

## IN THE FAIR WORK COMMISSION

### Annual Wage Review 2021-22

#### SUBMISSION OF TRANSDEV AUSTRALASIA PTY LTD

#### BACKGROUND

1. Transdev Australasia Pty Ltd (**Transdev**) is a private provider of public transportation services in Australia and New Zealand. The Transdev Group currently has 4,632 employees in Australia across its bus, ferry and light rail services.
2. In October 2019, the Government of New South Wales announced a competitive tender process for Sydney metropolitan bus services.<sup>1</sup> Following that competitive tender process, it was announced that Transdev John Holland Buses (NSW) Pty Ltd (**TJHB**) had been awarded the Greater Sydney Region 9 bus contract by Transport for New South Wales (**TfNSW**), which covers the eastern and south-eastern suburbs of Sydney and the Central Business District.<sup>2</sup> TJHB is an integrated joint venture partnership between Transdev (75%) and John Holland (25%).
3. TJHB will begin to operate the Region 9 bus contract from 4 April 2022 for an initial eight-year period. The contract marks the first time Region 9 buses will be operated privately, with TJHB taking over from the State Transit Authority (**STA**).
4. As part of the Greater Sydney Region 9 bus contract a transfer of business, within the meaning provided by section 768AD of the *Fair Work Act 2009* (Cth) (**FW Act**) will take effect on 4 April 2022. As a result of the transfer of business, TJHB will employ 1,232 former employees of the STA who are transferring employees within the meaning of section 768AE(1) of the FW Act (**the Transferring Employees**).
5. Due to the operation of section 768AM(1) of the FW Act, the following State awards will become copied State awards within the meaning provided by Section 768AI of the FW Act, covering TJHB and the Transferring Employees:
  - (a) *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020 (Engineering and Maintenance Award)*;
  - (b) *State Transit Authority Bus Operations Enterprise (State) Award 2021 (Operations Award)*; and
  - (c) *State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021 (Senior Officers Award)*

**(Collectively, the STA Copied State Awards)**

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<sup>1</sup><https://www.transport.nsw.gov.au/news-and-events/media-releases/new-bus-contracts-to-drive-improved-services>

<sup>2</sup><https://www.transdev.com/en/news-en/press-release/transdev-john-holland-awarded-sydney-australia-region-9-bus-contract-april-2022-including-major-zero-emission-fleet/>

6. Clause 54.3 of the Engineering and Maintenance Award provides a wage increase of 2.5% (including increases to minimum superannuation contributions) or 2.04% (excluding the scheduled increase to minimum superannuation contributions) applicable from 1 April 2022.
7. Clause 15.1 of the Operations Award provides a wage increase of 2.5% (including increases to minimum superannuation contributions) or 2.04% (excluding the scheduled increase to minimum superannuation contributions) from the first full pay period commencing on or after 1 January 2022.<sup>3</sup>
8. Clause 10.1 of the Senior Officers Award provides a wage increase of 2.04% from the first full pay period commencing on or after 1 January 2022.

## THE FAIR WORK COMMISSION'S APPROACH TO WAGE INCREASES FOR COPIED STATE AWARDS

9. As part of its review of modern award minimum wages each financial year, the Expert Panel for annual wage (**Panel**) is required to review and, if appropriate, make a determination varying minimum wages in copied State awards.<sup>4</sup>
10. In its 2012-13 Annual Wage Review decision,<sup>5</sup> the Fair Work Commission (**Commission**) developed a tiered approach to the application of the annual wage review to copied State awards, to avoid employees covered by such awards from receiving the benefit of wage increases awarded by the state Industrial Relations Commissions and the annual wage review (i.e. to mitigate 'double dipping'). At [560] of that decision the Commission said:

“We have decided that for copied State awards currently in operation, in order to limit the impact of any “double-dipping” as a result of this decision and minimum wage increases previously awarded by state Industrial Relations Commissions, a tiered increase will be applied to these instruments in the following terms:

- an increase of 2.6 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 July 2013;
- an increase of 1.3 per cent applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 January 2013; and
- no increase applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2013 and before 1 July 2013.”

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<sup>3</sup> Transdev notes that the version of the Operations Award currently published by the New South Wales Industrial Relations Commission (**NSWIRC**) provides for a 1.5% (including superannuation increases) /1.04% (excluding superannuation increases) wage increase. This was varied by the NSWIRC effective 30 September 2021 to include the rates set out at paragraph 7, however the Operations Award as varied has not yet been published.

<sup>4</sup> The provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* dealing with the variation of Division 2B State awards in annual wage reviews also apply to copied State awards. Sections 768BY and 768AW(b) of the *Fair Work Act 2009*.

<sup>5</sup> *Annual Wage Review 2012-13* [2013] FWCFB 4000.

11. The tiered approach was re-applied to the 2013-14,<sup>6</sup> 2014-15,<sup>7</sup> 2015-16<sup>8</sup> and 2016-17<sup>9</sup> Annual Wage Review decisions.

12. However, in the 2017-18 Annual Wage Review decision<sup>10</sup> the Commission confirmed its provisional view issued on 4 January 2018<sup>11</sup> that annual wage review adjustments should generally apply to copied State awards, subject to a different outcome being determined in respect of particular copied State awards. The Panel held at [444] and [452]:

“The method for adjusting wages in copied State awards was the subject of a decision by the Panel issued on 4 January 2018.<sup>495</sup> In that decision, the Panel expressed the following provisional view:

‘It is our provisional view that AWR adjustments should generally apply to copied State awards, subject to a different outcome being determined in respect of particular copied State awards. In other words, rather than seeking to apply a tiered approach as a decision rule to mitigate ‘double dipping’ we propose to address any ‘double dipping’ on a case by case basis. We invite submissions on our provisional view in the context of the 2017–18 Review proceedings.’<sup>496</sup>

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We confirm the provisional view expressed in our decision of 4 January 2018. The adjustment to the rates in modern awards that we have determined in this Review will be applied to copied State awards.”

13. No employer or employer representative raised any concern as part of the 2017-18 Annual Wage Review regarding ‘double dipping’ in the event that the Panel varied copied State awards consistent with the increase determined for modern award minimum wages.<sup>12</sup>

14. The same approach was applied in the 2018-19,<sup>13</sup> 2019-20<sup>14</sup> and 2021-21<sup>15</sup> Annual Wage Reviews.

15. In *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436, Rares J relevantly considered, inter alia, whether a clause of a copied State award exempted the Respondent from the obligation to increase wages consistent with the annual wage review decision.<sup>16</sup> On this question, Rares J held at [52] to [53]:

“Here, the Commission’s annual wage reviews for 2019–20, 2020–21 and 2021–22 varied every copied State instrument in exercise of its discretionary power to do so under item 20 and s 768AW(c) of the Fair Work Act. The Commission left it to any

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<sup>6</sup> Annual Wage Review 2013-14 [2014] FWCFB 3500 at [572].

<sup>7</sup> Annual Wage Review 2014-15 [2015] FWCFB 3500 at [536].

<sup>8</sup> Annual Wage Review 2015-16 [2016] FWCFB 3500 at [593].

<sup>9</sup> Annual Wage Review 2016–17 [2017] FWCFB 3500 at [699].

<sup>10</sup> Annual Wage Review 2017–18 [2018] FWCFB 3500.

<sup>11</sup> [2018] FWCFB 2.

<sup>12</sup> Annual Wage Review 2017–18 [2018] FWCFB 3500 at [451].

<sup>13</sup> Annual Wage Review 2018–19 [2019] FWCFB 3500 at [405].

<sup>14</sup> Annual Wage Review 2019–20 [2020] FWCFB 3500 at [411].

<sup>15</sup> Annual Wage Review 2020–21 [2021] FWCFB 3500 at [309].

<sup>16</sup> *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436, at [29].

party that may have been affected to apply to it to vary the impact of any of those determinations, as it explained (at [443]–[452]) when it introduced by the general process of variation to all copied State instruments in its 2018 decision at [443]–[452] (see [25] above).

Accordingly, the Commission’s 2019–20 and 2020–21 annual wage review variation determinations applied to the Award and, thus, increased the wages payable to the transferring employees in those years by 3% and 1.75% respectively.”

## **SUBMISSIONS ON THE STA COPIED STATE AWARDS**

16. Transdev submits that the Commission should not apply the annual wage review increase to the STA Copied State Awards in its 2021-22 Annual Wage Review.
17. Transdev submits that the Commission should apply the tiered approach in respect of those awards, with the outcome that no wage increase would apply, as the STA Copied State Awards were all the subject of an increase to wages that commenced on or after 1 January 2022 and before 1 July 2022. As set out at [6] to [8] above:
  - (a) the Engineering and Maintenance Award provides a wage increase of 2.5% (including increases to minimum superannuation contributions) or 2.04% (excluding the scheduled increase to minimum superannuation contributions) applicable from 1 April 2022;
  - (b) the Operations Award provides a wage increase of 2.5% (including increases to minimum superannuation contributions) or 2.04% (excluding the scheduled increase to minimum superannuation contributions) from 1 January 2022; and
  - (c) the Senior Officers Award provides a wage increase of 2.04% from 1 January 2022.
18. This approach is consistent with the previous submission of the ACTU as to how the Commission should approach requests for exemptions. As part of the 2017-18 Annual Wage Review the ACTU submitted:

“The difficulty from our perspective is the lack of certainty regarding how a future Panel might deal with an application that a different increase, or no increase, apply to employees to whom a particular copied state award applies. If the Panel were inclined to confirm its provisional view, it would in our view be usefully supplemented by an expression of support for the merits of the approach adopted in the 2012–13 decision - and re-applied to the 2016–17 decision by the correction order issued this year - when dealing with requests for an exemption.”<sup>17</sup>
19. Transdev submits that this approach is consistent with the minimum wage objective set out in a 284(1) of the FW Act, which requires the Commission to establish a safety net of fair minimum wages, as the Transferring Employees have already received (or will receive) the benefit of

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<sup>17</sup> *Annual Wage Review 2017-18* [2018] FWCFB 3500, at [447]; citing ACTU submission, 13 March 2018 at para 504; ACTU submission in reply, 9 April 2018 at p. 19.

minimum wage increases previously awarded by the New South Wales Industrial Relations Commission.

20. Transdev accordingly requests that the Commission's 2021-22 Annual Wage Review determination specify that it does not apply to the STA Copied Awards.