

## **IN THE FAIR WORK COMMISSION**

### **Annual Wage Review 2022-2023**

#### **REPLY SUBMISSION BY BUSWAYS NORTH WEST PTY LIMITED**

##### **Introduction**

1. This reply submission by Busways North West Pty Limited (**Busways**) is made specifically in response to the submission of the Australian Council of Trade Unions (**ACTU**) in the Annual Wage Review 2022-2023 dealing with the issue of copied State Awards.
2. Busways decision to focus solely on the issues raised in ACTUs submission should not be taken as any concession or acknowledgement with respect to the submissions made by other parties in the annual wage review with regard to copied state award related matters.

##### **Summary**

3. For the reasons set out further below, Busways disagrees with the position of the ACTU in its copied state award submission, that the Fair Work Commission (**Commission**) should apply any general increase to modern awards to copied state award. Busways also opposes the submission that there is “logic” in adopting a “top up” approach to copied state awards which have provided for wage increases in the year of review.
4. There are several reasons for this disagreement with the position of the ACTU, which are identified and addressed separately below.

##### **“Topping up”**

5. Busways does not agree with the ACTU’s concept that wages in copied state awards which presently far exceed equivalent modern award wages should in fact still be subject to a ‘top-up’.
6. As set out by way of example in Busways initial submission at paragraphs 39 to 41, the wages contained in the three copied State awards currently applying to Busways and its employees are already on average 23.69% higher than the equivalent modern award rates.
7. Therefore 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 increasing the rates in

comparable modern awards by such a margin before there would be any logical need to “top up” its copied state awards.

8. In suggesting a “top-up” approach the ACTU also contends that “the net result must not be that workers who are covered by copied state awards are left worse off than would be the case if they have remained in their respective State systems”.<sup>1</sup>
9. In response to this, it is critically important to emphasise that the purpose and function of the Annual Wage Review is not to determine wage increases for all employees in the federal industrial relations system. Nor is it to place employees in the position they would have been should they have not been subject to a transfer whether it be from a state public sector employer to a national system employer or simply between two national system employers. Its purpose is to review and determine minimum wages and the national minimum wage order.<sup>2</sup>
10. Consequently applying a “top up” to workers already earning far in excess of minimum rates in equivalent modern, no matter the intention of the outcome, would not only be a deviation from the purpose of the Review but would be contrary to the objectives<sup>3</sup> of the Fair Work Act and the minimum wages objectives.<sup>4</sup>

### **Review cycle periods and the “top up” approach**

11. The ACTU suggests at paragraphs 8 and 9 of its initial submission that the adoption of a “top up” approach would avoid both ‘double dipping’ and address any potential disadvantage to employees as a result of increases on a different review cycle.
12. In response to this suggestion, Busways wishes to draw attention to the pertinent observations of ABI and Business NSW in its reply submission<sup>5</sup> to the Annual Wage Review 2021-2022 regarding copied state awards. In its reply submission ABI and Business NSW helpfully observed the flaws with such a position which are equally relevant to the Commission current copied state award considerations:

*[15] Such an approach does not only result in double dipping. Rather, when an initial wage increase (say, in January 2022) is then subject to a further wage increase (say, in July 2022) the increases compound upon each other, such that the monetary cost of the two increases is greater than their combined sum had they*

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<sup>1</sup> ACTU Initial Submission at [5]

<sup>2</sup> Fair Work Act (Cth) 2009 section 285(2).

<sup>3</sup> Fair Work Act (Cth) 2009, section 3.

<sup>4</sup> Fair Work Act (Cth) 2009, section 284.

<sup>5</sup> ABI and Business NSW, Reply Submission dated 8 May 2022.

*been applied at the same time. Both the double dip increase and their compounding effect are inconsistent with the minimum wage objective set out in section 284(1) of the FW Act which requires that the Commission to establish and maintain a safety net of fair minimum wages.*

*[16] It is also 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. That is, these businesses do not often have the same measures available to them to increase the amount of revenue they collect in the manner a normal private sector operator might.*

13. Should the Commission still decide to adopt a “top up” approach to the detriment of employers, Busways submits it should nevertheless account for the compounding nature of two wage increases in one calendar year in setting its top up rate.

### **The potential to discourage bargaining**

14. The ACTU argues there is no sound basis to favour a proposition that upward adjustments to wage rates in copied state awards disincentivise bargaining where employers are already paying above award rates.<sup>6</sup> The ACTU also suggests that successive wage increases “may well motivate an employer to bargaining for an alternative”.<sup>7</sup>
15. Respectfully we dispute the assumption made by the ACTU regarding the impact of any decision to apply the annual wage review to copied state awards (whether in its entirety or by way of a “top up”) on the discouragement of collective bargaining for three key reasons.
16. **Firstly**, enterprise bargaining is said to be a major driver of economic prosperity because of the bargain or trade made between employees for high wages/better conditions and employers for greater efficiencies/productivity benefits.<sup>8</sup>
17. In negotiating wages in an enterprise agreement there is always a base line wage comparator which sets the status quo from which parties’ bargain up. Whether it be rates of pay in an expired agreement, a modern award or as is the current circumstances, a copied state award.

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<sup>6</sup> ACTU, Initial Submission at [10]

<sup>7</sup> Ibid.

<sup>8</sup> Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit, Regulation Impact Statement, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Department of Employment and Workplace Relations, OBPR ID 22-03169

18. Where the wages in a base line comparator instrument rise to a level that no productivity improvements could lead to greater capital output which could account for the increase, then any incentive to bargain on the part of an employer is not just diminished but entirely removed.
19. For business covered by copied state awards the risk of this arising is heightened, as wages in copied state award forming the base line in enterprise bargaining have typically already leapfrogged equivalent arrangements in similar competitor businesses/industries not subject to copied state awards.
20. **Secondly**, businesses covered by copied state awards are often subject to contractual constraints on the prices that they can charge for products/services, as a result of purchase agreements with state governments and the public nature of the product/service being provided. This is because copied state awards govern work outsourced from the public sector – which is likely to be the subject of considerable contractual agreements. This means the ability of a business covered by a copied state award to offset any increases in wages is either significantly limited or entirely non-existent. Often putting the wage/productivity bargain for such employers on a knives edge, even before factoring contemplating an additional wage increases as a result of the application of the annual wage review decision.
21. **Thirdly**, the ACTU reliance on the panel’s findings in the 2019-2020 Annual Wage Review decisions are misplaced. As the panel in fact observed in its 2019-2020 decision at paragraph 387:

*“...it is likely that an increase we have determined in a Review may impact on bargaining in different sectors in different ways and we cannot be satisfied that the increase we have determined will encourage collective bargaining.”*
22. Past Annual Wage Review decisions also do not appear to have ever specifically considered the impact on bargaining for parties currently covered by copied state awards, so no definitive conclusions should be drawn from such statements. In fact for all the reasons already set out above, we consider that there is a strong argument for the proposition that upward wage adjustments to copied state awards is a particular disincentive bargaining, particularly where employers, like Busways, are already paying far in excess of modern award rates.

## **The different nature of the statutory objectives, higher wages than in modern awards**

23. The ACTU's submission argues that despite the Fair Work Act granting the Commission with a discretion when it comes to the application of the annual wage review to copied state awards this "*should not be taken as an invitation or instruction to subject those instruments to differential treatment merely because their contents reflects what was permissible or required at the time they were made*".<sup>9</sup> Rather it "*signifies that they should be accepted as safety net instruments, without distinction*".<sup>10</sup>
24. Busways respectfully submits such a proposition is incorrect, as it fails to appreciate the historical reasoning for the introduction of copied state awards into the Fair Work system in 2012, which both explains and justifies copied state awards receiving differential treatment to other instruments including modern awards.
25. The *Fair Work Amendment (Transfer of Business) Bill 2012 (Transfer of Business Bill)*, which introduced copied state awards, to a large extent replicated the application of transfer of business provisions to instruments covering employees transferring to the federal system as a result of the sale of a state assets. This change was enacted in an effort to *retain existing* terms and conditions of employment of employees in such circumstances. With the alternative for transferring employees applying prior to the Transfer of Business Bill's introduction, a drop onto applicable modern award rates, with often significantly less generous rates of pay<sup>11</sup> and/or the national employment standards.
26. As former Minister for Employment and Workplace Relations, the Hon Bill Shorten explained in his second reading speech on the Transfer of Business Bill:
- "To put it plainly, transferring employees' existing terms and conditions of employment as set out in their industrial instrument will be protected."*<sup>12</sup>  
(emphasis added)
27. As well as in his media release entitled "Action to protect outsourced state public servants"<sup>13</sup> just prior to the introduction of the Transfer of Business Bill:

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<sup>9</sup> ACTU Initial Submission dated 17 February at [15].

<sup>10</sup> Ibid.

<sup>11</sup> Post implementation review of the Fair Work Amendment (Transfer of Business) Act 2012 at page 21.

<sup>12</sup> The Hon Bill Shorten, Second Reading Speech, Fair Work Amendment (Transfer of Business) Bill 2012, 11 October 2012.

<sup>13</sup> The Hon Bill Shorten, Minister for Employment and Workplace Relations, Media Release, 'Action to protect outsourced public servants', dated 21 September 2012.

*“I am deeply concerned about recent announcements by state governments to cut tens of thousands of public service jobs. The Commonwealth will do what it can to protect the terms and conditions of these workers”*

....

*“The amendments would ensure that where there is a transfer of business from a state public sector employer to a new employer in the national workplace relations system, the former public sector employees will see their existing terms and conditions and accrued entitlements protected, and have their prior service recognised.”*

28. Such was the strong desire of the Parliament to protect the existing terms and conditions of transferring employees at the point of transfer from the perils of state government privatisation, that not only was no general power granted to the Commission to vary copy state awards beyond the initial transfer period, but the cessation of them was set at five years.<sup>14</sup> As the Parliamentary library observed in its Bills Digest on the Transfer of Business Bill:

*“It would seem that five years is an extraordinarily long time to guarantee a pay level. There is no similar provision in the Fair Work Act for other transfers of business.”<sup>15</sup>*

29. Had the parliament intended for copied state awards to receive the same treatment as modern awards and be subject to variations and the yearly annual wage decision automatically, simply put, it would have provided for this and would not have given the Commission the discretion to decide on the application of the annual wage review to copied state award.<sup>16</sup>
30. It did not provide for this, however, because the fundamental purpose of the introduction of copied state awards was to *protect* and *retain* existing terms and conditions of employment such as wages and redundancy as they existed at the time of transfer, so that no transferring employee would go backwards as a result of the sale of a state asset.

### **The “base case”**

31. The ACTU alternatively argues that the Commission should at least apply a “base case” whereby the:

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<sup>14</sup> Fair Work Act (Cth) 2009, section 768AO(2)(a).

<sup>15</sup> Parliamentary Library, Fair Work Amendment (Transfer of Business) Bill 2012, Bills Digest No 45, 2012-113, dated 19 November 2012.

<sup>16</sup> Fair Work Act (Cth) 2009 at section 285(2)

*“net result must not be that workers who are covered by copied state awards are left worse off than would be the case if they had remained in their respective State systems”.*<sup>17</sup>

32. Busways does not accept this approach for the reasons already expanded upon above.
33. However, if the Commission is minded to apply a minimum wage increase to copied State awards, then any increase should not exceed the “base case” described by the ACTU.
34. In the case of Busways, the three awards that apply to the employees when they were employed under the NSW legislative regime were subject to the NSW Government Wages Policy which limits wage increases to 2.5% (once the superannuation increase of 0.5%) is taken into account.

#### The NSW Government Wages Policy

35. Clause 2.1 of the Wages Policy<sup>18</sup> states:

*The Wages Policy applies to the Government sector as defined in the Government Sector Employment Act 2013, including Public Service agencies, Departments, Executive agencies, independent statutory bodies, and persons identified in section 5 (1) (b) – (f) of the Government Sector Employment Act 2013.*

36. The Wages Policy sets a 3.0% cap for 2022-23, 2023-24 and 2024-25 (inclusive of superannuation).
37. The Wages Policy is also incorporated as part of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* in r. 6A.
38. Section 146C of the *Industrial Relations Act 1996* allows the IRC to give effect to policy and regulations on conditions of public sector employee. Through the regulation and s 146C, the wages policy gets its effect.
39. All employees of Busways were previously employed by Transport for NSW, working in the State Transit Authority. They were accordingly working for a Department of the NSW Government, which was covered by the Wages Policy.<sup>19</sup>

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<sup>17</sup> ACTU Initial Submission at [5]

<sup>18</sup> <https://arp.nsw.gov.au/assets/ars/attachments/NSW-Public-Sector-Wages-Policy-2022.pdf>

<sup>19</sup> <https://arp.nsw.gov.au/m2022-05-nsw-public-sector-wages-policy-2022>

40. As such, if the Busways employees subject of the three copied State awards referenced in Busways' submissions remained in the NSW industrial relations system, the maximum increase that would be applied to the awards would be 2.5%.
41. For the sake of completeness, we note that no employees are presently covered by these three awards in the NSW industrial system as all of the State Transit Authority's activities have now been outsourced to the private sector in NSW.

## **Conclusion**

42. Going forward, Busways maintains that the Commission should not automatically apply the annual wage review decision to copied State awards as part of a generic or automatic decision affecting all copied State awards. It should only apply the Annual Wage Review decision to a copied State awards where a case is made to do so following submissions by parties with respect to individual copied State awards during the Annual Wage Review process.
43. Should the Commission decide not to follow the above and instead decide to maintain a default approach which applies the Annual Wage Review decision to copied State Awards, it should nevertheless do the following:
  - (a) exempt copied State awards which exist as a result of public sector employees transferring from the NSW industrial relations systems to the national system from the default approach applying the Annual Wage Review decisions to copied State awards; and
  - (b) award an increase which is no higher than the "base increase" such awards would have received had the employees remained in the relevant State jurisdiction. In this case, such an increase would be no greater than 2.5% (after superannuation is factored in).