

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

OUTLINE OF SUBMISSIONS

1. These submissions are filed on behalf of Transit Systems West Services Pty Ltd and its related entities (**Transit Systems**).

Joinder of Application and Orders Sought

2. Transit Systems has (today) filed an application (attached) seeking that the Fair Work Commission Annual Wage Review Panel:

- (i) Vary or revoke the Commission's 2018-19 and 2019-20 Annual Wage Review (**AWR**) determinations to provide that the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively do not apply to the following copied State instruments:

- a. *State Transit Authority Bus Operations Enterprise (State) Award 2018* (**Bus Operator Award**); and
- b. *State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2018* (**Senior Officer Award**).

- (ii) Further or in the alternative to 2 (i) above, vary the Commission's 2018-19 and 2019-20 AWR determinations to provide that, in lieu of the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively, the Commission's tiered system developed in its 2012-

13 AWR decision should be applied to the Bus Operator Award and the Senior Officer Award as copied State instruments.

- (iii) Vary or revoke the Commission's 2018-19 AWR determination to provide that the minimum wage increase of 3% in the 2019-20 financial year does not apply to the *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018 (Bus Maintenance Award)* as a copied State instrument.
 - (iv) Further or in the alternative to 2 (iii) above, vary the Commission's 2018-19 AWR determination to provide that, in lieu of the minimum wage increase of 3% in the 2019-20 financial year, the Commission's tiered system developed in its 2012-13 AWR decision should be applied to the Bus Maintenance Award as a copied State instrument.
3. Transit Systems requests that its application be joined with, or the matters set out in its application be dealt with, by the Annual Wage Review panel in this 2021-22 annual wages review.
4. In addition to the variations set out above relating to past AWR decisions, in relation to the 2021-22 Annual Wage Review, Transit Systems seeks that:
- (i) If the variations or revocations sought in the application set out at 2 (i) or (ii) above **are not made** to the Bus Operator Award and/or Senior Officer Award, that no increase should be awarded to vary those instruments in this 2021/22 annual wages review;
 - (ii) If the variations or revocations sought in the application set out at 2 (i) or (ii) above **are made** to the Bus Operator Award and/or Senior Officer Award, that any increase to rate for any classification level should not exceed rate of pay for the same work under the relevant Modern Award.

Background

5. Transit Systems West Pty Ltd operates public buses under a contract with the NSW Government in the inner west region of Sydney, referred to by the NSW Government as Region 6.
6. Its related entity, Transit Systems West Services Pty Ltd employs about 800 bus drivers, 65 maintenance employees and 30 salaried staff in Region 6 whose employment transferred from the NSW Government - State Transit Authority (**STA**) on commencement of the contract on 1 July 2018.
7. At that time the Bus Operator Award, Senior Officer Award and Bus Maintenance Award came into operation and in accordance with Part 6-3A of the *Fair Work Act 2009* (**FW Act**) applied to the transferring employees as Copied State Awards.
8. The State awards (upon which the Copied State Awards were made) were made as consent Awards by the Industrial Relations Commission of NSW (**IRCNSW**).
9. Each consent Award contained wage increases agreed by the relevant parties to be in lieu of any State Wages decision increases, made by the IRCNSW. Those wage increases were payable by Transit Systems in accordance with the terms of the Copied State Awards.
10. The Copied State Bus Operator Award relevantly provides as follows:

15. Wages and Wage increases

- 15.1 Subject to this clause, wage rates at Part B – Table 1 Weekly Wage Rates (Table 1) – for classifications listed in Table 1, incorporate the following wage increases:
 - (i) 2.5% from the first full pay period commencing on or after 1 January 2018;
 - (ii) 2.5% from the first full pay period commencing on or after 1 January 2019; and
 - (iii) 2.5% from the first full pay period commencing on or after 1 January 2020.

15.2 **The wage increases contained in this Award are in substitution of any State Wages decisions.** Any arbitrated safety net adjustments may be offset against any equivalent amount in the rates of pay received by employees covered under this Award.
[emphasis added]

11. Transit Systems held the view that the provisions, in particular the first sentence of cl. 15.2, had the effect that the annual 2.5% wage increases contained in the copied State award were in substitution of any AWR decisions to increase wage rates in Copied State Awards.
12. Transit Systems paid the increases set out in the Copied State Awards. It did not pay any further AWR increases in addition to the increases set out in the Copied State Awards.
13. Transit Systems' view was ultimately determined by the Federal Court to be incorrect.¹
14. His Honour, Justice Rares determined that the Copied State Bus Operator Award was not varied by the 2018 AWR decision, as the variation had been made on 1 June 2018, prior to the Bus Operator Award commencement on 1 July 2018.²
15. However, his Honour also found that the Bus Operator Award was, in addition to the increases set out in the instrument itself, varied by the Commission's 2019 AWR, 2020 AWR and 2021 AWR decisions. Referring to clause 15 above, Rares J concluded:

50 In my opinion, cl 15.2 can be read sensibly, and as the Parliament intended that a copied State instrument would be read, without rendering the expression "any State wages decisions" as unintelligible. Once the Award is read as a copied State instrument, that expression can be understood to refer to an annual wage review (being a National decision as defined in s 49 of the Industrial Relations Act). The Fair Work Act used the legislative

¹ *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436.

² *Ibid* at [36]-[42].

device of a copied State instrument as a practical means of giving the persons covered by it sufficient time to work together to create a modern award or enterprise agreement to replace that instrument over a period while there remained in place a legally binding employment relationship with which they were already familiar (being the copied State instrument), subject to any express overrides in the Fair Work Act and the related legislation.

51 Accordingly, cl 15.2 can sensibly be understood as seeking to provide that the parties to the Award intended that wage increases contained in cl 15.1 were to be in substitution for any variation of minimum wages that otherwise would be payable under a National decision, being an annual wage review variation decision that the State Commission might decide to adopt under ss 50 and 52 of the Industrial Relations Act, much like it could make a State decision under s 51 that set principles or provisions for the purposes of State awards or other matters under that Act. Nonetheless, that intention could not have the effect of overriding a variation determination by the Commission that varies the Award as a copied State instrument, pursuant to its powers under item 20 and s 768AW(c), which has the force of law.

52 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 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).

53 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.

16. His Honour noted the past practice of the Commission to adopt a tiered approach in respect of AWR increases to copied State instruments but that it had not been adopted in the more recent AWR decisions by the Commission.³ His Honour further observed:

³ Ibid at [23]–[27].

55 The consequence of the Commission's abandonment of its tiered system in the 2018 decision was to treat all copied State instruments on the basis that, whenever they provided for any increases in wages in the previous financial year and those increases had commenced to be paid, the new wage would be the rate of pay used as the reference point for calculating the increased wages that would be paid in the next financial year with the determined uplift.

17. It was not open to Rares J to re-introduce the tiered approach in that circumstance. However, it is open to the Annual Wage Review Panel in the context of this application.
18. As a consequence, the full amount of the AWR 3% wage increase was found by the Court to be payable on the first full pay period on and from 1 July 2019, regardless of the fact that the bus drivers had already received a 2.5% increase on and from 1 January 2019.
19. The result of the above is expected to be an approximate \$3.5 million payment. Pursuant to orders made by the Court on 2 December 2021, Transit Systems has facilitated the conduct of an independent audit to determine the quantum of wages arising from the Court's decision. The auditor, Joanne McCormick of JMC Accounting, has produced a report which has been filed with the Court (**McCormick Report**).
20. The McCormick Report identifies that Transit Systems is liable to pay its employees:
 - (i) \$1,158,418.71 in gross wages and \$71,164.63 in superannuation as a result of the 2019 AWR decision by the Commission;
 - (ii) \$1,323,372.30 in gross wages and \$83,474.02 in superannuation as a result of the combination of the 2019 and 2020 AWR decisions by the Commission (including the compounding effect of the earlier 2019 decision);
 - (iii) \$791,806.61 in gross wages and \$47,460.90 in superannuation as a result of the combination of the 2019, 2020 and 2021 AWR decisions by the

Commission (including the compounding effect of the earlier 2019 and 2020 decisions).

21. The total amount of liability is \$3,475,696.72, made up of \$3,273,597.72 in wages and \$202,099.00 in superannuation. This does not include any quantum of interest that would be payable on the outstanding wages and superannuation, pursuant to an order for interest under s 547 of the FW Act.
22. No orders have yet been made by the Court for compensation and interest. The matter is listed for further hearing before Rares J on 4 April 2022. Transit Systems will seek a stay of any order for compensation pending the outcome of its application before the Commission referred to at paragraph 2 above.
23. Transit Systems made an enterprise agreement with the maintenance employees which was registered in the Commission on 20 May 2021 namely the *Transit Systems West Services Engineering and Maintenance Enterprise Agreement 2021 (AG2021/4175)* which became operational on 27 May 2021.
24. The Salaried Award and the Bus Operations Award continue to apply and are in operation.
25. Transit Systems and the RTBU and TWU have commenced bargaining for an enterprise agreement to replace the Bus Operators Award.

Brief history of AWR decisions varying copied State awards

26. One month prior to the creation of the Copied State awards, the Commission delivered its decision in its *Annual Wage Review 2017-18* [2018] FWCFB 3500 on 1 June 2018. At paragraph [495] of its decision, the Commission stated: '*Copied State awards will be varied on the basis discussed in Chapter 5 of this decision.*'
27. In Chapter 5 of its decision, commencing at paragraph [437], the Commission discussed the method for adjusting wages in copied State awards. Up until this decision, the Commission in its earlier AWR decisions had adopted the tiered

methodology for adjusting wages in copied State awards. This methodology was first established by the Commission in its 2012-13 AWR decision, as follows:⁴

[560] 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. [emphasis added]

28. The Commission adopted this tiered approach to avoid a situation where employees received *both* the benefit of the State Wages decision increase as well as the federal annual wage review increase during the same period.
29. This tiered approach was adopted by the Commission in subsequent AWRs.⁵ It is clear from those AWR decisions that this tiered approach was adopted by the Commission as a rule designed to mitigate double dipping.
30. In its 2017–18 AWR decision the Commission changed the method for adjusting wages in copied State awards.⁶ The tiered methodology was abandoned. Instead, the Commission made a determination in relation to copied State awards

⁴ [2013] FWCFB 4000.

⁵ [2014] FWCFB 3500 at paras 568–572; [2015] FWCFB 3500 at paras 531–536; [2016] FWCFB 3500 at para 593; [2017] FWCFB 3500 at para 699.

⁶ [2018] FWCFB 3500 at paras 443 to 452.

such that wage increases mandated by AWR decisions applied as a matter of course to copied State awards. The Commission determined that the adjustment to the rates in modern awards in the 2017-2018 AWR, namely an increase of 3.5%, applied directly to copied State awards.

31. On the issue of double dipping, the Commission made the following limited observations in its 2017-18 AWR decision:

[451] ACCI observed that '[w]here there are concerns regarding 'double dipping' there should be scope for an employer or employer representative to raise this with the Commission.' No employer or employer representative raised any concern regarding 'double dipping' in the event that we varied copied State awards consistent with the increase determined for modern award minimum wages.

32. The Commission also referred to the following submission made by one of the parties:

[448] ... should a party to a copied State award make an application to vary (by reducing) the Annual Wage Review increase applied to a copied State award, then (and only then) the tiered approach developed by the Commission in the 2012-2013 Annual Wage Review decision should be applied.

33. Some six months earlier, on 4 January 2018, the Commission had issued a decision in which it had foreshadowed this change of approach toward copied State awards. The Commission identified that double dipping would need to be addressed on a case-by-case basis in respect of particular copied State awards, rather than through tiered increases:

[43] ... 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.⁷

⁷ [2018] FWCFB 2 at [43].

34. In its subsequent AWR decisions in 2019, 2020 and 2021 the Commission has continued to determine that the wage increases should apply as a matter of course to copied State awards. In these decisions, the Commission has made no further rulings or comments about the issue of double dipping.
35. For present purposes, the salient point arising from the Commission's AWR decision is the intent of the Commission that double dipping should not exist and that AWR adjustments were intended to benefit those employees who have not received a wage increase from State industrial bodies.
36. This is most clearly evident in the Commission's tiered approach under which no AWR increases would have applied to the wage rates in the Copied State Awards applying to Transit Systems and its employees for each of the calendar years 2018, 2019 and 2020.
37. An AWR increase would have applied in the 2021 calendar year, but only because there was no 2.5% wage increase payable on 1 January 2021 under the Copied State Awards (except in respect of the Copied State Bus Maintenance Award which ceased to exist when the enterprise agreement was made).

Summary of the Applicant's Case

38. Transit Systems submits that there are a number of circumstances which warrant the making of the variations or revocations, including the retrospective variations/revocations, in the terms that it seeks:
 - (i) The Commission should give effect to the deals done by the unions and approved by the IRCNSW and limit the wage increases to those employed pursuant to the Copied State Awards.
 - (ii) The Commission should hold the unions to the bargains that they struck – with the confidence that the wage rates in the Copied State Awards are

significantly higher in all cases than the Modern Award that covers the same work.

- (iii) The Commission should not permit the windfall gain of double dipping, consistent with the Commission's tiered methodology.
- (iv) The Commission should give practical effect to the words in cl. 15.2 of the Copied State Awards: *'The wage increases contained in this Award are in substitution of any State Wages decisions.'*
- (v) Failure to grant the application would expose Transit Systems to substantial cost liability for claims for payment or award breach in circumstances where such claims could not reasonably have been anticipated at the time the potential liability was concerned.
- (vi) The Commission should vary the rates in the copied State Award to remove the impediment to achieving productivity at the enterprise level through collective bargaining.
- (vii) The variations sought are consistent with the statutory context and the Commission's powers.

The Statutory Context

39. The Commission has the broad power to vary or revoke its decisions. Relevantly, s 603 of the FW Act provides:

603 Varying and revoking the FWC's decisions

- (1) *The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).*
- (2) *The FWC may vary or revoke a decision under this section:*
 - (a) *on its own initiative; or*
 - (b) *on application by:*
 - (i) *a person who is affected by the decision; ...*

40. This power of the Commission is limited by the provisions set out in s 603(3), in particular:

(3) *The FWC must not vary or revoke any of the following decisions of the FWC under this section:*

.....

(d) *a decision under Part 2-6 (which deals with minimum wages);*

41. It follows that decisions under Part 2-6 of the FW Act (which deals with minimum wages) are expressly excluded from the scope of s 603, and the Commission cannot make a variation or revocation of the kind proscribed by s 603(3)(d).

42. It is submitted that a decision to vary minimum wages in the Copied State Awards is not a decision made under Part 2–6 of the FW Act. Rather, it is a decision made under Item 20(1) of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Transitional Act)*, as that item relates to copied State awards because of s 768BY of the FW Act. This item reads as follows:

20 Variation of Division 2B State awards in annual wage reviews under the FW Act

(1) In an annual wage review, the FWC may make a determination varying terms of a Division 2B State award relating to wages.

(2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a Division 2B State award relating to wages **in the same way** as it applies to a modern award. [emphasis added]

43. Section 768AW reinforces the point that a decision to vary minimum wages in the Copied State Awards is not a decision made under Part 2–6 of the FW Act. Section 768AW is in the following terms:

768AW Variation in limited circumstances

A copied State instrument for a transferring employee cannot be varied except under:

- (a) section 768AX; or
 - (b) item 20 of Schedule 3A to the Transitional Act (which deals with variation of discriminatory instruments) as that item has effect because of section 768BY; or
 - (c) item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY; or ... [emphasis added]**
44. There is nothing in s 603(3)(d) of the FW Act that prevents the broad power in s 603(1) being utilised by the Commission to vary or revoke the earlier determinations applying the AWR increases to the Copied State Awards. By virtue of s 603(2)(b)(i), Transit Systems has the necessary standing, as a person “*affected by*” those earlier AWR determinations, to bring an application under s 603(1) to vary or revoke them.
45. As stated by Justice Rares in his recent decision, the Commission left it open in its 2018 AWR decision, when it decided to abandon its tiered system, for an affected party such as Transit Systems to apply to it and seek to have the tiered system applied on a case-by-case basis to address and alleviate any double dipping.
46. The objects of the Act are also relevant to the present application. Section 3 of the FW Act describes the principal object, which is to provide:
- a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians ...
47. Section 3 goes on to describe the ways in which such an object is to be achieved. Those subsections most relevant to the current matter are as follows:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions ...

- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining ...

The Nature of the Commission's Task

48. There is clear precedent for the Commission exercising its powers to overcome the effect of a Federal Court decision interpreting award provisions. In *Re Mitsubishi Motors Australia Ltd Award 1998 (the **Vehicle Industry Public Holidays Case**)*,⁸ an award was retrospectively varied by a Full Bench of the Commission to, in effect, nullify the Court's decision concerning the interpretation of public holiday provisions.
49. As stated in the *Vehicle Industry Public Holidays Case*,⁹ the task of the Commission in matters such as this is not to be a mere reflection of the judicial proceeding to interpret the existing AWR decisions, or merely to interpret, enforce or adjudicate on the existing minimum wages determinations, or to uphold an employee's right to payment under the Copied State Awards. The Commission can, as has been confirmed in numerous authorities, make, vary or revoke its own decisions as it sees appropriate in the circumstances. This involves the creation or alteration of rights, not their enforcement.
50. The task is to determine the form and content of the determination which should apply in the circumstances brought before the Commission. In doing so, the

⁸ 3 October 2001, Print T1300.

⁹ Ibid at [21].

Commission may, and in the normal course should, give consideration to industrial principles and the general industrial merit of the variation sought.¹⁰

51. In dealing with a similar application to retrospectively vary the Metal Industry Award, the Full Bench of the former Australian Industrial Relations Commission explained the nature of this task as follows:¹¹

Such a task involves a discretionary judgment. That discretion is structured in many ways, but such structured discretion does not strike at the heart of the principle that the Commission may create a provision applying to a particular company or companies or particular employees on the basis of fairness, equity, and the industrial merits. In that task, the Commission takes into account the existing rights of the parties under the Award, but may consider whether in the circumstances those rights should be altered, left intact, or new rights created.

52. In that case, the Full Bench decided to retrospectively vary the Award to give effect to an industrial agreement relating to shift work arrangements within the business, notwithstanding that these arrangements did not comply with the existing Award provisions. The Full Bench noted:¹²

The variation is not prospective in application to the current award minimum standard. It is retrospective only in that will operate to validate a practice consistent with a prior agreement. In all the circumstances, we do not consider that such a variation would undermine the safety net of fair minimum wages and conditions.

Merits Considerations

53. Fairness should be a key determinant of whether the Commission's AWR determinations should be varied or revoked in this matter. The variation or revocation of those AWR determinations is necessary to avoid the impact of double dipping, namely to avoid a situation whereby the transferring employees

¹⁰ *National Engineering Pty Ltd re Metal, Engineering and Associated Industries Award 1998 - Part I - PR912582* [2001] AIRC 1357 at [53].

¹¹ *Ibid* at [54].

¹² *Ibid* at [72].

receive a double benefit of wage increases derived from the Copied State Awards, as well as the AWR decisions of the Commission, covering the same periods.

54. The alternative relief sought by Transit Systems in this matter is also consistent with the tiered system developed by the Commission in its 2012-13 AWR decision, as a means of mitigating the impact of double dipping and thereby ensuring fairness to all affected parties. Such fairness is consistent with the objects of the FW Act: s 3(a).
55. The Commission's AWR determinations in 2018, 2019 and 2020 have resulted in windfall gains for employees amounting to approximately \$3.5 million, as shown in the McCormick Report. This was the very kind of situation that the Commission had always intended to avoid when it developed the tiered methodology in its 2013 AWR decision.
56. If the Commission's tiered system had continued to apply in its 2018, 2019 and 2020 AWR decisions, then there would have been no question that the employees covered by the Copied State Awards were not entitled to receive a "double benefit" of an award wage increase and a further minimum wage increase during the same period. The Commission made it clear in its 2018 AWR decision (and its earlier 4 January 2018 decision) that the tiered approach would continue to be applied on a case-by-case basis to address any double dipping. That is the very circumstance in this case.
57. Fairness also dictates that the unions should be held to the bargains that were struck when the State Awards were made by consent in the IRCNSW, namely that the 2.5% wage increases provided in cl 15 of the Copied State Award were "*in substitution of*" of minimum wages decisions and increases.
58. It is a bedrock principle in this jurisdiction that parties should honour the terms of industrial agreements that were freely consented to. That principle strongly supports the present application. It is clear that the objective intention of the

parties (reflected in cl. 15.2 of the Bus Operators Award) is that the consent award excludes award increases from minimum wages decisions.

59. Furthermore, it is in the public interest that the Unions should be kept to the consent arrangements that they struck in the IRCNSW, as evidenced by the terms of cl 15 of the Copied State Bus Operator Award and cl 10 of the Senior Officer Award.
60. It is also relevant to the Commission's consideration that the wage rates applying under the Copied State Awards are substantially higher in all cases than the modern award rates covering the same work. In the case of bus drivers the relevant modern award is *Passenger Vehicle Transportation Award 2010 (2020)*. Attached to these submissions is a Table that provides a point-in-time comparison between the wage rates for all bus operator classifications under the relevant modern award and the Copied State Bus Operator Award, including if the tiered approach was applied to the Copied State Award.
61. The Table demonstrates conclusively that should the Commission hold the Union to the bargain that it struck in the IRCNSW when the Bus Operators Award was made, then the employees covered by the Copied State Award will continue to receive a level of remuneration that is substantially above the safety net of wages established in the modern award.
62. Having regard to its obligations to properly fix minimum rates to provide a fair and relevant safety net, the Commission should intervene in this matter so that the minimum wages differential between employees performing the same work under the relevant modern award and the Copied State Awards is not increased.
63. The Commission should also vary the rates in the Copied State Awards to remove the impediment to achieving productivity at the enterprise level through collective bargaining: s 3(f).

64. Unless the relief sought is granted, there will be manifest unfairness to Transit Systems in that the company will have a significant unfunded liability in the order of \$3.5 million, without any bargained-for cost offsets, or commensurate increases in productivity and efficiency. In turn, this will reduce the financial viability of Transit Systems' business.

Yaseen Shariff SC

12 Wentworth Selborne Chambers

Matthew Moir

Sir Owen Dixon Chambers

Sharlene Wellard

Meridian Lawyers, solicitors for Transit Systems

1 April 2022

Minimum Weekly Rates Comparison – Bus Drivers

<u>2019</u>	1 January 2019	<u>1 January 2019</u>	1 July 2019	<u>1 July 2019</u>	<u>If the Tiered Approach is maintained in AWR 2019</u>
	STA Drivers 2.5%	Transit Systems 2.5%	Modern Award 3%	Transit Systems 3% Federal Court Decision	Transit Systems 0%
<i>Classification</i>					
Bus Operator, Trainee <i>(equivalent to Grade 1 of Modern Award)</i>	\$988.20	\$988.20	\$799.10	\$1,017.80	\$988.20
Bus Operator level 1 <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,025.60	\$1,025.60	\$895.70	\$1,056.40	\$1,025.60
Bus Operator level 2 <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,066.70	\$1,066.70	\$895.70	\$1,098.70	\$1,066.70
Senior Bus Operator <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,087.10	\$1,087.10	\$895.70	\$1,119.70	\$1,087.10
Bus Operator Trainer 1 <i>(equivalent to Grade 5 of Modern Award)</i>	\$1,176.70	\$1,176.70	\$945.10	\$1,212.00	\$1,176.70
Bus Operator Trainer 2 <i>(equivalent to Grade 5 of Modern Award)</i>	\$1,266.70	\$1,266.70	\$945.10	\$1,304.70	\$1,266.70
Bus Operator Trainer 3 <i>(equivalent to Grade 6 of Modern Award)</i>	\$1,387.00	\$1,387.00	\$986.80	\$1,428.60	\$1,387.00

2020

	<u>1 January 2020</u> <u>If the Tiered Approach is maintained in 2019 and 2020</u> <u>Transit Systems</u> <u>2.5%</u>	1 January 2020 STA Drivers 2.5%	1 July 2020 Modern Award	1 November 2020 Modern Award 1.75%	1 July 2020 Transit Systems 1.75% Federal Court Decision
<i>Classification</i>					
Bus Operator, Trainee <i>(equivalent to Grade 1 of Modern Award)</i>	\$1,012.90	\$1,012.90	\$799.10	\$813.10	\$1,035.60
Bus Operator level 1 <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,051.20	\$1,051.20	\$895.70	\$911.40	\$1,074.90
Bus Operator level 2 <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,093.40	\$1,093.40	\$895.70	\$911.40	\$1,117.90
Senior Bus Operator <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,114.30	\$1,114.30	\$895.70	\$911.40	\$1,139.30
Bus Operator Trainer 1 <i>(equivalent to Grade 5 of Modern Award)</i>	\$1,206.10	\$1,206.10	\$945.10	\$961.60	\$1,233.20
Bus Operator Trainer 2 <i>(equivalent to Grade 5 of Modern Award)</i>	\$1,298.40	\$1,298.40	\$945.10	\$961.60	\$1,327.50
Bus Operator Trainer 3 <i>(equivalent to Grade 6 of Modern Award)</i>	\$1,421.70	\$1,421.70	\$986.80	\$1,004.10	\$1,453.60

<u>2021</u>	1 January 2021 STA Drivers 0.3%	1 July 2021 Modern Award 2.5%	1 July 2021 Transit Systems 2.5% Federal Court Decision	<u>1 July 2021</u> <u>If the Tiered Approach is maintained in 2019 and 2020</u> <u>Transit Systems</u> <u>2.5%</u>
<i>Classification</i>				
Bus Operator, Trainee <i>(equivalent to Grade 1 of Modern Award)</i>	\$1,015.90	\$833.40	\$1,061.50	\$1,038.20
Bus Operator level 1 <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,054.40	\$934.20	\$1,101.80	\$1,077.50
Bus Operator level 2 <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,096.70	\$934.20	\$1,145.80	\$1,120.70
Senior Bus Operator <i>(equivalent to Grade 4 of Modern Award)</i>	\$1,117.60	\$934.20	\$1,167.80	\$1,142.20
Bus Operator Trainer 1 <i>(equivalent to Grade 5 of Modern Award)</i>	\$1,209.70	\$985.60	\$1,264.00	\$1,236.30
Bus Operator Trainer 2 <i>(equivalent to Grade 5 of Modern Award)</i>	\$1,302.30	\$985.60	\$1,360.70	\$1,330.90
Bus Operator Trainer 3 <i>(equivalent to Grade 6 of Modern Award)</i>	\$1,426.00	\$1,029.20	\$1,489.90	\$1,457.20

Modern Award – Passenger Vehicle Transportation Award 2010 / Passenger Vehicle Transportation Award 2020

STA Drivers - State Transit Authority Bus Operations Enterprise (State) Award 2018 / State Transit Authority Bus Operations Enterprise (State) Award 2021

Transit Systems – Copied State Award - State Transit Authority Bus Operations Enterprise (State) Award 2018

About the F1 application form

Application (no specific form provided)

When to use this form

You can use this form if you would like to make an application to the Fair Work Commission (the Commission) and there is no specific form provided.

Please carefully check the [Forms](#) page of the Commission's website before using this form. If there is a specific approved form for your purpose, you must use the approved form that is available on the Commission's website.

Lodgment and service of your completed form

1. **Lodge your application** along with any accompanying documents with the Commission. You can lodge your application online using the Commission's [Online Lodgment Service \(OLS\)](#) or by post, by fax or by email or in person at the [Commission office](#) in your state or territory.
2. **Serve a copy** of this application on the Respondent as soon as possible after lodging this application with the Commission.

If you are unsure about the service requirements for your particular application, you can seek directions from the Commission by lodging a Form F48 – Applications for Directions on Procedure.

Where to get help

Commission staff & resources

Commission staff cannot provide legal advice. However, staff can give you information on:

- processes in the Commission
- how to make an application to the Commission
- how to fill out forms
- where to find useful documents such as legislation and decisions
- other organisations that may be able to assist you.

The Commission's website www.fwc.gov.au also contains a range of information that may assist.

Throughout this form



This icon appears throughout the form. It indicates information to help you answer the question following.

Legal or other representation

Representation is where another person (such as a family member or friend, lawyer or paid agent, or an employee of a union or employer organisation) speaks or acts on a person's behalf, or assists a person in certain other ways in relation to a matter before the Commission. There is no requirement to be represented at the Commission.

There are some restrictions on representation by a lawyer or paid agent.

Generally, a person must give notice to the Commission (by lodging a Form F53 – Notice that a person: (a) has a lawyer or paid agent; or (b) will seek permission for lawyer or paid agent to participate in a conference or hearing) and seek permission from the Commission Member dealing with the matter if they wish to have a lawyer or paid agent represent them by participating in a conference or a hearing.

Apart from participating in a conference or hearing, a person's lawyer or paid agent can represent them without permission, unless the Commission decides otherwise. For example, the lawyer or paid agent can prepare and lodge written applications, responses and submissions with the Commission, and communicate in writing with the Commission and other parties to the matter on the person's behalf.

The requirement to give notice and seek permission for a lawyer or paid agent to participate in a conference or hearing, does not apply if the lawyer or paid agent is:

- an employee or officer of the person **or**
- a bargaining representative that is representing the person **or**
- an employee or officer of an employee or employer organisation, or an association of employers or a peak council, that is representing the person.

Rule 12(2) of the [Fair Work Commission Rules 2013](#) sets out further exceptions to the requirement to give notice and seek permission.

For more information about representation by lawyers and paid agents, see section 596 of the [Fair Work Act 2009](#), rules 11, 12 and 12A of the [Fair Work Commission Rules 2013](#) and the Commission's [practice note on representation by lawyers and paid agents](#).

Glossary of common terms

Appellant – This is the person or organisation lodging an appeal.

Applicant – This is the person or organisation that is making an application.

Jurisdictional objection – This is a type of objection a Respondent can raise to an application. A Respondent can make this kind of objection if they think that the Commission, for a technical or legal reason, cannot hear the matter.

Lawyer – This is a person who is admitted to the legal profession by a Supreme Court of a State or Territory.

Paid agent – in relation to a matter before the Commission, is an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.

Party – A party is a person or organisation involved in a matter or case that is brought to the Commission.

Respondent – The person or business responding to an application made by an Applicant.

Service – Serving a document means giving a copy of the document to a person or organisation, usually to the other party to the matter. You can serve a document in a number of ways, including by email, fax, express or registered post, or in person. Parts 7 and 8 of the Fair Work Commission Rules 2013 deal with service.

Privacy

The Commission collects the information (including personal information) provided to it in this form for inclusion on the case file, and may disclose this information to the other parties to this matter and to other persons. For more details of the Commission's collection, use and disclosure of this information, please see the [Privacy notice](#) for this form, or ask for a hard copy to be provided to you.



Remove this cover sheet and keep it for future reference – it contains useful information

Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Transit Systems West Services Pty Limited
Trading name of business	Transit Systems West Services
ABN/ACN	21 624 939 699 / 624 939 699
Contact person	Jamie Sinclair – Managing Director

How would you prefer us to communicate with you?

Email (you will need to make sure you check your email account regularly)

Post

Does the Applicant have a representative?



A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or business who is representing the Applicant.

Name of person	Sharlene Wellard		
Firm, union or company	Meridian Lawyers		
Postal address	Level 16, MLC Centre, 25 Martin Place		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	02 9018 9939	Fax number	02 9018 9900
Email address	swellard@meridianlawyers.com.au		

Is the Applicant's representative a lawyer or paid agent?

Yes

No

The First Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Australian Rail, Tram and Bus Union		
Surname			
Postal address	Level 4, 321 Pitt Street		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	(02) 9261 1342	Fax number	(02)9261 1342
Email address	rtbu@trbu.org.au		

If the respondent is a company or organisation please also provide the following details

Legal name of business	Australian Rail, Tram and Bus Industry Union
Trading name of business	Rail, Tram and Bus Union
ABN/ACN	19 122 611 478
Contact person	David Babineau

The Second Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	Australian Services Union (NSW Branch)		
Surname			
Postal address	PO Box 1865		
Suburb	Strawberry Hills		
State or territory	NSW	Postcode	2012
Phone number	(02) 9310 4000	Fax number	
Email address	membership@asu.org.au		

If the respondent is a company or organisation please also provide the following details

Legal name of business	Australian Services Union (NSW Branch)
Trading name of business	Australian Services Union (NSW Branch)
ABN/ACN	62 176 363 768
Contact person	Natalie Lang

The Third Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	The Association of Professional Engineers, Scientists & Managers, Australia		
Surname			
Postal address	1/491 Kent Street		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	1300 273 762	Fax number	(02) 9264 1224
Email address	infor@ProfessionalsAustralia.org.au		

If the respondent is a company or organisation please also provide the following details

Legal name of business	The Association of Professional Engineers, Scientists and Managers Australia
Trading name of business	Professionals Australia

ABN/ACN	99 589 872 974
Contact person	Evan Romer

The Fourth Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	Australian Manufacturing Workers Union		
Surname			
Postal address	133 Parramatta Rd		
Suburb	Granville		
State or territory	NSW	Postcode	2142
Phone number	02 9897 4200	Fax number	02 9897 4218
Email address			

If the respondent is a company or organisation please also provide the following details

Legal name of business	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (NSW Branch)		
Trading name of business	Australian Manufacturing Workers Union (NSW Branch)		
ABN/ACN	59 459 725 116		
Contact person	Cory Wright		

The Fifth Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	Electrical Trades Union NSW & ACT Branch		
Surname			
Postal address	Level 5, 370 Pitt Street		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	(02) 9267 4844	Fax number	(02) 4968 3466
Email address	etunsw@etunsw.asn.au		

If the respondent is a company or organisation please also provide the following details

Legal name of business	Electrical Trades Union NSW & ACT Branch
Trading name of business	Electrical Trades Union NSW
ABN/ACN	24 379 005 569
Contact person	Allen Hicks

The Sixth Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	CFMEU Construction & General Division NSW Branch		
Surname			
Postal address	Level 2/63 Miller Street		
Suburb	Pymont		
State or territory	NSW	Postcode	2009
Phone number	(02) 9749 0400	Fax number	(02) 9749 3625
Email address	nswqueries@cfmeu.org		

If the respondent is a company or organisation please also provide the following details

Legal name of business	CFMEU Construction & General Division NSW Branch
Trading name of business	Construction, Forestry, Mining and Energy Union (NSW Branch)
ABN/ACN	17 524 350 156
Contact person	Darren Greenfield

The Seventh Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	Australian Workers Union NSW Branch		
Surname			
Postal address	Level 2, 16-20 Good Street		
Suburb	Granville		
State or territory	NSW	Postcode	2142
Phone number	1300 763 223	Fax number	

Email address	info@awunsw.com.au
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If the respondent is a company or organisation please also provide the following details

Legal name of business	Australian Workers' Union NSW Branch
Trading name of business	Australian Workers' Union NSW Branch
ABN/ACN	92 860 257 789
Contact person	Tony Callinan

1. The Application

1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

Section 603(2)(b)(i) of the *Fair Work Act 2009 (Act)*.

2. Order or relief sought

2.1 Please set out the order or relief sought.



Using numbered paragraphs, set out what you are asking the Commission to do.

1. Vary or revoke the Commission's 2018-19 and 2019-20 Annual Wage Review (**AWR**) determinations to provide that the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively do not apply to the following copied State instruments:
 - a. *State Transit Authority Bus Operations Enterprise (State) Award 2018 (Bus Operator Award)*; and
 - b. *State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2018 (Senior Officer Award)*.
2. Further or in the alternative to 1, vary the Commission's 2018-19 and 2019-20 AWR determinations to provide that, in lieu of the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively, the Commission's tiered system developed in its 2012-13 AWR decision should be applied to the Bus Operator Award and the Senior Officer Award as copied State instruments.
3. Vary or revoke the Commission's 2018-19 AWR determination to provide that the minimum wage increase of 3% in the 2019-20 financial year does not apply to the *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018 (Bus Maintenance Award)* as a copied State instrument.
4. Further or in the alternative to 3, vary the Commission's 2018-19 AWR determination to provide that, in lieu of the minimum wage increase of 3% in the 2019-20 financial year, the Commission's tiered system developed in its 2012-2013 AWR decision should be applied to the Bus Maintenance Award as a copied State instrument.

2.2 Please set out grounds for the order or relief sought.



Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

Grounds for relief sought in relation to the Bus Operator Award as a copied State instrument:

1. The Bus Operator Award was a consent award made by the Industrial Relations Commission of New South Wales (**State Commission**) in December 2017. The Australian Rail, Tram and Bus Industry Union (**Union**) was a party to the Bus Operator Award.
2. The Bus Operator Award provided in cl 15 for annual wage increases for the employees whom it covered, relevantly wage increases of 2.5% from the first full pay periods commencing on or after 1 January 2019 and 1 January 2020 respectively.
3. The Bus Operator Award further provided in cl 15 that *“[t]he wage increases contained in this Award are in substitution of any State Wages decisions.”*
4. On 1 July 2018, a transfer of business took effect from the State Transit Authority (**STA**) to the Applicant which involved approximately 1100 bus drivers being transferred from employment with the STA to the Applicant (**transferring employees**).
5. By operation of Pt 6-3A of the Act, the transfer of business gave rise to the creation of the Bus Operator Award as a copied State instrument covering the Applicant and each of the transferring employees.
6. Consistent with its obligations under cl 15 of the Bus Operator Award, the Applicant paid annual wage increases of 2.5% to the transferring employees in January 2019 and January 2020 respectively.
7. On 27 August 2021, the Union commenced proceedings in the Federal Court of Australia (**Court**) alleging, amongst other things, that the Applicant was liable for underpayment of the minimum wage increases determined by the Commission in its 2018-19 and 2019-20 AWR decisions in respect of the transferring employees covered by the Bus Operator Award.

8. Prior to 27 August 2021, and going back to the transfer of business more than three (3) years earlier, there had never been any issue, claim, demand or controversy raised with the Applicant to the effect that:
 - a. the minimum wage increases determined by the Commission in its 2018-19 and 2019-20 AWR decisions applied to the Bus Operator Award and the transferring employees; and/or
 - b. the transferring employees were entitled to the benefit of **both** the 2.5% increases under cl 15 of the Bus Operator Award **and** the minimum wage increases determined by the Commission its AWR decisions.
9. In its decision of 5 November 2021 (*Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436) (**liability judgment**), the Court determined that the Commission's 2018-19 and 2019-20 AWR decisions applied to the Bus Operator Award, and thus increased the wages payable to the transferring employees in the 2019-20 and 2020-21 financial years by 3% and 1.75% respectively.
10. The Court determined that these minimum AWR increases were payable to the transferring employees **in addition to** the 2.5% annual wage increases mandated by cl 15 of the Bus Operator Award.
11. The Court also observed that the Commission left it to any party to a copied State instrument (such as the Applicant) that may have been affected by the Commission's AWR decisions to apply to it, to vary the impact of any of those AWR decisions.
12. The Applicant is a person who is affected by the Commission's 2018-19 and 2019-20 AWR decisions, for the reasons outlined in the Court's liability judgment.
13. The relief sought by the Applicant is necessary to avoid or limit the impact of "double dipping", namely to avoid a situation whereby the transferring employees receive a double benefit of wage increases derived from the Bus Operator Award as a copied State instrument, as well as the AWR decisions of the Commission, covering the same periods.

14. The relief sought is necessary to ensure that the Union is held to the bargain that was struck when the Bus Operator Award was made by consent in the State Commission, namely that the 2.5% wage increases provided in cl 15 were “*in substitution of*” of minimum wages decisions and increases.
15. It is in the public interest that the Union should be kept to the consent arrangements that it struck in the State Commission, as reflected in cl 15 of the Bus Operator Award.
16. The relief sought is consistent with the tiered system developed by the Commission in its 2012-13 AWR decision, as a means of mitigating the impact of “double dipping” and thereby ensuring fairness to all affected parties.
17. The relief sought is consistent with the Commission leaving it open in its 2017-18 AWR decision, when it decided to abandon its tiered system, for an affected party to apply to it and seek to have the tiered system applied on a case-by-case basis to address and alleviate any “double dipping”.
18. Unless the relief sought is granted, there will be manifest unfairness to the Applicant which will result in:
 - a. a very large cohort of transferring employees receiving significant windfall gains, without any bargained-for cost offsets and/or commensurate increases in productivity and efficiency;
 - b. significant unfunded liabilities for the Applicant’s business in respect of the base rates of pay for transferring employees;
 - c. additional unfunded liabilities in respect of the penalty rates, overtime and other benefits calculated on those employees’ base rates of pay;
 - d. the compounding effect of the “double dipping” of wage increases across successive years, namely 2019, 2020, 2021 and beyond;
 - e. minimum award rates applying to the Applicant that are in excess of the minimum award rates applying to any other bus operator in New South Wales (if not Australia) and will adversely impact on enterprise bargaining;
 - f. a significant deterioration in the financial viability of the Applicant’s business.

Grounds for relief sought in relation to the Senior Officer Award as a copied State instrument:

19. The Senior Officer Award was a consent award made by the State Commission in December 2017. The Union was a party to the Senior Officer Award, together with the Australian Services Union (NSW Branch) and Professionals Australia.
20. The Senior Officer Award provided in cl 10 for annual wage increases for the employees whom it covered, relevantly wage increases of 2.5% from the first full pay periods commencing on or after 1 January 2019 and 1 January 2020 respectively.
21. The Senior Officer Award further provided in cl 10 that “[t]he wage increases contained in this Award are in substitution of any State Wages decisions.”
22. On 1 July 2018, the transfer of business referred to in paragraph 4 above took effect which involved senior officers being transferred from employment with the STA to the Applicant (**transferring senior officers**).
23. By operation of Pt 6-3A of the Act, the transfer of business gave rise to the creation of the Senior Officer Award as a copied State instrument covering the Applicant and each of the transferring senior officers.
24. Consistent with its obligations under cl 10 of the Senior Officer Award, the Applicant paid annual wage increases of 2.5% to the transferring senior officers in January 2019 and January 2020 respectively.
25. It would seem to follow from the Court’s liability judgment that the Applicant is liable to pay to the transferring senior officers the minimum wage increases determined by the Commission in its 2018-19 and 2019-20 AWR decisions, **in addition to** the 2.5% annual wage increases mandated by cl 10 of the Senior Officer Award.
26. The Applicant is therefore a person who is affected by the Commission’s 2018-19 and 2019-20 AWR decisions.

27. The Applicant repeats the grounds of relief set out in paragraphs 13 to 18 above in respect of the Senior Officer Award as a copied State instrument.

Grounds for relief sought in relation to Bus Maintenance Award as a copied State instrument:

28. The Bus Maintenance Award was a consent award made by the State Commission in June 2018. The Union was a party to the Bus Maintenance Award, together with the following unions:

- a. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (NSW Branch);
- b. Electrical Trades Union of NSW;
- c. Construction, Forestry, Mining and Energy Union (NSW Branch);
- d. Australian Workers Union, NSW.

29. The Bus Maintenance Award provided in cl 54 for an annual wage increase for the employees whom it covered, relevantly a wage increase of 2.5% from the first full pay period commencing on or after 1 January 2019.

30. The Bus Maintenance Award further provided in cl 54 that “[t]he wage increases contained in this Award are in substitution of any State Wages decisions.”

31. On 1 July 2018, the transfer of business referred to in paragraph 4 above took effect which involved maintenance employees being transferred from employment with the STA to the Applicant (**transferring maintenance employees**).

32. By operation of Pt 6-3A of the Act, the transfer of business gave rise to the creation of the Bus Maintenance Award as a copied State instrument covering the Applicant and each of the transferring maintenance employees.

33. Consistent with its obligations under cl 54 of the Bus Maintenance Award, the Applicant paid an annual wage increase of 2.5% to the transferring maintenance employees in January 2019.

34. It would seem to follow from the Court’s liability judgment that the Applicant is liable to pay to the transferring maintenance employees the minimum wage increase determined by the Commission in its 2018-19 AWR decision, **in addition to** the 2.5% annual wage increase mandated by cl 54 of the Bus Maintenance Award.
35. The Applicant is therefore a person who is affected by the Commission’s 2018-19 AWR decision.
36. The Applicant repeats the grounds of relief set out in paragraphs 13 to 18 above in respect of the Bus Maintenance Award as a copied State instrument.

3. The employer

3.1 What is the industry of the employer?

Passenger transport (Non-Rail)

4. Industrial instrument(s)

4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.


Copied State Awards:

1. *State Transit Authority Bus Operations Enterprise (State) Award 2018*
2. *State Transit Authority Senior and Salaried Officers’ Enterprise (State) Award 2018*
3. *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018*

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Sharlene Wellard, solicitor for the Applicant
Date	1 April 2022



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

