

Annual Wage Review 2021-22

Relevant Instruments

State Transit Authority Bus Operations Enterprise (State) Award 2018 as a Copied State Award on and from 1 July 2018

State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2018 as a Copied State Award from 1 July 2018

State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018 as a Copied State Award from 1 July 2018

**SHORT SUBMISSIONS BY TRANSIT SYSTEMS IN RESPONSE TO
BACKGROUND PAPER**

1. These short submissions are filed on behalf of Transit Systems West Services Pty Ltd and its related entities (**Transit Systems**) in response to the Background Paper dated 25 May 2002 and the questions posed in the Background Paper.
2. Before addressing those questions, it is useful to identify at the outset that Transit Systems does not accept that the 2018-19 and 2019-20 Review decisions to vary the copied State awards applying to Transit Systems were decisions made under Part 2-6 of the *Fair Work Act 2009 (FW Act)*. Transit Systems relies on three discrete points, any one of which may be accepted to support this contention:
 - (a) On its proper construction, Item 20(1) of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Transitional Act)* is the source of the FWC's power to vary terms of a copied State award relating to wages in an annual wage review.
 - (b) As a matter of fact, the FWC's 2018-19 and 2019-20 Review decisions made determinations to vary the copied State awards applying to Transit Systems under Item 20(1), Schedule 9 of the Transitional Act.
 - (c) On its proper construction, s 603(3) of the FW Act applies to a decision under Part 2-6 of the FW Act, and not a decision under Item 20(1), Schedule 9 of the Transitional Act.

3. On the first point, it is plain that Item 20(1) confers the power on the FWC to vary terms of a copied State award relating to wages in an annual wage review. Item 20(2) does not alter the power in existence under Item 20(1). The power to vary resides in Item 20(1), however Item 20(2) says that Division 3 of Part 2-6 of the FW Act applies, so that in exercising the power under Item 20(1) the FWC has to take into account the matters prescribed under Division 3 of Part 2-6 of the FW Act. There is a distinction between the existence of power found in Item 20(1) and the matters that are said to apply to the exercise of that power in Item 20(2). By its terms, Item 20(2) is expressed as applying to the exercise of the power. In that sense, it is a provision that is facilitative of the power residing in Item 20(1). It is not and cannot be the source of the power. Thus, it follows that the determinations made were not made under Division 3 of Part 2-6. They were made under Item 20(1).
4. This construction is reinforced by the terms of s 768AW of the FW Act. Paragraph (c) of this section expressly identifies Item 20 of Schedule 9 of the Transitional Act as the source of the Commission's power to vary a copied State award. The opening words of s 768AW, read in conjunction with paragraph (c), make plain the legislative intention that terms of copied State awards relating to wages "*cannot be varied except under*" Item 20. The use of the word "*under*" in s 768AW, immediately before the wording used in paragraph (c) is instructive, because it shows that the FWC's decision to vary copied State awards relating to wages is a decision under Schedule 9, Item 20 of the Transitional Act and not a decision under Part 2-6 of the FW Act.
5. With respect to the second point, Transit Systems relies on the fundamental factual matter as to what the FWC actually did in its 2018-19 and 2019-20 Review decisions. As a matter of objective fact, the FWC made determinations in those decisions to vary copied State awards under Item 20(1) of Schedule 9. This is evident from a plain reading of the FWC's 2018-19¹ and 2019-20² Review decisions.

¹ [2018] FWCFB at [437]-[452].

² [2019] FWCFB at [400]-[405].

6. In fact, the FWC has always identified Item 20(1) of Schedule 9 as the source of its power to make determinations varying copied State awards in relation to wages. The FWC first had the occasion to consider this issue in its 2012-23 Review decision³ given that copied State awards first came into existence in December 2012 when the FW Act was amended to insert Part 6-3A of the FW Act. In that decision, the FWC Panel identified at the outset its power to vary transitional instruments, including copied State awards, at [550]:

The Panel is required to review and, if appropriate, make one or more determinations varying a number of transitional instruments as part of its review.⁴⁷⁶

In its footnote to this statement, the Panel identified the Transitional Act as the source of its power to make determinations varying transitional instruments, and in particular Item 20(1) of Schedule 9 as the source of its power relating to copied State awards:

⁴⁷⁶ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, items 10(1) and 20(1) of Sch. 9 and item 12A(5) of Sch. 3.*
(emphasis added)

7. On the third point, s 603(3) should not be given a meaning that is broader than its words will fairly allow. Paragraph (d) of this sub-section states that the FWC must not vary or revoke “a decision under Part 2-6” of the FW Act, but these words on their proper construction do not apply in respect of a determination to vary copied State awards made under Item 20(1) of Schedule 9 of the Transitional Act. Following the introduction of Part 6-3A into the FW Act in December 2012, the legislature did not choose to amend the words of s 603(3) by extending those words to a decision under Item 20(1) of Schedule 9 of the Transitional Act.
8. Coming back to the questions posed in the Background Paper, Transit Systems does not agree with Questions 1, 2, 3, 4 and 5(a) to the extent that they do not address any of the fundamental issues discussed above relating to statutory construction and factual characterisation of the FWC’s earlier determinations, but

³ [2013] FWCFB 4000 at [550]-[560].

instead lead to the query whether Transit Systems presses its claim that the FWC has the power to vary or revoke its earlier wage determinations.

9. In answer to Question 5(b), Transit Systems contends that the source of the Commission's power to vary or revoke previous annual review wage determinations adjusting minimum wages in copied State awards is s 603(1) of the FW Act.⁴
10. In answer to Question 6, Transit Systems relies on the affidavit of its managing director, Mr Jamie Sinclair dated 1 June 2022 concerning 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. The evidence of Mr Sinclair establishes the following matters:
 - (a) There is significant inconsistency in the minimum rates of pay applying to bus drivers in Sydney, depending on whether the bus drivers are covered by the modern award or a copied State award, or an existing State award under the NSW industrial relations system.
 - (b) The transfer of employment from the NSW Government to private bus operators in some parts of Sydney, but not others, and at different times, has resulted in different minimum rates of pay for bus drivers performing the same work.
 - (c) Enterprise bargaining negotiations to replace the copied State awards applying to Transit Systems commenced in 2021, however little progress has been made toward a new enterprise agreement despite numerous bargaining meetings and the taking of industrial action.
 - (d) The previous decisions of the Annual Wage Review Panel to increase the wage rates in the copied State awards applying to Transit Systems have been a real impediment to effective enterprise bargaining.

⁴ Section 603(1) applies to any decision of the FWC "*however described*": see s 598(1). This includes a determination of the FWC varying the wages in a copied State award. Furthermore, if the FWC makes a decision that varies an instrument, then the reference in s 603(1) to a decision of the FWC includes the FWC's decision to vary the instrument: s 598(2). A copied State award is an instrument under the FW Act: see ss 768AH and 768AI. Thus, it follows that the FWC may vary or revoke its earlier determinations varying copied State awards in relation to wages pursuant to s 603(1).

11. In summary, Transit Systems submits that the Commission should not increase the current wage rates in the copied State awards applying to Transit Systems because those wage rates are already significantly higher than the equivalent modern award rates. The wage tables attached to Transit Systems' earlier written submissions and the evidence of Mr Sinclair amply illustrates this point by reference to the current modern award rates and the significantly higher copied State award wage rates enjoyed by Transit Systems' transferred employees.
12. In addition, there are compelling reasons why the Commission should exercise its power of revocation under s 603(1) of the FW Act in respect of its earlier 2018-19 and 2019-20 determinations increasing the wages in the copied State awards applying to Transit Systems. Those reasons were fully set out in Transit Systems' earlier written submissions.
13. The FWC's earlier determinations have resulted in Transit Systems having a very substantial additional liability of over \$3.5M in wages, and its transferring employees receiving this windfall benefit through the FWC's determinations, as reflected in the liability decision and orders made by Rares J in the Federal Court. This is not merely an "*inconvenient*" outcome as claimed by the Unions; it is fundamentally unfair and contrary to the very kind of outcome that the FWC had always intended to avoid (double-dipping, not sticking to the industrial bargain struck by the Union over wages etc). The FWC's previous tiered approach to increasing wages in copied State awards would have avoided this unjust situation, as it was always intended to do by the Panel.
14. While this tiered methodology was abandoned by the FWC as a default rule, the FWC stated that it would not only consider but actively "*address any 'double dipping'*"⁵ and like injustices on a case-by-case basis, as in the present case of Transit Systems. Granting the relief sought by Transit Systems would also be consistent with the FWC's obligation to exercise its powers – in this case, the FWC's power of revocation under s 603(1) – in a manner that is fair and just (s 577(a)), and by taking into account "*equity, good conscience and the merits of the matter*": s 578(b).

⁵ [2018] FWCFB at [43].



Yaseen Shariff SC

Matthew Moir

12 Wentworth Selborne Chambers

Sir Owen Dixon Chambers

1 June 2022

Affidavit

**Before the Fair Work Commission
Annual Wage Review 2021-2022**

(C2022/1)

Affidavit of: **Jamie Sinclair**
Address: 230-240 Balmain Road, Leichhardt NSW 2040
Occupation: General Manager
Date: 1 June 2022

I Jamie Sinclair affirm:

1. I am the Managing Director of Transit Systems West Services Pty Ltd (**'Transit Systems'**) and I make this affidavit in support of Transit Systems West Services' submissions to the Annual Wage Review 2021-2022.
2. I have been employed as the Managing Director/General Manager of Transit Systems since 1 October 2021. Previous to this role I worked in the position of Area Manager – North. My specialty is in bus management, having been employed in the public bus transport industry since 1978, initially with the New South Wales State Transit Authority (**'STA'**) and then joining Transit Systems in 2018.
3. Transit Systems West Services Pty Ltd is part of the Transit Systems group of companies. It employs the employees that transferred from the STA to Transit Systems to provide public bus services in the area known as Region 6 in accordance with a contract with the NSW Government that took effect on and from 1 July 2018. A map of Region 6 is annexed and marked "**JS 1**".
4. Prior to the transfer the State Transit Authority Bus Operations Enterprise (State) Award 2018 (**'the 2018 Award'**), applied to the STA bus drivers in Region 6. The 2018 Award was a consent award made between the STA and the Rail Tram and Bus Union (**'RTBU'**) in December 2017 and approved by the NSW Industrial Relations Commission. After the transfer on 1 July 2018, the 2018 Award applied to the transferring employees as a Copied State Award (**'Bus Operator Copied State Award'**).
5. The 2018 Award contained built in increases of 2.5%, year on year from when it was made, up until 1 January 2020. The 2018 Award applied in all regions in Sydney where the STA managed the bus operations. The 2018 Award was replaced by the State



- Transit Authority Bus Operations Enterprise (State) Award 2021 ('the 2021 Award'). The 2021 Award includes wage increase on 1 January 2021 and 1 January 2022.
6. Since the making of the 2021 Award, the NSW Government has awarded contracts to private bus operators in Regions 7, 8 & 9. Those regions now have their own Copied State Awards.
 7. The effect of that is that there are now three instruments currently applying that contain the same conditions but have, or may have after the current annual wage review, different minimum rates of pay for bus drivers performing the same work. I understand that the way the law works is that the 2021 Award will become a Copied State Award for the transferring employees in those regions.
 8. There are a number of regions in Sydney that have always, or for a very long time, been operated by private bus operators under a contract with the NSW Government. Those regions include Region 3, which is operated by Transit Systems. In those regions, unless there is an enterprise agreement in place, the Passenger Vehicle Transportation Award 2010/Passenger Vehicle Transportation Award 2020 applies to the work performed by drivers.
 9. The Bus Operator Copied State Award that applies to Transit Systems in Region 6 contains the highest minimum rates of any award setting minimum rates for bus drivers in Sydney. A table setting out the rates is annexed and marked "JS 2".
 10. Transit Systems submissions and application made to the Fair Work Commission Annual Wage Review Panel seeks to rectify the inconsistency in minimum rates.
 11. The setting of appropriate consistent minimum rates for the same work is important and has a significant impact on bargaining.
 12. Transit Systems is currently bargaining with the RTBU, the Transport Workers' Union ('**TWU**') and appointed Bargaining Representatives for an enterprise agreement to apply in Region 6. The new enterprise agreement would replace the Bus Operators Copied State Award. Employees under any new enterprise agreement must be better off overall when compared to the Passenger Vehicle Modern Award.
 13. Bargaining has been difficult and protracted. Annexed and marked "JS 3" is a document that contains two tables separately listing all of the dates industrial action took place in Regions 3 and 6, the proposed duration of that industrial action, the actual duration of that industrial action and the action that was taken. The tables were created using the TWU and RTBU Notices of Intended Protected Industrial Action.




14. The significant difficulty in the bargaining is that the RTBU is seeking wage increases on top of the already significantly higher Bus Operator Copied State Award rates and the preservation of STA conditions.
15. The rates set out in the Bus Operator Copied State Award, increased by the last two Annual Wage Reviews, are a real impediment to effective enterprise bargaining. If there was to be another increase this year, the difference between the minimum rates payable by Transit Systems' to its employees and our competitors to their employees will be greater again.
16. Unfortunately, despite numerous bargaining meetings, negotiations have failed to advance resulting in all of the original log of claims items remaining.
17. In order to progress negotiations, Rick Carpenter (Chief People and Culture Officer) and I met with TWU and RTBU officials on 18 May 2022 to understand their most important items in their log of claims and to discuss a path to achieve their preference for a single enterprise agreement with the same terms and conditions for all employees covered under the agreement. We had a similar meeting with the other independent bargaining representatives the following day. Both meetings were very productive.
18. Despite being very productive meetings, on 25 May 2022 Transit Systems received an updated combined 8-page Log of Claims from the TWU and RTBU containing some 128 items. It was clear that this Log of Claims 'cherry-picked' the best parts of the Bus Operators Copied State Award, the 2021 Award and the Transit (NSW) Service Pty Ltd, Transport Workers Union and Bus Drivers Enterprise Agreement 2017 (which applies in Region 3 operated by Transit and the employees in Region 6 who were not transferring employees).
19. While bargaining is ongoing, it has not substantially progressed toward a resolution in the past six months.

Sworn / Affirmed by Jamie Sinclair)
at)
in New South Wales)
on 1 June 2022)



Jamie Sinclair

Before me:



Signature of witness

MARK DALY SENIOR PEOPLE - CULTURE MANAGER
[Name and qualification of witness]



Annexure 'JS 1'
AFFIDAVIT OF JAMIE SINCLAIR SWORN 1 June 2022

Fair Work Commission

Annual Wage Review 2021-2022

C2022/1

This and the following page is the annexure marked 'JS 1' referred to in the Affidavit of Jamie Sinclair sworn before me on 1 June 2022.

Signature of witness

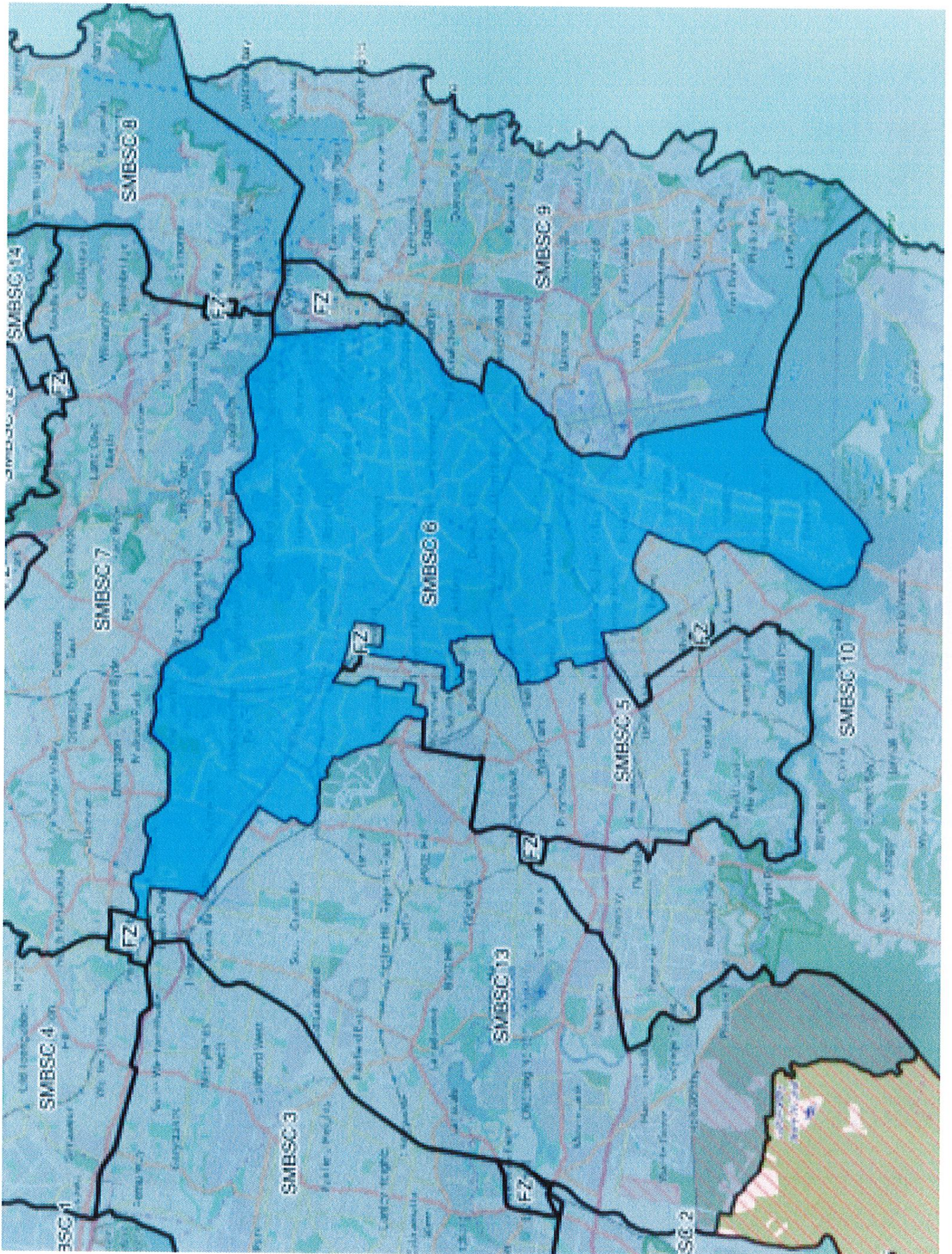


Name of witness; Mark Daly

Address of witness:

[REDACTED]

Capacity of witness: Senior
People & Culture Manager



Annexure 'JS 2'
AFFIDAVIT OF JAMIE SINCLAIR SWORN 1 June 2022

Fair Work Commission

Annual Wage Review 2021-2022

C2022/1

This and the following page is the annexure marked 'JS 2' referred to in the Affidavit of Jamie Sinclair sworn before me on 1 June 2022.

Signature of witness



Name of witness: Mark Daly

Address of witness:

[REDACTED]

Capacity of witness: Senior
People & Culture Manager

Bus Driver Minimum Rates as at 30 June 2022 (before any 2021/22 AWR)

	<i>Passenger Vehicle Transportation Award 2010 / Passenger Vehicle Transportation Award 2020</i> Modern Award	<i>State Transit Authority Bus Operations Enterprise (State) Award 2021</i> STA Drivers	State Transit Authority Bus Operations Enterprise (State) Award 2021 as a Copied State Award	<i>Copied State Award - State Transit Authority Bus Operations Enterprise (State) Award 2018</i> Transit Systems
<i>Classification</i>				
Bus Operator, Trainee <i>(equivalent to Grade 1 of Modern Award)</i>	\$833.40	\$1,015.90	\$1,015.90	\$1,061.50
Bus Operator level 1 <i>(equivalent to Grade 4 of Modern Award)</i>	\$934.20	\$1,054.40	\$1,054.40	\$1,101.80
Bus Operator level 2 <i>(equivalent to Grade 4 of Modern Award)</i>	\$934.20	\$1,096.70	\$1,096.70	\$1,145.80
Senior Bus Operator <i>(equivalent to Grade 4 of Modern Award)</i>	\$934.20	\$1,117.60	\$1,117.60	\$1,167.80
Bus Operator Trainer 1 <i>(equivalent to Grade 5 of Modern Award)</i>	\$985.60	\$1,209.70	\$1,209.70	\$1,264.00
Bus Operator Trainer 2 <i>(equivalent to Grade 5 of Modern Award)</i>	\$985.60	\$1,302.30	\$1,302.30	\$1,360.70
Bus Operator Trainer 3 <i>(equivalent to Grade 6 of Modern Award)</i>	\$1,029.20	\$1,426.00	\$1,426.00	\$1,489.90

Annexure 'JS 3'
AFFIDAVIT OF JAMIE SINCLAIR SWORN 1 June 2022

Fair Work Commission

Annual Wage Review 2021-2022

C2022/1

This and the following two pages is the annexure marked 'JS 3' referred to in the Affidavit of Jamie Sinclair sworn before me on 1 June 2022.

Signature of witness



Name of witness: Mark Daly

Address of witness:

[REDACTED]

Capacity of witness: Senior
People & Culture Manager

The tables below separately list all of the dates industrial action took place in Region 3 and 6, the proposed duration and the action taken.

The tables have been created using the TWU and RTBU Notices of Intended Protected Industrial Action we received.

Region 3

Date	Proposed Duration	Actual Duration	Action Taken
22 November 2021	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 22 November 2021 at 12:01am and continuing indefinitely
2 December 2021	2 hours	2 hours	Two consecutive one hour stoppages of work commencing at 4.00am on 2 December 2021 and ending at 6.00am
4 December 2021	Indefinite	Every weekend until 13 April 2022	Ban on the refueling of vehicles commencing on 4 December 2021 at 12.01am and continuing indefinitely
7 December 2021	24 hours	24 hours	Twenty-four (24) consecutive one (1) hour stoppages of work commencing 7 December 2021 at 12.01am.
16 December 2021	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 16 December 2021 at 12:01am and continuing indefinitely
16 December 2021	Indefinite	Approx. 24 hours	Ban on the wearing of uniforms (except for personal protection or safety equipment) commencing on 16 December 2021 at 12:01am and continuing indefinitely
16 December 2021	Indefinite	Approx. 24 hours	The wearing of union clothing, badges and other union campaign items and the placing of union campaign material in the workplace commencing on 16 December 2021 at 12.01am and continuing indefinitely.
16 December 2021	Indefinite	Approx. 24 hours	A ban on the use of personal technological devices such as mobile phones, smart watches, computers, tablets, including using the 'Blink App' to receive and respond to work related communications whilst not at work commencing on 16 December 2021 at 12.01am and continuing indefinitely
23 December 2021	2 hours	2 hours	Two consecutive one hour stoppages of work commencing at 4.00am on 23 December 2021 and ending at 6.00am
23 December 2021	2 hours	2 hours	Two consecutive one hour stoppages of work commencing at 4.00pm on 23 December 2021 and ending at 6.00pm
18 February 2022	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 18 February 2022 at 12:01am and continuing indefinitely

Region 6

Date	Proposed Duration	Actual Duration	Action Taken
22 November 2021	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 22 November 2021 at 12:01am and continuing indefinitely
2 December 2021	2 hours	2 hours	Two consecutive one hour stoppages of work commencing at 4.00am on 2 December 2021 and ending at 6.00am
3 December 2021	2 hours	2 hours	An unlimited number of indefinite stoppages of work commencing on 3 December 2021 at 5:00pm and ending at 7:00pm.
6 December 2021	24 hours	24 hours	Twenty-four (24) consecutive one (1) hour stoppages of work commencing 6 December 2021 at 12.01am.
16 December 2021	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 16 December 2021 at 12:01am and continuing indefinitely
16 December 2021	Indefinite	Approx. 24 hours	Ban on the wearing of uniforms (except for personal protection or safety equipment) commencing on 16 December 2021 at 12:01am and continuing indefinitely
16 December 2021	Indefinite	Approx. 24 hours	The wearing of union clothing, badges and other union campaign items and the placing of union campaign material in the workplace commencing on 16 December 2021 at 12.01am and continuing indefinitely.
16 December 2021	Indefinite	Approx. 24 hours	A ban on the use of personal technological devices such as mobile phones, smart watches, computers, tablets, including using the 'Blink App' to receive and respond to work related communications whilst not at work commencing on 16 December 2021 at 12.01am and continuing indefinitely
25 December 2021	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 25 December 2021 at 12:01am and continuing indefinitely
11 April 2022	24 hours	Approx. 24 hours	Twenty-four (24) consecutive one (1) hour stoppages of work commencing 11 April 2022 at 12.01am.
6 May 2022	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 6 May 2022 at 12:01am and continuing indefinitely
13 May 2022	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 13 May 2022 at 12:01am and continuing indefinitely
20 May 2022	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 20 May 2022 at 12:01am and continuing indefinitely
27 May 2022	Indefinite	Approx. 24 hours	Ban on the use of ticket machines and other fare collection devices commencing on 27 May 2022 at 12:01am and continuing indefinitely