

**IN THE FAIR WORK COMMISSION
OF AUSTRALIA**

**Application by Transit Systems West Services Pty Ltd and ors re:
Annual Wage Review 2018-2019 Decision [2019] FWCFB 3500
Annual Wage Review 2019-2020 Decision [2020] FWCFB 3500**

ARTBIU, AMWU and ASU Submissions re ‘Undertakings’

1. Given the approach taken by Transit Systems, it is important to set out clearly:
 - a. what has occurred; and
 - b. what is sought.
2. On 2 December 2021 Rares J made declarations in respect of the correct rates of pay for Transit Systems employees covered by the Bus Operators Award. The rates declared as correct were higher than what Transit Systems had been paying.
3. A copy of these orders is attached. Those orders informed the subsequent contingent compensation orders made on 28 April 2022, which Transit Systems has provided to the Commission.
4. As well as, at present,¹ being owed backpay, those employees are presently entitled to those higher wages by force of the *Fair Work Act*, and can enforce this entitlement under that legislation into the future.
5. Transit Systems accepts that the logic of Rares J’s judgement applies identically to the 2018 Salaried Officers Award and the 2018 Maintenance Award. The employees covered by these awards are owed backpay and must be paid the higher rates.
6. Transit Systems has, as the Unions understand matters, been paying the higher rates since around December 2021.

¹ Noting that the orders for compensation for same are contingent on the dismissal of this application.

7. By its variation application, Transit Systems seeks from the Commission orders to reduce the wages these employees are currently entitled to and are currently being paid, with retrospective effect from 1 July 2019.
8. The disclosed object of the application is to avoid an unexpected obligation to make back-payments. This does not reflect the true substance: it remains an application for a significant retrospective and ongoing wage cut. Transit Systems has declined to confront this directly.
9. Following the hearing of this matter, and only in response to a question from Hampton C, Transit Systems belatedly offers an 'undertaking' that it will not reduce the current take-home pay of employees.
10. That undertaking is not enforceable directly, whether under the *Fair Work Act* or otherwise, by any employee. If Transit Systems decided to resile from it, it would not even have to '*take the law into [its] own hands*² this time.
11. Matters are further confused by the recent submissions at [8]-[9], which refer to the Court being the appropriate forum to make further orders. Transit Systems would presumably be seeking some variation to the declarations made, and has made no undertaking that it would not reduce actual wages if *that* occurred.
12. The undertaking is better understood as a cosmetic attempt to distract from the real consequences of the application. The backpay to the employees that the Court has ordered will still be avoided. Transit Systems is seeking orders which represent a substantial interference with existing substantive rights enjoyed by its employees.
13. Further, it is asking the Commission to undo its earlier deliberate decisions, two to three years after the event, to accommodate a single employer who took no action at the time. The earlier review decisions were intended to, and did, increase rates in copied state awards *regardless* of whether those awards contained internal increases.

² *ARTBIU v Transit Systems* [2022] FCA 389 at [39].

14. It is a situation quite different to the two decisions relied on by Transit Systems, which fundamentally involved the Commission's intention, and decades of industry-wide practice, being found by the Courts as not being reflected in the text of the ultimate award made.³
15. The application is extraordinary. The essence of the intellectual justification advanced distills to a proposition that Transit Systems previously acted upon a view of its legal obligations which the Federal Court concluded was wrong.⁴
16. This has been considered a basis upon which penalties ought not be imposed, or might be notional: see, e.g. *AWU v Bluescope* [2018] FCA 80 at [154]. It is not a defence to the substantive contravention, or a reason to avoid compensating affected employees.
17. In any event, neither the instructions which led to the advice, or the advice itself, have ever been put before the Commission or the Court. Transit Systems has otherwise declined to put on evidence supporting any of the various assertions it has made. Its contention at the hearing that submissions on these matters are sufficient and the giving of sworn testimony is a mere technicality is somewhat glib given the magnitude of the indulgence sought, and its impact on employees.
18. The application is, as previously set out, foreclosed by s.603(3)(d). Even if it were not, no principled basis upon which the Commission could exercise its discretion in the manner sought has been established.⁵ This position is not changed by the 'undertaking' now offered.

L.E.O. SAUNDERS

Greenway Chambers | 5 June 2022

³ *Vehicle Industry Public Holidays Case* Print T1300; *National Engineering Pty Ltd re Metal, Engineering and Associated*

⁴ Transit Systems submissions at [11].

⁵ *Hartley Poynton v Ali* (2005) 11 VR 568 at 1884; *ARTBIU v Metro Trains* [2020] FCAFC 81; *Mealing v P Chand* (2003) 57 NSWLR 305; *Castle Construction v North Sydney Council* [2007] NSWCA 164 at [97]; *Esso Australia* (2017) 263 CLR 551.



Federal Court of Australia

District Registry: New South Wales

Division: Fair Work

No: NSD867/2021

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

Applicant

TRANSIT SYSTEMS WEST SERVICES PTY LTD ACN 624 939 699

Respondent

ORDER

JUDGE: JUSTICE RARES

DATE OF ORDER: 2 December 2021

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. By consent, pursuant to r 39.05(f), (g) and (h) of the *Federal Court Rules 2011*, the orders entered on 29 November 2021 be set aside and in their place the following orders be entered:

THE COURT DECLARES:

1. Clause 15 and item 1 of each copied State award applying to the respondent and an employee covered by the *State Transit Authority Bus Operations Enterprise (State) Award 2018*, as varied by the:

- a. 2018-2019 Annual Wage Review decision;
- b. 2019-2020 Annual Wage Review decision ; and
- c. 2020-2021 Annual Wage Review decision,

required the respondent to pay each such employee weekly wages based on his or her relevant classification:

- d. from the first full pay period on or after 1 July 2019, in accordance with Column B of Schedule A to these orders;



- e. from the first full pay period on or after 1 July 2020, in accordance with Column C of Schedule A to these orders; and
 - f. from the first full pay period on or after 1 July 2021, in accordance with Column D of Schedule A to these orders.
2. The respondent contravened s 768AG of the *Fair Work Act 2009* (Cth) in respect of each of the relevant employees (**the 2019-2020 Contravention**) by its failure to apply the wages terms of the copied State awards as set out in declaration 1 in respect of each covered employee from the first full pay period on or after 1 July 2019 to 30 June 2020.
 3. The respondent contravened s 768AG of the *Fair Work Act* in respect of each of the relevant employees (**the 2020-2021 Contravention**) by its failure to apply the wages terms of the copied State awards as set out in declaration 1 in respect of **each covered employee** from the first full pay period on or after 1 July 2020 to 30 June 2021.
 4. The respondent contravened s 768AG of the *Fair Work Act* in respect of each of the relevant employees (**the 2021 Contravention**) by its failure to apply the wages terms of the copied State awards as set out in declaration 1 above in respect of each covered employee from the first full pay period on or after 1 July 2021 to 27 November 2021.

THE COURT ORDERS:

5. Joanne McCormack of JMC Accounting Group be appointed as a referee to:
 - a. inquire into the wages records of the respondent in respect of each employee to whom a copied State award applied at any time in the period between the first full pay period on or after 1 July 2019 and 27 November 2021 (**the relevant period**);
 - b. produce a written report on or before 4:00pm on 31 January 2022 in accordance with r 28.66 of the *Federal Court Rules 2011* as to:
 - i. the identity of each relevant employee;
 - ii. the amounts that should have been paid as wages, including in respect of overtime, penalties, loadings and wage-based allowances, pursuant to declaration 1 above to each such employee in respect of each pay period;



- iii. the amounts in fact paid as wages, including any overtime, penalties, loadings or wage-based allowances, to employees in each pay period in the relevant period; and
 - iv. the quantum of underpaid wages in respect of each employee.
6. The respondent pay the costs of the reference including the referee's costs.
7. The applicant's claim for a pecuniary penalty in respect of the 2019-2020 and 2020-2021 Contraventions be dismissed.
8. The matter be listed for hearing on 4 April 2022 in respect of:
 - a. orders for compensation under s 545 and interest under s 547 of the *Fair Work Act*; and
 - b. the question of the imposition of a pecuniary penalty in respect of the 2021 Contraventions only.
9. The respondent file and serve any evidence or materials upon which it intends to rely on or before 4:00pm on 18 March 2022.
10. The applicant file and serve any evidence in reply and an outline of submissions limited to 10 pages on or before 4:00pm on 25 March 2022.
11. The respondent file and serve an outline of submissions limited to 10 pages on or before 4:00pm on 30 March 2022.
12. The applicant and the respondent cooperate in the production of a paginated, chronological, double-sided court book in a lever-arch folder without tabs containing one clear copy of the documents the parties will seek to tender at the hearing to be filed electronically and in hard copy, and served by the applicant no later than 4:00pm on 1 April 2022.

Date that entry is stamped: 2 December 2021


Registrar

SCHEDULE A

	A	B	C	D
Classification	30-Jun-19: Award rate	1-Jul-19 + 3%	1-Jul-20 +1.75%	1 Jul 21 + 2.5%
Bus Operator, Trainee	\$988.20	\$1,017.80	\$1,035.60	\$1,061.50
Bus Operator level 1	\$1,025.60	\$1,056.40	\$1,074.90	\$1,101.80
Bus Operator level 2	\$1,066.70	\$1,098.70	\$1,117.90	\$1,145.80
Senior Bus Operator	\$1,087.10	\$1,119.70	\$1,139.30	\$1,167.80
Yard Supervisor	\$1,176.70	\$1,212.00	\$1,233.20	\$1,264.00
Senior Bus Operator - Yard (SBOY)	\$1,118.60	\$1,152.20	\$1,172.40	\$1,201.70
Bus Operator Trainer	\$1,176.70	\$1,212.00	\$1,233.20	\$1,264.00
Bus Operator Trainer 2	\$1,266.70	\$1,304.70	\$1,327.50	\$1,360.70
Bus Operator Trainer 3	\$1,387.00	\$1,428.60	\$1,453.60	\$1,489.90

Bus Cleaner level 1	\$888.80	\$915.50	\$931.50	\$954.80
Bus Cleaner level 2	\$944.30	\$972.60	\$989.60	\$1,014.30
Bus Cleaner level 3	\$971.60	\$1,000.70	\$1,018.20	\$1,043.70
Bus Cleaner level 4	\$1,026.90	\$1,057.70	\$1,076.20	\$1,103.10
Shed Driver	\$1,118.60	\$1,152.20	\$1,172.40	\$1,201.70
Customer Service Coordinator 1	\$1,209.50	\$1,245.80	\$1,267.60	\$1,299.30
Airport Coordinator	\$1,174.70	\$1,209.90	\$1,231.10	\$1,261.90
Customer Service Liaison (Kiosk)	\$1,174.70	\$1,209.90	\$1,231.10	\$1,261.90
Customer Service Liaison (Explorer)	\$1,174.70	\$1,209.90	\$1,231.10	\$1,261.90
Conductor T/A Sign on Clerk	\$883.10	\$909.60	\$925.50	\$948.60