

Annual Wage Review 2022-23

Copied State Awards

ACCI Initial Submission

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Working for business. Working for Australia

Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au

Media Enquiries

Telephone 02 6270 8020 | Email media@acci.com.au

Canberra Office

Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600
PO BOX 6005
Kingston ACT 2604

Melbourne Office

Level 2, 150 Collins Street
Melbourne VIC 3000

Sydney Office

Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

Perth Office

Bishops See
Level 5, 235 St Georges Terrace
Perth WA 6000

ABN 85 008 391 795

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I Overview

1. Copied State awards are industrial instruments that are designed to preserve the terms and conditions of employees who transfer from a non-national system employer to a national system employer.¹ This will occur where a State public sector employer transfers the ownership of assets, outsources work, or entitles the beneficial use of assets to a national system employer.²
2. In an annual wage review, the Fair Work Commission (**Commission**) is empowered to make a determination that varies terms relating to wages in a Division 2B State award.³ Copied State awards are included in the definition of Division 2B State awards.⁴ Since 2018, the Commission has adopted a default approach in annual wage reviews of increasing the wages in copied State awards by an amount commensurate with the increase to modern award minimum wages.
3. ACCI submits that the default approach to wages in copied State awards in annual wage reviews should be to only apply increases on a case-by-case basis on application. ACCI contends that this approach should be adopted for the following reasons:
 - a. the existing approach of automatically adjusting wages in copied State awards leads to “double-dipping” effects, which may be unforeseen by the employer, and unfairly places the onus on them to justify not receiving two wage increases in a single year (**Part III**);
 - b. the jurisdictional differences in wage-setting under State awards in NSW leads to wage levels that will generally exceed the minimum safety net under modern awards, even without any adjustment that accords with the annual wage review decision (**Part IV**);
 - c. although wage-setting in awards in other states may not necessarily be subject to significant jurisdictional differences, a risk of “double-dipping” persists and the disproportionate impact on NSW businesses alone justifies the adoption of a new approach (**Part V**); and
 - d. the statutory considerations favour a more cautious approach to the adjustment of wages in copied State awards (**Part VI**).

II Background

4. Copied State awards first came into existence in December 2012.⁵ In the Annual Wage Review 2012-13, the first annual wage review that followed their creation, the Commission decided to adopt a multi-tiered methodology for the application of minimum wage increases to copied State awards.⁶ The Commission was determined to “limit the impact of any ‘double-dipping’” and therefore decided to apply:⁷
 - a. no increase to the wage rates in copied State awards that had been subject to a state minimum wage decision between January 1 and July 1 that year;
 - b. an increase to the wage rates in copied State awards that had been subject to a state minimum wage

¹ Explanatory Memorandum, Fair Work Amendment (Transfer of Business) Bill 2012 (Cth) 4.

² *Fair Work Act 2009* (Cth) (**FW Act**) ss 789AD(2)-(3).

³ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 9 pt 5 div 2 item 20.

⁴ *FW Act* s 768BY(2).

⁵ *Fair Work Amendment (Transfer of Business) Act 2012* (Cth) s 2.

⁶ *Re Annual Wage Review 2012-13* (2013) 235 IR 332, 472-473 [560].

⁷ See *ibid*.

- decision between July 1 in the year prior and January 1 that year that was 50% of the determined increase of wage rates under modern awards; and
- c. an increase to the wage rates in copied State awards that had not been subject to a state minimum wage decision between 1 July in the year prior and July 1 that year that was 100% of the determined increase of wage rates under modern awards.
5. This approach to wage rates in copied State awards was replicated in each successive annual wage review until 2018.⁸ On 4 January 2018, during the Annual Wage Review 2017-18, the Commission expressed a provisional view that it no longer considered the multi-tiered approach appropriate.⁹ The Commission proposed to automatically apply the full quantum of any determined increase to modern award wages to wages under copied State awards in future reviews.¹⁰ The Commission further proposed to address any “double dipping” concerns on a case by case basis.¹¹
 6. The Commission invited parties to make submissions in response to this provisional view.¹² ACCI submitted that there should be scope for parties to continue to raise “double dipping” concerns with the Commission.¹³ The Commission subsequently confirmed this view in the Annual Wage Review 2017-18 decision.¹⁴
 7. The Commission continued to automatically apply the full quantum of the determined increase to modern award wages to wages under copied State awards in each successive review until last year’s decision, when “double dipping” concerns were raised for the first time. In the Annual Wage Review 2021-22, the Commission decided to exempt the copied State awards of certain bus companies which had acquired bus networks from the NSW Government because they had recently been subject to wage increases under the State system.¹⁵
 8. In that review, ACCI proposed that the Commission should adopt a new approach to adjusting wages under copied State awards.¹⁶ ACCI submitted that the default approach in annual wage reviews of adjusting wages under copied State awards should be to not automatically apply any increase and to only do so on application, considered on a case-by-case basis following submissions from affected parties.¹⁷
 9. The Commission decided that there had not been sufficient opportunity for interested parties to address these submissions.¹⁸ In this year’s review, the Commission has invited submissions on how the Expert Panel should deal with copied State awards in the future.
 10. For the undermentioned reasons, ACCI maintains its position that wage increases determined in annual wage reviews should only apply to copied State awards on a case-by-case basis on application, rather than automatically.

⁸ *Re Annual Wage Review 2013-14* (2014) 245 IR 1, 138 [572]; *Re Annual Wage Review 2014-15* (2015) 252 IR 119, 241 [536]; *Re Annual Wage Review 2015-16* (2016) 258 IR 201, 347 [593]; *Re Annual Wage Review 2016-17* (2017) 267 IR 241, 434-435 [699].

⁹ *Annual Wage Review 2016-17* [2018] FWCFB 2 [43].

¹⁰ See *ibid.*

¹¹ See *ibid.*

¹² See *ibid.*

¹³ ACCI Submission, *Annual Wage Review 2017-18* (9 April 2018) [37].

¹⁴ *Re Annual Wage Review 2017-18* (2018) 279 IR 1, 132 [452].

¹⁵ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [426].

¹⁶ ACCI Reply Submission, *Annual Wage Review 2021-22* (10 May 2022) [203].

¹⁷ See *ibid.*

¹⁸ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [446].

III The “double dipping” effect

11. Part 6-3A of the FW Act, in which the laws regarding copied State awards are situated, is directed at “preserving” the terms and conditions of employees transferring into the national system.¹⁹ It is not directed at materially *improving* the terms and conditions of transferring employees, but rather ensuring that the employees are not worse off than they would have been in the absence of the transfer of business.²⁰
12. This purpose is subject to Commission’s obligation to maintain a safety net of *fair* minimum wages.²¹ Fairness is considered from the perspective of both employees and employers.²²
13. Requiring the provision of two wage increases to their employees within a single year, or sometimes a shorter period,²³ is unfair to an employer. It leads to rapid and compounding increases in labour costs. The Commission has consistently recognised this impact as unfair in its desire to “limit the impact of any ‘double-dipping’” in its past decisions.²⁴
14. The question therefore becomes how this unfair “double dipping” effect can best be avoided. The existing approach to wages adjustments under copied State awards is not the best means of doing so for the reasons outlined below.
15. First, it has passed the burden onto employers to directly, and individually, apply to the Commission for an exemption from the determined increase. This requires the employer to be aware of the effect of annual wage review decisions on copied State awards, which is not always the case. This was demonstrated in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436, in which Rares J suggested that perhaps “it never occurred to either [the employer] or the Union” that the annual wage review decision would impose a further increase of the employees’ wages.²⁵ There is evidently a lack of knowledge about this issue by both employers and employee organisations. The consequence of this incognisance is that the “double dipping” effect will often not be dealt with on a case-by-case basis, but instead remain unremedied.
16. Second, the passing of this burden onto employers to directly, and individually, apply for an exemption from the determined increase also places the onus on an employer to satisfy the Commission that it should exercise its discretion to depart from the default approach, taking into account the applicable statutory considerations. This means that, in effect, 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. This is not a fair or just means of limiting the impact of “double dipping”.²⁶
17. Third, but relatedly, the default approach results in the creation of “double dipping” effects under instruments which the Commission is incapable of identifying. The Commission should adopt more caution when proposing to change the terms and conditions of employees in occupations, industries and quantities it

¹⁹ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [428].

²⁰ See *ibid.*

²¹ See *ibid.*

²² *Ibid* [18].

²³ See, eg, *ibid* [330]-[332].

²⁴ *Re Annual Wage Review 2012-13* (2013) 235 IR 332, 472 [560].

²⁵ *ARTBIU v Transit Systems* [57] (Rares J) (emphasis added).

²⁶ See FW Act s 577(1)(a).

cannot ascertain, with no knowledge of the resulting impact on the affected employer.

18. Ultimately, as aforementioned, the purpose of the transfer of business rules which lead to the creation of copied State awards is to *preserve* the terms and conditions of the employees.²⁷ The existing approach does not preserve the terms and conditions of employees under copied State awards but instead will often materially improve them in the first year of being transferred into the national system, as well as any years after for which the copied State award provides for wage increases in successive years.

IV Jurisdictional differences in NSW

19. The Annual Wage Review 2021-22 decision recognised the considerable jurisdictional differences between the modern awards system and the NSW industrial relations system.²⁸ This further justifies the adoption of a more cautious approach to wage adjustments under copied State awards.
20. As the Commission is well aware, the NSW Industrial Relations Commission (**NSW IRC**) must set “fair and reasonable conditions of employment for employees” in the awards it creates.²⁹ This threshold of employment conditions is easily contrastable with that of the national system, which requires the setting of “a fair and relevant minimum safety net”.³⁰ The terms “fair and reasonable” import a requirement for wage-setting at levels that exceed what is required for the establishment of a “minimum safety net”.³¹
21. In addition to the higher threshold for wages in NSW State awards, these instruments often bear similar characteristics to those of enterprise agreements.³² Their terms are often determined and varied by consent between the relevant parties.³³ This also contributes to the setting of wage levels which are likely to be higher than modern award rates.
22. Collectively, these important distinctions, of which there are likely more, mean that the wages in copied State awards resulting from the transfer of business from a NSW public sector employer will almost inevitably be higher than wages in comparable modern awards. This was demonstrated in the Annual Wage Review 2021-22, where the Commission noted that the “the current wage rates in the copied State awards applying to [the relevant bus companies] and their transferring employees are already significantly higher than the corresponding modern award rates”.³⁴ It is submitted that for copied State awards created following the transfer of business from a NSW public sector employer, given the operation of the award-setting system in NSW, this will largely be the rule rather than the exception.
23. The Commission was correct in stating in the Annual Wage Review 2021-22 decision that there was “no information before the Panel that any copied State awards other than the excepted State awards, appropriately maintain a safety net of fair minimum wages”,³⁵ however, in the absence of individual applications being made, there is also no evidence to the contrary. It cannot be presumed that, by default, wages under copied State awards do not provide for a safety net of fair minimum wages. In fact, given the

²⁷ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [428].

²⁸ *Ibid* [376].

²⁹ *Industrial Relations Act 1996* (NSW) s 10 (emphasis added).

³⁰ FW Act s 134(1) (emphasis added).

³¹ See generally *Re City of Sydney Wages/Salary Award 2014* (2014) 247 IR 386, 390-391 [19]-[22].

³² See *Annual Wage Review 2021-22* [2022] FWCFB 3500 [377].

³³ *Industrial Relations Act 1996* (NSW) ss 15 and 17(3)(a).

³⁴ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [378].

³⁵ *Ibid* [430].

jurisdictional differences outlined above, those copied from NSW State awards can more easily be presumed to provide wages that exceed what is necessary for the maintenance of a safety net of fair minimum wages.

24. Regardless, the current approach to wage adjustments under copied State awards does not guarantee the maintenance of a safety net of fair minimum wages either. By adjusting wages under copied State awards by a percentage corresponding to the increase to minimum wages, if wage rates under the affected copied State awards were significantly lower than those in modern awards, the wages rates will not be increased to match the minimum safety net; the wages under copied State awards would continue to fall short. Without examining each individual copied State award, the Commission cannot be satisfied that a safety net of fair minimum wages has been maintained.
25. This further demonstrates the inappropriateness of automatically applying the full quantum of the determined increase to modern award wages to wages under copied State awards. Given that the Commission is unlikely to be able to identify every copied State award in a given year, the default approach should be to not apply any increase to their wages and only do so on application of affected parties.

V Wage decisions in other States and their implications

26. ACCI is not aware of significant jurisdictional differences in the considerations for wage setting under awards in states other than NSW. Nevertheless, the absence of these jurisdictional differences does not itself justify maintenance of the existing approach.
27. In state wage cases, the annual wage review decision will usually be considered; however, the weight attached to its determinations will vary by state. For example, in Queensland, the Industrial Relations Commission (**QIRC**) attaches considerable weight to the national annual wage review decision when determining increases to minimum wages.³⁶ The QIRC will *generally* not depart from the determined increases to minimum wages and modern award wages in the annual wage review decision in the absence of “cogent evidence”;³⁷ but there is no principle of law that states that the QIRC *must* accept them.³⁸
28. On the other hand, the Western Australian Industrial Relations Commission (**WAIRC**) does not seem to seek cogent evidence as a justification for a departure from the annual wage review decision but will instead accept submissions on the decision’s merits and relevance to non-national system employers in Western Australia.³⁹ Nevertheless, it will sometimes find that a level of consistency between the state wage case and the annual wage review decisions is desirable.⁴⁰ The statutory considerations which the WAIRC is bound to take into account also bear substantial resemblance to those examined in annual wage reviews.⁴¹
29. The diversity of approaches adopted in state wage cases does not detract from the argument for not applying annual wage review increases to wages in copied State awards by default. They still present risks of “double dipping” effects resulting from state wage decisions occurring in the same year as an annual wage review decision, even there are no jurisdictional distinctions causing disparities between the wages under the state awards and those under modern award wages.

³⁶ *Declaration of General Ruling (State Wage Case 2014)* [2014] QIRC 129 [12].

³⁷ *Declaration of General Ruling (State Wage Case 2022)* [2022] QIRC 340 [32].

³⁸ *Ibid* [55].

³⁹ See generally *2022 State Wage Case* [2022] WAIRC 00273 [83]-[92].

⁴⁰ See, eg, *ibid* [98].

⁴¹ See *Industrial Relations Act 1979* (WA) s 50A(3).

30. Regardless, if the Commission considered that a default approach of not applying annual wage review increases to wages in copied State awards is only justifiable where notable jurisdictional differences exist, thereby perhaps only for copied State awards created from transfers of business from NSW public sector employers, different approaches should not be taken depending on the originating state of the employment terms and conditions. Doing so would be contrary to the intention of the *Fair Work Amendment (Transfer of Business) Act 2012* (Cth), which was to create “a nationally consistent set of transfer of business rules”.⁴² The Commission should, of course, adopt a consistent approach nationwide.
31. As ABI identified in the Annual Wage Review 2021-22,⁴³ NSW has the largest holding of “privatisable” government assets by a considerable degree.⁴⁴ It has also been the largest divestor of state government assets over recent years.⁴⁵ This trend is likely to continue. The consequence will be that, in the absence of a decision to amend the default approach to copied State awards, businesses in NSW will be disproportionately disadvantaged by annual wage review decisions.
32. Accordingly, the fact that the state in which the most privatisation is likely to occur in the future, thereby creating the most copied State awards, is also the state in which the jurisdictional differences in award wage setting are most significant, warrants particular caution in the treatment of wages in these instruments.

VI Statutory considerations

33. The minimum wages objective provides the statutory criteria relevant to the setting of wage rates in copied State awards.⁴⁶ The objects of the FW Act are also relevant considerations.⁴⁷
34. The Commission must take into account “business competitiveness and viability”.⁴⁸ National system employers that acquire State government assets often have a lesser capacity to raise revenue due to contractual constraints. This means that they are uniquely less equipped to manage unplanned increases to their labour costs. The default approach of automatically increasing their labour costs, despite potentially having already been subject to a wage increase in the given year and, for NSW businesses, having wage levels higher than comparable modern awards due to jurisdictional differences, harms their viability.
35. Adopting the approach to wages in copied State awards submitted herein would not compromise the object of “ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through ... national minimum wage orders”.⁴⁹ The Commission would continue to be able to ensure the maintenance of fair and relevant terms and conditions on a case-by-case basis. As outlined above, the existing approach does not guarantee the maintenance of a safety net of fair minimum wages either.
36. As noted in the Annual Wage Review 2021-22 decision, increasing wage rates in copied State awards is likely to act as a disincentive to bargaining in circumstances where the employers are already paying above

⁴² Explanatory Memorandum, *Fair Work Amendment (Transfer of Business) Bill 2012* (Cth) 2.

⁴³ ABI Reply Submission, *Annual Wage Review 2021-22* (6 May 2022) [9].

⁴⁴ *Ibid*, citing The Australia Institute Submission, *Review of the National Partnership Agreement on Asset Recycling* (January 2015) 8 <<https://australiainstitute.org.au/wp-content/uploads/2020/12/Submission-Privatisation-of-state-and-territory-assets-and-new-infrastructure.pdf>>.

⁴⁵ *Ibid*, citing *Review of the National Partnership Agreement on Asset Recycling* (Final Report, January 2019) 5.

⁴⁶ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [378].

⁴⁷ FW Act s 284(2) ‘note’.

⁴⁸ *Ibid* s 284(1)(a),

⁴⁹ *Ibid* s 3(b).

modern award rates of pay.⁵⁰ In NSW, for reasons outlined earlier, this will often be the case due to jurisdictional differences in wage setting. This favours an approach that does not increase wages in copied State awards by default.

VII Conclusion

37. The fundamental challenge for the Commission in its determination of how copied State awards should be dealt with in annual wage reviews is that unless an affected party comes forward, the Commission is unable to ascertain the coverage and nature of the instruments it is varying. This challenge impedes the Commission's ability to be adequately satisfied that it is doing no more and no less than maintaining a minimum safety net of fair minimum wages.
38. Without examining each specific instrument, the application of an increase to its wages by a percentage mirroring the adjustments to modern award wages may significantly exceed, or even potentially fall short of, the threshold which the Commission considers a minimum safety net of fair minimum wages. Accordingly, whether the Commission automatically applies or does not apply the percentage increase to wages in copied State awards, it is identically satisfied that it has met its obligation in maintaining the minimum safety net. The need to maintain the minimum safety net does not therefore justify maintenance of the current approach to copied State awards.
39. The existing approach and ACCI's suggested approach should therefore be compared in other respects.
40. The existing approach risks causing the application of two wage increases in a single year to a copied State award. It also then places the onus on employers to justify why they should not be subject to two mandated wage increases in a single year, when the default for employers of modern award covered employees is only one increase. This is despite the substantial jurisdictional differences between the setting of wages under modern awards and the setting of wages under State awards, where most privatisation occurs and is likely to continue to occur.
41. Alternatively, the Commission could by only apply increases on a case-by-case basis on application. This would mean that where a copied State award does not provide for any wage increases in a given year or its wages fall short of the minimum safety net, affected parties would have the opportunity to bring this to the attention of the Commission. This would enable the Commission to ensure the maintenance of a minimum safety net of fair minimum wages under those instruments without imposing significant disadvantages on employers covered by copied State awards at large.

⁵⁰ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [390].

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