSW is not unique in permitting paid rates or consent awards. Section 40A of the IRAWA and section 145 of the QIRA clearly permit an award to contain paid rates established on a consent basis, and section 36 of the IRAT does not prevent this (especially given that the Tasmanian Industrial Commission has set aside all of its wage fixing principles save for those relating to equal remuneration).

9. The assertion in paragraph 29(a) of Busways submissions that "in Queensland, Tasmania and South Australia state-based award wages are 'minimum wages', as is also the case with our

[6] ABI at [3.2]
[7] *National Retail Association v. FWC* [2014] FCAFC 118 at [109]

national system modern awards" is marked with footnote 16. The legislative provisions referred to at footnote 16 do not however support the assertion. It is not correct that section 69 of the *Fair Work Act 1994* (SA) requires South Australian awards to be minimum rate awards. Insofar as that section refers to minimum wages at all, it does so not by reference to awards but to the *minimum standard for remuneration*. The *minimum standard for remuneration* is given effect to by a declaration of the SAET and is effectively South Australia's equivalent to a National Minimum Wage Order. Similarly, section 47AB of the IRAT and section 22 of the QIRA, also referred to in note 16, are concerned with the respective state minimum wage, not wages fixed in award. NSW also has a State minimum wage, determined by reference to the National Minimum Wage Order.[8]

10. Busways relies on both:

- its mistaken dichotomy between "NSW only" paid rates and minimum rates awards; and
- an assertion at 29(b) that QLD, TAS and SA award wages have "historically always been set by simply adopting the Commission's Annual Wage Review determination each year and applying a uniform increase across all state award minimum wage rates"

as bringing about the result that state award wages in Queensland, Tasmania and South Australia "largely mirror the minimum wages in comparable national system modern awards". Again, this is not correct. As explained in the annexures to our initial submission:

- The NSWIRC also flows increases to minimum rates awards;
- TIC generally does not vary most awards as part of its adjustment to the state minimum wage;
- The QIRC does adjust award wages when adjusting the QLD minimum wage, but some of the rates it thereby adjusts may not be minimum rates.

Accordingly, it if it *were* the case that state award wages in QLD, TAS and SA largely mirrored the minimum wages in "comparable nation system modern awards", it would not be due to any fundamental homogeneity in the minimum and award wage systems in those states compared to that which exists in NSW.

[8] See for example paragraphs [6]-[7] of Annexure A to *State Wage Case 2021* [2022] NSWIRC 1014.

11. Moreover, the assertion that that state award wages in Queensland, Tasmania and South Australia "largely mirror the minimum wages in comparable national system modern awards" is a difficult one to verify in the time available, and potentially gives the word "comparable" significant work to do. A question arises, particularly in the context of privatisations, as to whether a federal private sector award *is* actually "comparable", if the privatisation merely involves the provision of pre-defined State public services under a contract with the State. Bus transport is a good example, as it could scarcely be said that the operation of pre-determined bus routes on the state transport network is not the provision of public, as opposed to private transport. Taking that example, is the $1108.10 identified in Table 1 of Busways submissions as payable to a Bus Operator Level 2 under the NSW *State Transit Authority Bus Operations Enterprise (State) Award* really more "comparable" to the lesser $944 payable under the *Passenger Vehicle Transportation Award* than it is the higher $1015.50 payable under the QLD *Brisbane City Council Bus Transport Employees Award* for the corresponding classification? The *Brisbane City Council Bus Transport Employees Award* is an obvious example that defies the "largely mirror" assertion. Consider also the situation of teachers in schools and their starting rates. There are two modern awards in the Federal System, the *Educational Services (Teachers) Award* and the *Victorian Government Schools Award*. The former provides an entry rate of $63,842 and the latter provides an entry rate of $60,901. The South Australian *Teachers Award* provides an entry rate of $54,741 against $60,640 in the Tasmanian *Teaching Service (Tasmanian Public Sector) Award* and $63,918 in the QLD *Teaching in State Education Award*. Clearly the award rates do not mirror each other and even the two federal awards are not in agreement. But which of the federal awards should be considered comparable? Are all "minimums" the same irrespective of how legalisation is structured and the presence or absence of "modern award objectives" or "minimum wage objectives" in similar or identical terms to those in the FW Act? The more the proposition is interrogated, the less appealing it becomes.

12. The reality is that the content of modern awards is likely more heavily influenced by the content of various state awards than the reverse, having regard to the award modernisation process. The *adjustment* of wages in state awards has not brought about any mirroring of wages between state and federal awards. If anything, it has likely brought NSW public sector paid rates award rates *closer* to minimum rates in modern awards over time, because of the dampening impacts of the NSW government's public sector wages policy. It is that policy, which, to adopt Busways terminology, assumes the role of a "general overriding" mechanism

"which automatically and uniformly" adjusts rates of pay in the class of NSW awards that are amendable to being reflected in the terms of copied state awards.

13. In referring to a "disproportionately negative impact" on NSW employers of the Panel's approach to adjusting copied state awards, ABI & NSWBC rely on data from Infrastructure Partnerships Australia. The charts used are from an online service available at https://infrastructurepipeline.org. It is to be noted, based on Chart 2 in the ABI submissions, that the privatisations listed for NSW within the 5 year operation of copied state awards are in 2018/19, 2020/21 and 2021/22. No information is provided as to whether any of the privatisations involved transferring employees, or how many, or whether enterprise agreements have since been made. Digging a little deeper, it is possible to produce charts which include or exclude privatisations based on sector: All, Energy, Social Infrastructure, Road, Rail Other Transport, Water & Sewerage and Other. Below are charts we have generated for the 2018/2019-2021/2022 period in NSW the using the online tools https://infrastructurepipeline.org, as follows:

- Figure 1 is for all sectors in NSW;
- Figure 2 includes only the Road and Other Transport Sectors, and appears identical to Figure 1; and
- Figure 3 includes only the Road sector.

Figure 1

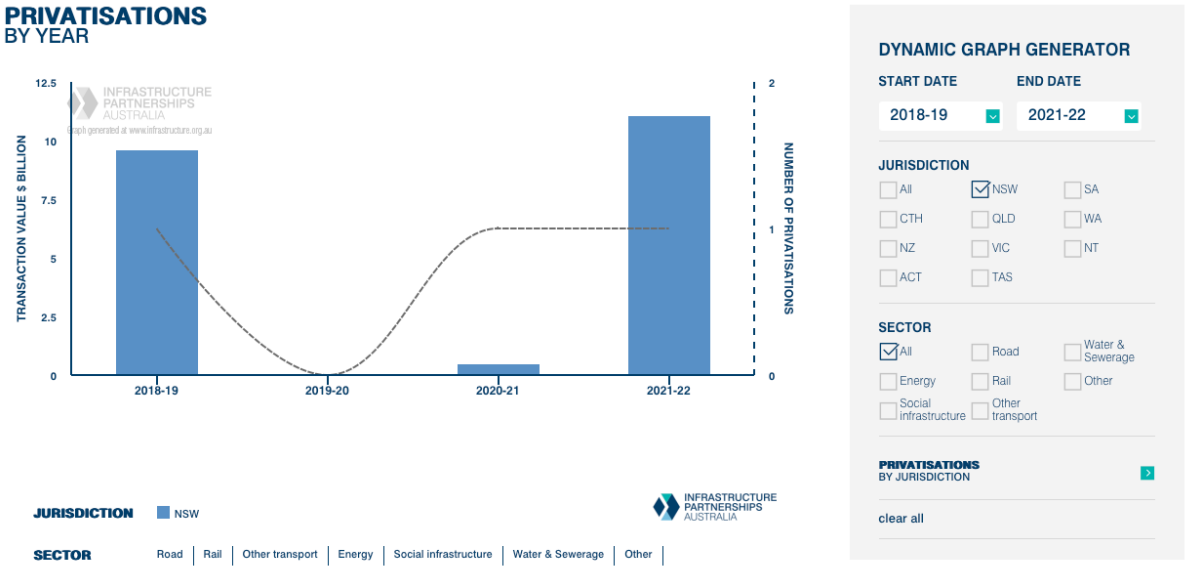


Figure 2

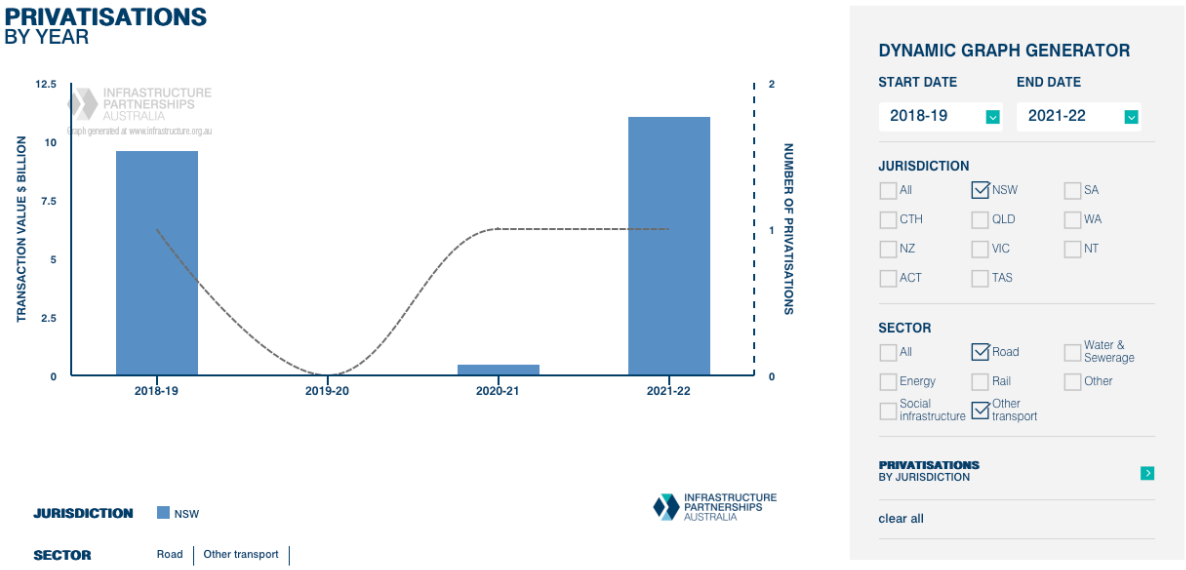
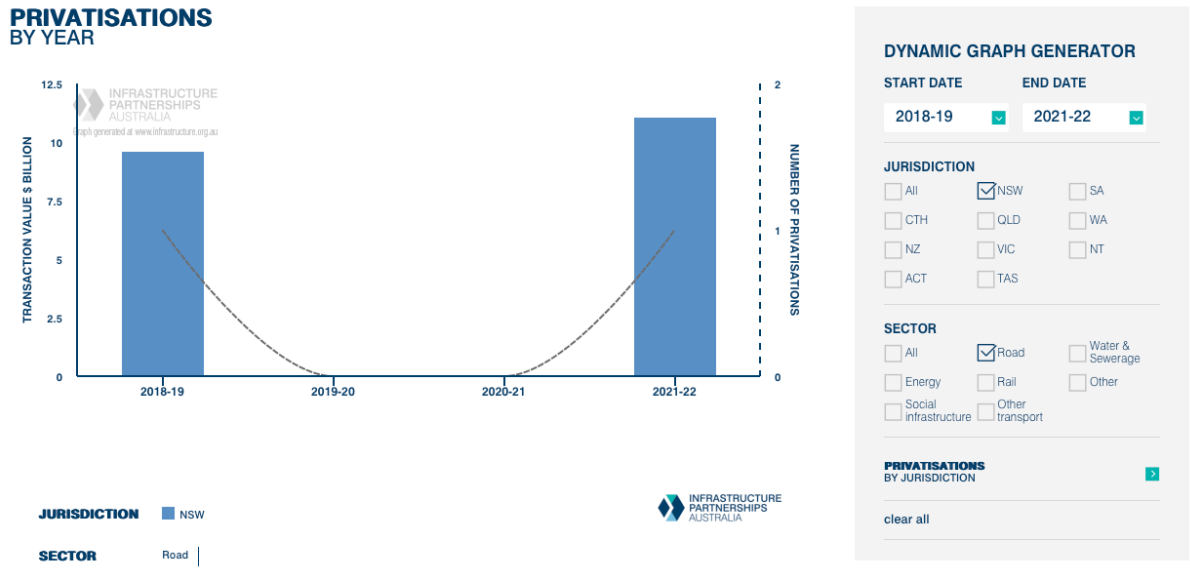


Figure 3



14. Collectively, Figure 1 to Figure 3 suggest that most of the value of privatisations has occurred in the road transport sector. The small value of privatisation in the "other transport" sector limited to 2020-21, may well relate to bus services contracts of the type which Busways is a party. The remainder is likely almost entirely attributable to the two tranches of WestConnex privatisation ($9.3 Billion for 49% in 2018/19, $11.1 Billion in 2021 for the remainder[9]). A search on the "Find an Agreement" section of the Fair Work Commission website with the

[9] WestConnex website "Board and Governance", Standen, C., "Privatising WestConnex is the biggest waste of public funds for corporate gain in Australian history", the Conversation, 25/9/2018, DeLorenzo, L, "NSW Government sells WestConnex stake of $11 billion", Infrastructure magazine, 21/9/2021.

search term "WestConnex" yields 79 agreements, many of them Greenfields, which would supplant any copied state awards that might otherwise be operative in the absence of take-home pay orders. In any event, it is not at all clear whether the nature of the transactions required involved any transferring employees so as to create a copied state award[10]. In short, there is nothing in ABIs submissions to point to a major influx of copied state awards.

15. Moreover, there are real difficulties with the logic of the argument that NSW employers are particularly disadvantaged by the operation of copied state awards. Copied state awards are not outliers but rather one part of a harmonious system of transfer of business regulation which transfers instruments - both awards and agreements- upon the happening of specified events wherein there are "transferring employees", either between national system employers (under Part 2-8) or from a State to a national system employer (Part 6-3A). In either situation, the "new employer" may need to contend with wage rates which were fixed by an agreement outside of their control and which may increase in future without their control. Where a State government, or national system employer, seeks to divest assets or outsource in circumstances that give rise to transfer of business, all national system employers that are bidders for the same work face the same labour cost and compete on a level playing field, irrespective of the State those bidders are domiciled in. If the real complaint of ABI is that such a system of transfer of business regulation exists at all, this is not the correct forum in which it to raise it.

16. Finally, none of the Employers make any mention or allowance for the fact that copied state awards apply only to transferring employees, in discussing their potential impact.

Deficiencies in the default approach?

17. Busways claim in paragraph 5 of their submission that the 2021-2022 Annual Wage Review process highlighted deficiencies in the Commission's approach to copied state awards. This is a surprising claim for Busways to advance, given that it secured precisely the result it contended for in those proceedings. It is with respect entirely unclear what a less deficient process might look like when viewed from the perspective of Busways interests (which presumably are the only interests the submissions lodged in their name seek to advance).

[10] The report of the NSW Auditor General "WestConnex: Changes since 2014" identifies Sydney Motorway Corporation as the entity that was formed as government owned business, the equity in which the government thereafter sold in two tranches. Sydney Motorway Corporation was registered as a proprietary limited company on 28 August 2014, and remains registered at such (ACN 601 507 591).

18. In further prosecuting the case for deficiencies, Busways point to "Unnecessary Technicalities", "Fairness" and "Undermining Collective Bargaining". Neither of these are convincing.

19. There is no "unnecessary technicality" involved in the Panel adopting, and announcing in advance, its intended approach to adjusting copied state awards. The technicalities exist in the legislative scheme which establishes copied state awards and mandates that they be reviewed. Once again, the complaint appears not principally to be with the method of adjustment of the instruments, but with the existence of the instruments themselves.

20. Busways conclusion that there is "lack of awareness" that the Annual Wage Review adjusts copied state awards is based on the "lack of submissions from individual employers until last year's annual wage review" and the result in one underpayment case. There is likewise traditionally little participation in annual wage reviews from individual national system employers covered by modern awards, but this does not compel a conclusion that they are not aware of it. There could be range of explanations for individual employers covered by copied state awards not participating, and the inductive reasoning upon which Busways conclusion rests falls far short of the standard it describes in paragraph 47 of its submissions as requiring evidence which is "..cogent and probative in the sense that it should be logical and compelling and properly directed to the demonstration of the facts". Perhaps one reason for employers in NSW outside of bus industry employers being disengaged from the process in recent years lies in Busway's solicitors separate submissions for ABI, which rely solely on data which, as we have shown above, suggests that there has been very little if any activity outside of that industry in recent years that would give rise to the creation of copied state awards in NSW. The complaint in paragraph 52 of Busways submissions that it is a burdensome and unrealistic expectation "to both be aware of and understand the history and interaction between copied state awards and annual wage review decisions" is a further complaint about the legislative scheme rather than the process adopted by the Panel – the complaint as expressed would remain irrespective of the process which the Panel adopted in carrying out its mandatory function of reviewing copied state awards in an annual wage review.

21. The "unfairness" which Busways claims to arise in paragraph 55 of its submission is that a further increase in the copied state awards which apply to it "..will lead to a clear disparity between Busways and other national system employers as Busways will be subject to labour costs which are far greater than other national system employers engaging employees doing the same work". This submission fails to appreciate that the operation of Part 6-3A of the FW

Act in fact ensures that all operators who elect to tender for the same work will face the same labour costs in the event they take on transferring employees – there is a level playing field for the same work, and no question of labour cost competition arises other unless or until an enterprise agreement is made and approved. Generally speaking, enterprise agreements will increase wages further. A case in point relates to Transdev, who were active participants in last year's proceedings. On 27 June 2022, FWC approved[11] the *Transdev NSW & TWU Enterprise Agreement 2022-2026*, which at clause 5 states that it applies to "persons wholly or principally bus drivers and conductors or persons employed primarily as bus drivers who are employed by the Companies named as parties to this Agreement, that provide services under a Sydney Metropolitan Bus Services Contract, or any successor agreement or contract which replaces this contract". As at 1 July 2023, it will pay a weekly full time employee in the classification of bus driver $1191.93, which is 7.56% higher than the "Bus Operator Level 2" rate cited in Table 1 of Busways submission as the current rate deriving from the State Transit Authority Bus Operations Enterprise (State) Award 2021, which had also applied to Transdev[12]. The agreement also provides for a further wage increase in that year in the event that the wage price index exceeds 3%.

22. Busways submission about the risk of "Undermining collective bargaining" is contradicted by paragraphs 19-25 of the statement of its only witness and workplace relations manager, which concludes with the emphatic statement "It is mine and Busway's expectation that a new enterprise agreement will be implemented this year which provides for wage increases from 1 January 2023 going forward for drivers and Senior Salaried Officers and from the 1 April 2023 for maintenance staff, to ensure that employees continue to receive wage increases on a yearly basis". The asserted undermining of collective bargaining is also at odds with Transdev's evident experience, who concluded an agreement (but had not yet had it approved) prior to the outcome of last year's review being known.[13]

[11] [2022] FWCA 2103
[12] [2022] FWCFB 3500 at [331]
[13] [2022] FWCFB 3500 at [359]

Double dipping vs zero

23. Ai Group at paragraphs (a) and (b) on the bottom half of page 6 and ACCI at paragraph 13 of their respective submissions point to the burden associated with implementing more than one wage increase in a 12 month period. The only means of avoiding such a burden where a copied state award has built in wage increases is to adopt a decision rule of applying zero increase to copied state awards which have that feature. To adopt such an approach effectively renders the Panel's obligation to review and discretion to vary nugatory. It is also at odds with the detailed individual examination and consideration that Ai Group (at page 6) and ACCI (at paragraph 35 and 38) claim is required. The position lacks internal consistency and perhaps discloses a preference for copied state awards not to be adjusted at all.

24. ACCI justifies its position on the basis of it avoiding "double dipping". The position we advance does properly avoid the risk of "double dipping", because it involves an offset of wage increases already mandated under copied state awards.

The burden of participation

25. Both ACCI and Ai Group express concerns about employers being ignorant of the process for adjusting copied state awards (at paragraphs 15-16 and paragraph (e) on page 7 respectively). Aside from the underpayment case also referred to by Busways, no examples of claimed ill effects are given. Since the commencement of Part 6-3A of the FW Act there has been a decade of annual wage review decisions, a federal court judgement, and the current proceedings. If ignorance were ever an excuse, surely its time has passed.

26. Ai Group state "Those unaware of the process or without the resources to participate in an AWR ought not be unfairly saddled with the outcome of the review". It is a difficult complaint to accept without also accepting that employers generally are unfairly saddled with the outcome of annual wage reviews in which they do not individually participate. We do not accept that any such unfairness arises. Similarly, ACCI state that the Panel's current process has the effect that "the onus is placed on individual employers to demonstrate to the Commission as to why it should be subject to only a single wage increase within the given year, rather than two wage increases". Ignoring for present purposes the fact that not all copied state awards do in fact provide for scheduled wage increases into the future, the burden upon employers of being aware of and participating in an annual wage review will remain even if ACCI or Ai Group's position is adopted. Secondly, the language of an onus is inapt to describe the processes generally adopted in an annual wage review.

27. Ai Group's position on page 7 of their submissions that "..the burden of identifying situations in which rates should not be increased in accordance with an AWR decision should not fall on employers" is glaringly inconsistent with their opening position on page 2 that "..the Commission should afford all interested parties a reasonable opportunity to be heard in relation to any proposed increases". It is with respect indecipherable how the opportunity that Ai Group evidently seeks be afforded to interested parties would be any more reasonable, or any less burdensome, than is currently the case.

Business competitiveness and viability

28. At paragraph 34 of their submissions, ACCI commence a discussion about how the requirement to consider "business competitiveness and viability" interacts with employers that acquire State Government Assets, claiming that they have a lesser capacity to raise revenue due to contractual constraints. Similar concerns are expressed in paragraphs 11-13 of Mr Gibson's Statement, which neglects to mention that the Independent Pricing and Regulatory Tribunal for NSW has provided for public transport fees to increase by an average of 5% per year between 2020 and 2024[14]. Contractual or indeed regulatory requirements having the effect of restricting revenue are not unique to those employers, and may apply to many parties engaged to provide services to or on behalf of public or private sector entities where no transferring employees are involved. It does not follow that employers that acquire state government assets are "uniquely less equipped to manage unplanned increases in their labour costs", as ACCI claim. Rather, a ready tool for managing unplanned increases in labour costs is to enter into enterprise agreements. This is presumably a step which is less burdensome than the EOI to bid to contract procedure associated with successful participation in a competitive tender process for the acquisition of the state government assets in question. The only way to answer ACCI's concern is to mandate that there be no increase at all copied state awards, which as we have pointed out above is both internally inconsistent with the broader position they adopt and inconsistent with the Panel's task.

29. As we have recounted in paragraphs 15 and 21 above, an issue of "competitiveness" does not arise given that copied state instruments fix the labour costs for transferring employees equally among the prospective bidders for State government work. Some employers may

[14] Independent Pricing and Regulatory Tribunal, "Maximum Opal Fares 2020-2024", February 2020.

prefer a relative profit advantage by reducing real wages over time, but this does not render them more or less competitive.

Maintenance vs. preservation

30. ACCI seek to misdirect the Panel as to the scope of its functions in an annual wage review. At paragraphs 11 and 18 of their submissions, ACCI claim that Part 6-3A of the FW Act is merely directed at preserving the conditions of transferring employees, as distinct from materially improving them. This is at odds with the Panel's findings at paragraphs [392] and [428] of its decision last year, and should not be accepted. Section 768BY, which is contained in Part of 6-3A has the effect that the minimum wages objective applies to copied state awards. That objective casts an obligation on the FWC to "establish and maintain" a safety net of fair minimum wages.

Avoiding wage increases

31. Paragraphs 4 (c) and (d) on the bottom half of page 6 of Ai Group's submission are tainted by their apparent more fundamental objection to the existence of copied state awards containing rates of pay higher than some modern awards and their concern that any increase that might be awarded by the Panel would be "unjustifiable or unsustainable". One might expect that a major national employer organisation purporting to have an interest in this matter might readily give an example of unjustifiable or unsustainable increases to copied state awards since the commencement of Part 6-3A more than a decade ago, but no example is given. Nor is any example given of employers covered by copied state agreements being discouraged from bargaining because of the Panel's past decisions. The submissions in this regard are mere conjecture.

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