



DECISION

Fair Work Act 2009

s.285—Annual wage review

s.289(3)—Confidential or commercially sensitive information

Annual Wage Review 2022-23

(C2023/1)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 29 MAY 2023

Annual Wage Review 2022-23 – copied State awards – s 289(3) Fair Work Act 2009 – confidential and commercially sensitive information not published.

[1] In [Directions](#) issued on 1 May 2023, I directed that Ai Group could file further submissions and evidence in relation to copied State award coverage of Transdev John Holland Buses (NSW) Pty Ltd (TJHB) by 11 May 2023. I also directed that any submissions in reply to material filed by Ai Group, or cross-examination of witnesses, could occur at the Annual Wage Review consultation hearing on 17 May 2023.

[2] In accordance with the Directions, on 11 May 2023 Ai Group filed a submission¹ (the Submission) and a witness statement of Rachel Spencer (the Witness Statement). The Submission and Witness Statement were filed in redacted and unredacted forms. Included with the documents was an application by Ai Group for confidentiality orders in relation to certain parts of the Submission and Witness Statement (the confidential information). The application requested that should the orders be issued in the terms sought, only the redacted versions be published.

[3] In the interests of providing interested parties with access to the documents as soon as possible, the redacted versions of the Submission and the Witness Statement were published to the Fair Work Commission's (the Commission's) webpage for the 2022-23 Annual Wage Review.

The application

[4] The confidential information the subject of Ai Group's application is contained at the following paragraphs:

- [17(a)] and [17(d)] of the Submission; and
- [17], [19]–[21] and [36] of the Witness Statement.

[5] Ai Group submits that the confidential information is commercially sensitive and is confidential to TJHB on the basis that it is not in the public domain and if released into the public domain, would or could affect TJHB's market competitiveness and/or its business interests.

[6] The confidentiality orders sought by Ai Group would provide that the confidential information should not be published to the Commission's website but would not prevent parties with a legitimate interest in the matter from accessing the confidential information, provided they undertake in writing:

- (a) to treat the relevant information confidentially;
- (b) not to use the relevant information for any purpose other than these proceedings;
- (c) not to disclose the relevant information to any person other than a legal officer or legal representative with direct involvement in these proceedings, provided that they also agree to the matters here described at paragraphs (a)-(e);
- (d) not to make a copy, or copies, of the relevant information; and
- (e) to destroy any of the relevant information at the conclusion of the proceedings.

[7] Section 594 of the *Fair Work Act* 2009 (FW Act) empowers the Commission to make orders restricting or prohibiting publication of certain evidence, documents lodged or parts of Commission decisions or reasons in relation to a matter. However, as previously observed,² s 594 does not apply to the publication of a submission made to the Commission for consideration in an annual wage review.³

[8] Section 289(2) of the FW Act requires that all submissions made to the Commission for consideration in an annual wage review must be published, subject to s 289(3). Section 289(3) provides:

- (3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
 - (a) may decide not to publish the information; and
 - (b) may instead publish:
 - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
 - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

Summary of the confidential information

[9] Paragraphs [17(a)] and [17(d)] of the Submission and paragraphs [17] and [19]–[21] of the Witness Statement describe details of a commercial agreement between TJHB and Transport for NSW, including financial information concerning TJHB.

[10] Paragraph [36] of the Witness Statement describes an offer advanced by TJHB in its current enterprise agreement negotiations.

Conclusion

[11] In the copied State awards hearing of 17 May 2023, it was established that there is agreement between the parties as to the making of the confidentiality order sought.⁴

[12] Having considered the application and documents submitted, and as foreshadowed in the copied State awards hearing of 17 May 2023,⁵ I am satisfied that:

- (1) Pursuant to s 289(3) of the Act, the Commission should not publish the confidential information in the Submission on the grounds that it is confidential or commercially sensitive. The Submission should remain published in a form that redacts the confidential information.
- (2) Pursuant to s 594(1) of the Act, the Commission should not publish the confidential information in the Witness Statement on the grounds that it is confidential or commercially sensitive. The Witness Statement should remain published in a form that redacts the confidential information.

[13] As indicated above, the redacted copies of the Submission and Witness Statement are already published on [the Commission's webpage for the 2022-23 Annual Wage Review](#). The redacted copy of the Submission should be read with the summary of the confidential information in this statement pursuant to s 289(3)(b)(i) of the FW Act.



PRESIDENT

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¹ Ai Group submission (on behalf of Transdev Australasia), dated 11 May 2023.

² [\[2023\] FWC 490](#) at [7].

³ *Fair Work Act 2009* (Cth) s 594(2).

⁴ Transcript, 17 May 2023 PNs 7-8.

⁵ *Ibid* at PN9.