



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT  
VICE PRESIDENT ASBURY  
VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT HAMPTON  
MR M CULLY  
MS LABINE-ROMAINE  
PROFESSOR BAIRD AO**

**C2023/1**

**s.285 - Annual wage review**

**Annual wage review  
(C2023/1)**

**Sydney**

**2.03 PM, THURSDAY, 13 APRIL 2023**

**Continued from 07/03/2023**

PN1

JUSTICE HATCHER: I'll take the appearances. Mr Izzo and Ms Lawrence, you appear for Busways North West Pty Ltd; is that correct?

PN2

MR L IZZO: Correct, and Business New South Wales and ABI, your Honour.

PN3

JUSTICE HATCHER: All right. Thank you. Ms Bhatt, you appear for Australian Industry Group?

PN4

MS R BHATT: Yes.

PN5

JUSTICE HATCHER: Mr Clarke, you appear for the ACTU?

PN6

MR T CLARKE: Yes, your Honour.

PN7

JUSTICE HATCHER: Then, via Teams, Ms Tinsley and Mr Farrow, you appear for the Australian Chamber of Commerce and Industry? You said something there, Ms Tinsley, but your microphone is on mute.

PN8

MS J TINSLEY: My apologies, your Honour. I was just confirming, yes, I will be appearing here today, but Mr Farrow will only be observing.

PN9

JUSTICE HATCHER: All right. Thank you. I can indicate that the panel has read the submissions. You will go first, Mr Izzo?

PN10

MR IZZO: I'm happy to, your Honour. I did have a conversation with Mr Clarke that he might proceed first. Yes, Mr Clarke had expressed a preference to proceed and then the employers, your Honour.

PN11

JUSTICE HATCHER: Yes.

PN12

MR IZZO: Unless the Commission has a preference in order, which we will happily - - -

PN13

JUSTICE HATCHER: All right, Mr Clarke, you go ahead since you volunteered.

PN14

MR CLARKE: All right. Thank you. Yes, so I'm pleased to appear before you and I hear that the material has been read. Consistent with what I had said at the

mentions of this matter, I wanted to confine my commentary as much as possible to be commentary on the reply submissions that have been filed in this matter and of course to address any matters that you might raise.

PN15

JUSTICE HATCHER: Just before we go on, is it convenient that we mark the statement of evidence?

PN16

MR CLARKE: Is that the statement of Mr Gibson, your Honour?

PN17

JUSTICE HATCHER: Yes.

PN18

MR CLARKE: I just note for the sake of completeness that there is, as you would be aware, a redacted and unredacted version, so the Commission members will have the unredacted version but what has been posted publicly is redacted.

PN19

JUSTICE HATCHER: Yes, all right. The witness statement of William O'Neill, dated 30 March 2022, will be marked exhibit 1 in the review.

**EXHIBIT #1 WITNESS STATEMENT OF WILLIAM O'NEILL  
DATED 30/03/2022**

PN20

JUSTICE HATCHER: Mr Clarke?

PN21

MR CLARKE: Yes, thank you. For context, the limit of what I will say about our own case is this one – it's a simple one. Copied state awards are federal safety net instruments because the Act says they are. In the ordinary course wages in those instruments should, therefore, ordinarily move in tandem with modern awards in the same way that modern awards move in tandem not only with modern awards, but also with modern enterprise awards and state reference public sector modern awards. They are all established under different criteria, but all federal safety net instruments nonetheless. As I read it, no objection is taken in the reply materials to the construction points that underlie that position.

PN22

The proposition we put is that the panel should, consistent with what it established in last year's decision was the legislative intent for Part 6-3 of the Act. The panel should have regard to what the likely wage outcomes for employees relying upon these awards would have been had they remained in state public sector employment and also have regard to what is necessary for a fair safety net. That may well mean an adjustment beyond what we refer to as the base case in our submissions.

PN23

In our view once you disabuse yourself of the notion that there is some requirement to treat copied state awards as outlier instruments that need to be harmonised with awards derived from the award modernisation process, the difference for differential treatment as a default position just simply falls away. There is nothing inherently wrong with a party putting a position about the circumstances of employers or employees covered by a particular award, be that a modern award or an enterprise award or a copied state award. No difficulty with that happening and a party contending for a particular outcome; that's all fine.

PN24

The absence of that, the absence of somebody taking a particular position, does not mean that the panel is or should be disqualified from reviewing those instruments or choosing to vary them. The top-up approach that we contend for merely aligns the copied state awards with the 1 July review cycle in the federal system. That's all I wanted to say in summary about the contextualised position – our position.

PN25

I might start, in terms of the reply submissions, by addressing what is said by ACCI and there are four points really raised in ACCI's reply submissions. The first, paragraphs 3 to 7 of their reply submissions is essentially that materially – they use the word 'materially' – improving the wages in copied state awards goes beyond the task required by the Commission and that Part 6-3A of the Act is directed at merely preserving the terms and conditions of employees. Now, that submission seems I think to merely re-state what was said at paragraphs 11 and 18 of their initial submissions and we have answered that at paragraph 30 of our reply.

PN26

Part 6-3A contains section 768BY, which is the provision that results in the panel being obliged to maintain the wages in these instruments. That is the section that says in the transitional Act when you read 'division 2B state award' pretend it says 'copied state award' and pretend it's a copied state award in these – that is section 768BY. It is, therefore, not correct that Part 6-3A is solely concerned with creating a static safety net in those circumstances. Now, I have not been able to decipher how materially improving wages is to be contrasted with immaterially increasing wages, but perhaps we will hear more about that this afternoon.

PN27

The second point raised by ACCI relates to encouraging bargaining; encouraging collective bargaining. Now, there is clearly a difference between us and ACCI on some of the incentives at play and what assumptions one can make about the effects of adjusting wages in copied state awards. Not too much further we can take that, except to say this: ACCI, at paragraph 11, agree with us that the limited period of operation of copied state awards encourages employees covered by them to bargain. They also say that the limited period of operation of copied state awards encourages employers covered by those awards to bargain.

PN28

Now, if we can agree that there is already an incentive at play that encourages both parties to bargain, being an incentive that arises because of a feature that

copied state awards have that are not shared with other safety net instruments, then we would submit that the requirement under section 134 of the Act to take into account the need to encourage collective bargaining, well, that might be reasonably treated with a more neutral consideration than it might be in other contexts.

PN29

The third point raised by ACCI, commencing at paragraph 13, is that the requirement to review wages in copied state awards can't be satisfied by applying the same level of increase to copied state awards as is provided to modern awards. That, with respect, is confusing the function of conducting a review with the outcome of that review. You will note that the meaning of the word 'review', in seeking to explain that ACCI referred to the penalty rates judicial review 2017 decision, the ordinary and actual meaning of 'review'. That is a decision that also – only a couple of paragraphs up from that, at paragraph 36, explains the difference between – and focusing on a process of a review - making a criticism of the process of a review and focusing it on the outcome.

PN30

In our view what the panel does with respect to modern award in an annual wage review meets the description of 'review' in the statute and I don't take it that ACCI or anyone else suggests otherwise. What already happens with modern awards is a review and an annual wage review, and that's what we're seeking here. Annual wage review decisions typically don't involve a granular examination of wages and classifications in modern awards, so why should any more be required here? In fact the review necessarily deals in aggregates.

PN31

If you will excuse my tardiness, about an hour ago I put the parties on notice I was going to refer to a couple of decisions. The first was the 2012 annual wage review decision. I'm talking here about the necessity to deal in aggregates. It's short and let me just be a talking head for a moment. Paragraph 133:

PN32

*It is necessary to review the aggregate and sectoral economic performance in the recent past and into the future in the context of the structural change currently occurring. In this context we recognise that some sectors in the Australian economy face more difficult trading conditions than aggregate data suggest.*

PN33

*In giving effect to the various statutory considerations which we must take into account, we have had regard to the aggregate economic data and to available sectoral information, with specific consideration of the circumstances of the award-reliant industries.*

PN34

*We have also taken into account the different circumstances between industries, and sectors within industries, and the differential impact upon them of structural change. But it is important to appreciate that the fixation of minimum wages cannot be based principally on the position of those sectors*

*facing the most difficult economic circumstances, given the range of statutory considerations which we are required to take into account.*

PN35

*In fixing fair and relevant minimum wages in the context of consistent minimum wage rates we must have regard to the economy as a whole. Like monetary policy, minimum wage fixation has a national focus.*

PN36

Then again at paragraph 260:

PN37

*It is also important to appreciate that in an annual wage review, the Act directs the Panel's attention to a range of macroeconomic and general factors including: the performance and competitiveness of the national economy; inflation; employment growth; relative living standards; the promotion of social inclusion; and the needs of the low paid. The nature of these factors directs the Panel's attention to matters which are relevant to the variation of all modern awards.*

PN38

Now, the final point raised by ACCI – paragraph 18 onwards – relates to a disagreement they evidently had with Busways and ABI about the appropriate treatment of its state award. That might be expanded upon today, but for our purposes for completeness neither of the positions that are put there in paragraphs 18 to 22 are acceptable to us for the reasons that we have already detailed in paragraphs 5 to 16 of our submissions in reply.

PN39

I might come to Busways' submissions; five matters raised there. Firstly, paragraphs 5 to 10, objection is taken to the top-up approach we contend for. It said that it would result in wage levels in copied state awards that exceed those in modern awards. To that we would say that the discrepancy between wage levels in modern awards and other safety net instruments is baked into the system already. The instruments are established according to different criteria, but those criteria are taken to be Commonwealth laws and the instruments are taken to be safety net instruments in relation to which there is an obligation to maintain.

PN40

There is an illustration of that at paragraph 14 of our initial submissions where we go to the decisions relating to the making of state reference enterprise awards, where the Commission identified that what they were really dealing with were paid rate awards and that the desirability of maintaining internal relativities within those awards outweighed fixing consistent external relativities across the federal safety net. We refer to the decision at paragraph 14:

PN41

*For the most part the awards requiring adjustment have previously been paid rates awards and have a history of adjustment on an enterprise or similar basis. In the public sector, for example, the establishment and maintenance of internal relativities has been regarded as more important than adjusting for*

*variation in market rates for particular skill groups or particular locations. We emphasize that this approach is directed to enterprise based awards including those in the public service.*

PN42

Above that, an acknowledgment that what they're doing is going to lead to differences in minimum rates at particular skill levels across the award system but they, nevertheless, think that's appropriate.

PN43

JUSTICE HATCHER: Mr Clarke, in respect of New South Wales we don't know what is going to happen with state award wages this year, do we?

PN44

MR CLARKE: Not yet, no. Well, I think we are all aware that there was some general commitment to lift the public sector wage cap. To put that in context, in the '22 to '23 financial year the existing policy encompassed within the regulations isn't strictly a cap. It says it should be 3 per cent, but you can agree to more. The state commission can't do more, but the employing authority can agree to more.

PN45

The commitment from the incoming government is to lift the cap. How, when they give effect to that, I don't know. I do understand that the first legislative sittings will be in May. I don't know if it's on the program. I have made some inquiries, but I - - -

PN46

JUSTICE HATCHER: It's quite possible that we won't know (audio malfunction) prior to issuing a decision in this matter. That seems to me to be likely, doesn't it?

PN47

MR CLARKE: Yes. I would have to say that is a possibility, yes, yes. I don't have any further information on it. Yes, sorry, the point that I was making - - -

PN48

JUSTICE HATCHER: So it follows from that that we won't be in a position to sort of determine an outcome which would mimic what would have happened if the relevant workers had stayed in the New South Wales system.

PN49

MR CLARKE: If you chose to restrict yourself to that, yes, then you're having a bit of a guess, but our position just for clarification is not that you ought to restrict yourself to that, you should have regard to the base case but, nonetheless, thereafter do what you think is necessary to maintain fair minimum wages.

PN50

JUSTICE HATCHER: So apart from Busways, who are we actually talking about here? I'm just trying to ground this in some reality.

PN51

MR CLARKE: Yes, sure. Well, you know, I was going to make a point about that, that there is really no kind of concrete example of hardship coming from anywhere except for the one bus provider left standing that hasn't made an enterprise agreement yet, but says in their evidence that they are committed to doing it. The rest of them that we know that are operating or have operated in recent times, you know, are actually in sectors where you do often get employers represented in this Commission.

PN52

Disability home care in New South Wales; I think some transition in New South Wales of some either local government or state government-related aged care services, being copied state awards operating there. In Tasmania with the association of privatisation of TasTAFE there has been copied state awards created there, but I don't know whether the copied state awards for TasTAFE are instruments that are actually determining the wages and conditions because the practice as I understand it in Tasmania is to make some form of agreement which the awards can then be varied to reflect.

PN53

There may have been some in Queensland, as well. I don't think there are any in the recent past in Queensland. Another one in New South Wales I think is associated with the transition of the regulation of heavy vehicle inspection to the national heavy vehicle regulator and there is some sort of planning authority in Western Australia. There is some process to create, I think, a corporation that would be a national system employer in WA. I don't know that the copied state award exists yet, but there will be one operating.

PN54

JUSTICE HATCHER: In the analysis at the end of your first submission it appears to be the case that apart from New South Wales the other state jurisdictions are, broadly speaking, mimicking annual wage review outcomes. Is that - - -

PN55

MR CLARKE: Yes, and increasingly so, as the years have gone on. Once you get to 2019 it's almost sort of identical.

PN56

JUSTICE HATCHER: Yes.

PN57

MR CLARKE: For completeness, I don't see, in the reply submissions, that anyone's said that I've got that wrong, but that's our position.

PN58

Sorry, your Honour, the purpose of what I took you to before, that exchange, was in Busaways submissions - I keep calling them Busaways, Busways, not Busaways - was in relation to the criticism of the top up approach and resulting in wages that are higher. I was just illustrating, by reference, not only to copied state awards but other types of federal safety net instruments that, yes, of course they're different, that's the way the system is designed.



PN59

Now, it's not made explicit in Busways' submissions but, at paragraph 9 in those submissions, the implication appears to be that if a rate in a copied state award is not a 'minimum wage' then it cannot be varied at all in a review.

PN60

Now, that would require some explanation about what they mean by 'minimum wage', but maybe we'll get to that, maybe we won't. I don't know how a minimum wage is to be contrasted to a maximum wage but, certainly, if you look at the appendices to our initial submissions, the distinction with New South Wales is not really between minimum rates versus paid rates, it's between awards that are varied by consent and awards that are varied, as a result of rolling out the national wage case increases, the safety net - I withdraw that. The distinction is not between paid rates and minimum rates awards in the New South Wales jurisdiction, the distinction is between awards which are varied through the application of state wage case adjustments versus those that are varied by consent. Section 406 of the Industrial Relations Act NSW describes awards of the Commission as setting minimum rates - sorry, as the minimum standards, the minimum conditions.

PN61

Now, Busways go on to raise a second issue about topping up, commencing on paragraph 11 of their submission. It's, effectively, a complaint that topping up necessarily involves double dipping because increases compound on one another. To that we would say they do, yes. Successive percentages do compound on one another, but what that translates to is not a huge difference.

PN62

Five per cent increase to \$900 a week is \$945 a week, whereas two successive 2.5 increases is \$945.56 a week. Now, if that extra 56 cents a week is too much to handle then, of course, there's the option of expressing increases differently.

PN63

On the first pay period, commencing on or after 1 July 2023, the rate must be 5 per cent more than the rate that was paid on or after the first pay period, commencing on or after 1 July 2022. That's an absorption that has no compound.

PN64

The third issue that's raised, commencing on paragraph 14 of Busways' submission, is concerned with incentives to bargain. Now, I needed repeat what I've already said, in reply to ACCI, on that issue. What I will say is this; in paragraph 20 of the reply submissions of Busways, the point is made that owing to the nature of the work that's covered by copied state awards and the contractual arrangements with state governments, there are limits on the extent to which wage increases can be offset by businesses.

PN65

Now, I've already had something to say about the extent of evidence on that point, from Busways, in our brief reply to the redacted material. You'll note, of course, that Busways' position has shifted between its initial position that there should be an exemption for New South Wales derived awards, or a cap based on modern

awards rates, to now accepting, at least in the alternative, the 2 and a half per cent increase. So clearly there's room for something and whether or not it's enough to match the rates that Transdev pays for bus drivers operating under what appear to be the same types of contracts for Sydney metropolitan bus routes, remains to be seen. That's around 6 and a half per cent more than the rates quoted in the Operations Award that was circulated last night, plus an allowance for more if wage price index exceeds 3 per cent, which it currently is.

PN66

What we do know, as we point out in paragraph 22 of our reply submissions is that Busways is bargaining and expects to conclude with an agreement.

PN67

The fourth issue raised is similar to what's been put by ACCI, is that there is no merit in adjusting copied state awards because part 6(3) of the Act is only concerned with preserving existing entitlements. Specifically, in paragraph 29, Busways say:

PN68

*Had the parliament intended for copied state awards to receive the same treatment as modern awards and be subject to variations and the yearly annual wage review decision automatically, simply put, it would have provided for this and would not have given the Commission the discretion to decide on the application of the annual wage review to copied state awards.*

PN69

Now, you have to unpack that a little. I don't know if you've got your copy of the Act, it seems like you need a new one every week, at the moment. So what the parliament did, in item 14 of the table, at subsection (2) of 768BY of the Act - - -

PN70

JUSTICE HATCHER: Slow down, section what?

PN71

MR CLARKE: 768BY.

PN72

JUSTICE HATCHER: Yes?

PN73

MR CLARKE: Subsection (2) there's a table, I'm looking at item 14.

PN74

JUSTICE HATCHER: Yes.

PN75

MR CLARKE: So we're looking at item 14 of the table at subsection (2) and item 2 of the table at subsection (1). So what the parliament actually did there is to require copied state awards to be reviewed in an annual wage review and permit them to be varied, because it's part 5 - item 20 in part 5 of schedule 9 of the

transitional Act that contains the - you're nodding, you understand, okay - the provision that requires these awards to be reviewed in an annual wage review.

PN76

So the legislative intention is to subject them to the annual wage review. You can't read into that an intention to subject these awards to differential treatment in that review. But what you might notice is that the statutory device, that secured statutory device, which the parliament chose to subject copied state awards to, in an annual wage review, is a modification of some existing provisions that required division 2B state awards to be reviewed and permitted them to be varied.

PN77

So that's the provisions that were chosen. Item 20 of part 5 of schedule 9 of the traditional Act, on the face of it, applies to division 2B state awards. This says, 'Pretend division 2B state awards says copied state awards as at the employees transfer'.

PN78

So let's have a look at what the Commission did, when it applied those provisions to division 2B state awards, which the parliament presumably knew it had done that when it made the active choice of reapplying those same provisions to copied state awards.

PN79

Now, that issue was first confronted in the first annual wage review decision, that's [2010] FWAFB 4000, in paragraphs 347 to 388 of that decision. It was explained there that division 2B state awards are notional instruments from awards of state industrial tribunals, insofar as they applied to employers who only entered the federal system by virtue of a state parliament referral, under division 2B of part 1(3) of the Act.

PN80

Now, those instruments themselves had a very limited lifespan, from 1 January 2010, when the referral commenced, to 31 December 2010, save for those division 2B state awards that were enterprise awards and some others relating specifically to particular training arrangements, in Queensland, predominantly, I think.

PN81

Now, there was - as you can read in this decision, there was some opposition among employers to adjusting these rates in division 2B state awards, including that increases might have already been awarded in the last 12 months. The rates in the state based instruments were higher than the federal instruments because the wage fixing principles were different. Familiar?

PN82

What the Commission decided to do, after considering those submissions, was to increase the rates in division 2B state awards that were enterprise awards in the say way as it did modern awards. It chose not to vary other division 2B state awards because the transitional legislation provided an alternative process, with respect to those awards, as was outlined in paragraph 388 of that decision, which reads:

PN83

*We have decided not to vary minimum wages, casual loadings or piece rates in division 2B state awards, as part of this review, other than wages in division 2B enterprise awards. Division 2B state awards, other than enterprise ones, are the subject of a separate exercise by Fair Work Australia to review whether transitional arrangements in modern awards should be varied because of the termination of division 2B state awards on 31 December 2010. That exercise will provide an opportunity to properly consider all of the issues that may be relevant to the termination of a particular award. Any increase afforded now would have the potential to unreasonably complicate the position.*

PN84

Now, back to the copied state awards, briefly. As we point out, at paragraph 16 of our initial submissions, there is no alternative process for adjusting the wages in the copied state awards. So the most direct comparator is really to division 2B state awards that were enterprise awards.

PN85

Now, it wasn't only in 2010 that the Commission provided the same increase to division 2B awards that were enterprise awards as it did to modern awards generally. It did the same in 2011, that's [2011] FWAFB 3400. In paragraph 346 of its decision the Commission said:

PN86

*Minimum wages in division 2B enterprise awards form part of the safety net and were adjusted as part of the 2009/10 decision. On the submissions advanced, we do not see any justification for not increasing those minimum wages on this occasion.*

PN87

In the June 2012 decision, again the Commission chose to adjust division 2B state awards. That's the only wage decision [2012] FWAFB 5000. Yes, the Commission again decided to adjust the division 2B state awards that were enterprise awards, in line with the increase in modern award minimum wages. That part of the decision is set out in paragraph 294.

PN88

So, in our submission, if you're to attribute something to the parliament, as at the time these provisions that became part 6(4)(a) were first proposed, in 2012, you should attribute to them the knowledge and, perhaps, expectation that the Commission may well do as it had done, in applying item 20 of part 5 schedule 9, to notional instruments that are derived from the content of state awards, including those in New South Wales.

PN89

The final point advanced in Busways reply is based on, we would say, a mischaracterisation of our position. It's not, and I think perhaps we've dealt with that in questions from your Honour the President, it's not our position that employees should only ever get the base case, merely that an appropriate approach

is one that involves having regard to the base case and then subjecting that to the obligation to maintain a safety net of fair minimum wages.

PN90

As I say, what is the base case in New South Wales? Well, we know what it is right now, we also know there are commitments to change that and beyond that I can't take it any further.

PN91

Now, turning to the Ai Group, briefly, they seem to, at page 3, they seem to misunderstand our point that adopting a predetermined outcome of not varying rates at all defeats the purpose of having a review.

PN92

The fact that no party fronts up to say something specifically about a particular modern award, Storage Services Award is an example, does not mean that the Commission can't vary it after reviewing it.

PN93

A party putting a particular position about the desired outcome really adds nothing to the obligation to actually conduct a review.

PN94

If the parties are to be required to put a position, what's it actually going to add, in substance? What's the utility of it? We'll say, 'Vary copied state awards by X', employers will say, 'Don't'. We're not saying the Commission should ignore what the parties have to say, but the Commission really shouldn't take up the offer to sit on its hands, waiting on the parties to say something.

PN95

The point that the Ai Group make about preserving versus maintaining rates in copied state awards, I think, has been sufficiently addressed by my comments already. Ai Group also use their reply submission to re-state this position that it's in some way burdensome or unfair to subject employers covered by copied state awards to wage increases. Now, that is a point that we address at paragraph 25 to 27 and 31 of our submissions in reply.

PN96

Frankly, if an employer is sophisticated enough to navigate a public tender and contract for the delivery of state public services, on behalf of the Crown, in *Rudd v State of New South Wales*, or to try and make a Greenfields agreement with a union whose members aren't covered by the relevant copied state award, it ought to be sophisticated enough to calculate a wage increase.

PN97

I'll leave you with this; a lot of what's put in opposition to our position here is not really based in any concrete example of hardship and is not really based in any detailed examination of the operation of state and federal wage fixation instruments and the transitions between one and the other. It seems to really be motivated or taken as another opportunity to say no.

PN98

Our position, really, is just not to accept that invitation to have some inbuilt discrimination against - discrimination between instruments that are already part of the federal safety net.

PN99

I can either sit down, or you can - - -

PN100

JUSTICE HATCHER: Just dealing with Busways, specifically, and the enterprise bargaining, which is said to about to commence or perhaps has started, one option might be to apply the generally determined increase but to defer its application to Busways to a certain date, to allow it a reasonable opportunity to bargain?

PN101

MR CLARKE: I think that's an option that is available and I didn't think I'd have to use this expression today, but I suspect it would be subject to the requirement to show that those were exceptional circumstances. I've had a bit to say about that already, I think, in the other submissions in these proceedings.

PN102

JUSTICE HATCHER: Yes, all right, thank you.

PN103

Mr Izzo?

PN104

MR IZZO: Thank you, your Honour.

PN105

Just a couple of housekeeping matters. In terms of the written statement that you marked earlier, your Honour, I think the statement of Mr O'Neill, that was at the back of our submissions from the previous year. The statement is actually - - -

PN106

JUSTICE HATCHER: What have I done?

PN107

MR IZZO: - - - the statement of Mr Robert Gibson, dated 17 February 2023. It would have been the next page after the O'Neill statement.

PN108

JUSTICE HATCHER: Yes, I see. All right, so I'll replace that exhibit. So the witness statement of Robert Gibson, dated 17 February 2023 will be marked exhibit 1.

**EXHIBIT #1 STATEMENT OF ROBERT GIBSON DATED  
17/02/2023**

PN109

MR IZZO: Thank you. The other housekeeping matter is I sent into Chambers, three version of the copied state awards. Now, interesting with the

terminology. The versions of the documents I sent are the last time those awards were varied in the New South Wales system. So that is the New South Wales award that has now been replicated as a copied state award. It's not actually available online, from what I can tell. There was a late variation done in late 2021. My understanding is it's not controversial, that they are the instruments. I've spoken to Mr Clarke last night and said he can make inquiries and if he wishes to raise any issue, in due course, he's welcome to. But my understanding is it's very uncontroversial that they are the instruments, it's just that that's not what you will find if you go to the Commission's website, you will find an older version of those awards, which is why I've provided them. So that's just so the Commission has the benefit of those documents.

PN110

Your Honour, I appear for Busways Business NSW and ABI, simply because they all have a common interest in these proceedings, and I do rely on our written submissions and won't repeat them.

PN111

There are four matters which I specifically wish to address today, in addition to then just replying to a few things Mr Clarke has said.

PN112

The first is, I want to draw some addition to the significant regulatory differences between the New South Wales regime and the federal modern award system, to demonstrate that these awards actually are outliers, contrary to Mr Clarke's suggestion that they're not. They actually are outliers, and I'd like to demonstrate why.

PN113

The second thing I'd like to show - - -

PN114

JUSTICE HATCHER: So when you say 'these awards' you mean the three?

PN115

MR IZZO: Well, the copied state awards that derive from the New South Wales system, of which we have three examples today. My submission, for reasons that will become apparent, is that all the New South Wales awards will often be outliers, once you understand the regulatory regime, but we have, in granular detail, evidence of three particular ones that affect my client, Busways. The submission, actually, is broader, your Honour, to answer your question.

PN116

I'd then actually like to demonstrate how this resonates in wages and to just briefly take you to the wage tables that show what the effect of this different regulatory regime is.

PN117

I'd then like to deal with this, if I can excuse this term, respectfully, that the fallacy that's been adopted in the so-called top up approach that's proposed by the ACTU.

PN118

Finally, I'd like to talk about why the proper exercise of the Commission's discretion, under the transitional Act, necessitates that you actually look at the copied state award you're varying before varying it and, accordingly, when it comes to the case of Busways, that you will exclude Busways from this year's annual wage review. So they're the four matters I wanted to address.

PN119

JUSTICE HATCHER: Regardless of the outcome we determine in the annual wage review?

PN120

MR IZZO: Probably yes.

PN121

JUSTICE HATCHER: I mean, just for argument's sake, let's assume we determine the across the board increase should be 1 per cent, like I suspect you would be grabbing that, rather than running off to bargain, wouldn't you?

PN122

MR IZZO: The cost impact associated with, let's say, a notional 1 per cent increase would be significantly less. It's, in fact, less than what Busways' - the discretionary level given its employees this year, which is 1.9 per cent. The reason for adjusting, though, that copied state award, there still wouldn't be a reason.

PN123

So what Busways have, in fact, done this year is they've given the employees 1.9 per cent, the award doesn't require it. They've done it because that's what they think is fair and reasonable. That still doesn't mean the award should get 1.9 per cent. Not now it's in the federal system and not now that we're exercising minimum wage powers, as opposed to paid rates powers. I think I can develop that as part of my first point but, yes, your Honour.

PN124

JUSTICE HATCHER: Isn't the problem that, by definition, once they're rates in a copied state award they are federal minimum rates?

PN125

MR IZZO: They're part of the overall Fair Work Act safety net but they are different. The rates are different, they are much higher.

PN126

JUSTICE HATCHER: They are higher, but for the purpose of the Act, they are the federal system minimum rates applicable to the relevant employees, by definition, that's what they are. They're not what they used to be, it's what they are now.

PN127

MR IZZO: They are, but when you exercise your discretion in the factors you take into account, you end up with a different outcome. For a couple of reason



that I'll point to, but one for instance that I'll come to, these people are, by and large, not the low paid. You'll have people who are low paid on modern awards, when we come to the Fair Work's definition of what low paid means, it by and large excludes all of these employees, save for a small section.

PN128

So there are different discretionary factors and that's - this Commission does not always determine to vary all awards all in the same way. Sometimes there are discretionary reasons against the factors you must consider that lead you to a different outcome. What we're saying is, in this case those discretionary factors do lead you to a different outcome.

PN129

JUSTICE HATCHER: I don't think we've ever excluded a classification from an increase simply because it wasn't (indistinct).

PN130

MR IZZO: No, but you have deferred increases.

PN131

JUSTICE HATCHER: Yes.

PN132

MR IZZO: The other slight difference is, the modern awards objective actually does not apply to these awards. It's a small and technical distinction and we don't make much of it but, in fact, it's only the minimum wage objective, not the modern awards objective, which is a matter we raised last year and was accepted by the Full Bench last year.

PN133

If I can start with the difference in the regulatory regimes to make this point. Can I just start by saying one thing about the ACTU's written submissions in reply, they went to great length to demonstrate that New South Wales perhaps isn't so different from other jurisdictions and I think that was in response to something that we said.

PN134

To the extent that I created that (indistinct), I apologise. Our primary point is this; the New South Wales system is very different to that federally, and it is for that reason we urge a different approach. It is for that reason we say you shouldn't automatically apply the federal regimes wage increase to an award that has come out of the New South Wales system.

PN135

Now, your Honours, I provided a copy of an extract last night, of the Industrial Relations Act. I apologise in advance to Hampton DP, because a couple of sections I just wish to take you to briefly I took him to last year and, your Honour, Hatcher J, I'm sure you're quite well-versed in these provisions, albeit it's some time since you've practiced as an advocate in that jurisdiction.

PN136

I just want to show you the structure of this regime, because it does demonstrate why we're in a very different world with these awards. The excerpt I gave you, the Industrial Relations Act, the second page deals with awards and it has section 10. Section 10 says:

PN137

*The Commission may make an award setting fair and reasonable conditions of employment.*

PN138

We've already made the point, in our written submissions, that 'fair and reasonable conditions' is a different test to that in the minimum wages objective, which talks about 'fair minimum wages' and 'a minimum safety net'.

PN139

Section 11 then explains when an award can be made and it talks about being made on the Commission's own initiative, 'In the course of an arbitration, under chapter 3, to resolve an industrial dispute'.

PN140

We then skip ahead and if you go to chapter 3, which is on about 12 of the document I've put in, we have chapter 3, which deals with industrial disputes.

PN141

Chapter 3 starts with section 130 and it says that:

PN142

*Any of the following may notify an industrial dispute: a union, an employer, a person who is likely subject of secondary boycott. The Commission can also deal with an industrial dispute of its own initiative.*

PN143

Then it provides for a process of dispute resolution; it talks about conciliation. Then, finally, you get to section 135 and it talks about:

PN144

*If the matter can't be resolved at conciliation there is an arbitration.*

PN145

Then 136 says that:

PN146

*In arbitrating the industrial dispute the Commission may make a recommendation or give a direction.*

PN147

And, importantly, 136(1)(b):

PN148

*Make or vary an award.*

PN149

Now, the reason I've just quickly you through all of that is that this regime is one that is focused on making awards in the resolution of industrial disputes. What that means is you necessarily get a focus on the enterprise, as opposed to a common award. Employee being a dispute about their workplace. That dispute is not going to be about a minimum safety net, the dispute is going to be about their actual terms, about what it is they want and what it is the employer is or is not giving. That dispute will be resolved by the State Commission.

PN150

The consequence of all of that is you're going to end up with an award that is tailored and we say, in that context, there is a much greater propensity, if not inevitability, that these awards will set actual rates of pay, not minimum safety net rates of pay.

PN151

JUSTICE HATCHER: I don't think that analysis is correct. When the New South Wales Commission had a large private sector jurisdiction and it had a large range of private sector common law awards, which were minimum rates awards. I think the fact that these awards were pay rates awards derives out of the fact that they were public sector awards, not necessarily because of the legislative scheme. That is, by definition, traditionally the New South Wales government has regulated its employees, through its various arms, through awards rather than agreements, and entered into consent pay rates awards, for that purpose.

PN152

MR IZZO: All right. I agree with those comments, your Honour, but I think this entire jurisdiction is what facilitates that. So, that is, by consent, they go to the Commission and more recently it's been done by consent, they agree an outcome. If it wasn't by consent they could still have conditions regulated, through the Commission's award system. That regime facilitates it, I do accept - - -

PN153

JUSTICE HATCHER: In any event, I don't think it's in dispute that when these were state awards they were paid rates awards.

PN154

MR IZZO: Yes. And the final point I just want to make about that is then you look back to section 10 again. So they're paid rates awards, the Commission's exercising a function to determine what the rate should be and when it does that, it's got to be a fair and reasonable safety net. So it's not determining what the minimum is, it's determining what's fair for these people in this context.

PN155

We say that's very different to the federal regime. The federal regime, we've made the point, deals with minimum safety nets, but it also does not have, anymore, a general enterprise award making powers. There's some relic awards that were created through the transitional enterprise award modernisation process, they are a discrete exception. There is no longer a function in the Act for making enterprise awards, and that's confirmed in section 168C of the Act. So that's the differences in the regimes.

PN156

Now, the consequence of that is the second point I want to make, is that you then see the outcome in the wages. So at page 11 of our submissions we set out some tables that have the wage rate differences. Now, these aren't all the classifications, we've taken some at a lower level and some at a higher level. What we see is that the copied state awards are generally, for the bus operators, at the lowest, about 13 per cent higher. They get higher, in some of the classifications we looked at, to 17 per cent higher. The clerks is the lowest we found, in terms of distinction. There's, basically, an 11 per cent difference at level 1. Once you get much higher there's a 45 per cent difference between the awards. For the engineers, it's about 18 per cent difference at some levels, 37 per cent once you get higher.

PN157

These are material differences in the safety nets. So what we say is, when you have safety nets that are so different, because of the regimes they've come out of, you can't just automatically apply with federal minimum wage increase to a regime that is really dealt with paid rates that are much higher. That goes to the discretionary factors. When it comes to Busways I'll explain why, in Busways' case particularly, they should be exempted. But we can't just assume there should be an automated same outcome for instruments that just have such disparities in wages. Mr Clarke said they're all federal safety net instruments. Yes, they are, but they're governing different things.

PN158

That then brings me to the point about the low pay. So one thing is notorious and uncontroversial, that is that the Commission considers two-thirds of the median adult full-time earnings to be low paid. Through reading some of the materials associated with the annual wage review, I've begun to understand that there isn't full uniform views in terms of what that number is. My understanding is around \$24.67, that number could be out by 50 cents here or there, but that's roughly \$24.67 an hour is roughly that low paid rate.

PN159

There's about 30 classifications across all these awards, all of them are above that number, save for two: bus cleaner level 1 and sign on clerk both just sit on the cusp of that number. So when you consider the discretionary factors, it is relevant that a large majority, an overwhelming majority of these employees are not low paid and so different considerations apply.

PN160

JUSTICE HATCHER: What are those different considerations?

PN161

MR IZZO: I imagine the impact of cost pressures, cost of living, inflation, those types of things. Broadly speaking, one is more concerned, in the annual wage review, to ensure that the living standards of the low paid are not impacted by that, in a way that's probably of less significance than those that aren't considered low paid.

PN162

The second point - - -

PN163

JUSTICE HATCHER: That's not a case for an exemption, is it? I think we touched on this before, an wage case under this Act, award covered employees, who are not low paid, have received a wage increase. Except for last year, the same wage increase as everybody else.

PN164

MR IZZO: That's correct. I think the point is that there are many more low paid award classifications than there are here, so \$24.67 is going to be higher than the first few entry level grades in most modern awards, so you're dealing with a safety net that has a lot of low paid rates. Here it's much less of a concern.

PN165

I'm not saying that we should start dividing up the classifications but, to the extent  
- - - -

PN166

JUSTICE HATCHER: To the extent that these pay rates are higher, why shouldn't we treat them the same way as we intend to treat classifications with pay rates of an equivalent amount in other modern awards, in the annual wage review?

PN167

MR IZZO: Because they're much higher than even the modern award rates for the same work.

PN168

JUSTICE HATCHER: I'm not talking about the same work, I'm talking about any award classification has the same monetary value, why shouldn't we treat them in the same way? That is, if we decide to award, for this argument's sake, 4 per cent to all award classifications which are higher than \$30 an hour, why shouldn't we treat these awards the same?

PN169

MR IZZO: Because the work - I'm not sure if I understand your question correctly, your Honour, because what I was going to say is, the work these people are doing, that work is valued in the modern award safety net at a much lower rate. The work these people are doing is not - the rate for it, under the copied state award, is not a minimum rate, it's not, 'There's the minimum safety net', it's higher. It's the actual market rate. So the need or the - I suppose the case for raising that is different.

PN170

Now, other people who are on these award rates, the same dollar figure as the Busways drivers, they would be doing work that is classified much higher under the award system. So that means they would have been working for much longer, they would have greater expertise, skills. The work value of someone earning the same in the award system as a Busways employee would be greater, because there are higher grades in that award system. So that's why they deserve a higher rate and a higher increase than someone that is performing work that's not being

valued at the same level by the Commission. I'm not sure if that precisely answers your question.

PN171

JUSTICE HATCHER: I understand.

PN172

MR IZZO: We are dealing with a disparity and the disparity is a bus driver over here, in the federal system, is going to be earning anywhere from 15 to 30 per cent less than a bus driver on a copied state award. If the Commission awards a percentage increase, which it often does, the dollar figure and the disparity just exacerbates, just grows. The dollar figure earnings of the bus driver in the federal system will go up by less than the dollar earnings or take home pay of the bus driver under a copied state award. So, in dollar terms, in fact you're going to magnify the disparity between the copied state award employees and those in the federal system doing the same work. We say that is a odd outcome, it is a perverse outcome and it arises because of the unique features of the New South Wales system.

PN173

The third point it to address this top up approach. My client's have a fundamental conceptual difficulty with this approach and the terminology used. I don't understand how it can be said that employees on copied state awards, earning more than employees doing the same work in the federal system, have to have their wages topped up. That's not a mathematical possibility.

PN174

If one was to approach the ordinary person in the street or, more relevantly, a bus driver governed by the award that the Fair Work Commission sets, if you told the bus driver what dollars they were earning and you told them what dollars people on copied state awards were earning, the modern award drivers would tell you that their wages need to be topped up, not the copied state awards, because they are the ones on the inferior monetary rates.

PN175

VICE PRESIDENT ASBURY: Unless they're bus cleaners.

PN176

MR IZZO: If they're bus cleaners, they're still earning 10.9 per cent - sorry, they're still earning about somewhere around 13 or 14 or 15 per cent less than the copied state award driver, it's just that both are considered low paid. But even in the federal system a bus cleaner is earning 13 per cent less, at minimum, than a bus cleaner under the copied state award.

PN177

I just say that's a fallacy. The only top up here, and I'm not suggesting, in all seriousness, you do this, but if you're going to top someone up, top up the people on the lower wages.

PN178

Now, of course, that's not something I seriously suggest, because you'd need to look at work value in the rest of the modern award system and why this is an outlier. But to use the terminology of 'top up' really deludes the recipient as to what's actually going on here.

PN179

JUSTICE HATCHER: Do we have any information about how the award rates, in the state awards, were originally set?

PN180

MR IZZO: In terms of the wage setting principles and work value and those types of thing? Not before you presently. I do know that the last couple of rounds were done by consent between the parties. I couldn't say how the original award was - whether there were wage fixing principles adopted and what they were.

PN181

JUSTICE HATCHER: I mean if those rates were originally set, on the basis of a work value exercise, conducted under the then applicable wage fixing principles, doesn't your argument fall away?

PN182

MR IZZO: Because of the nature of the work we're talking about, bus driving, which is - this is a submission, but I think it's one that would be proven to be true. If you're a bus driver that was in the state system, now in the federal system, in Sydney for the public sector, versus a bus driver for a private operator, the work is the same. So if the submission is that or if the position is that this was derived from a work value proposition, that means the work value of the bus drivers in the federal system is manifestly inadequate, in short.

PN183

JUSTICE HATCHER: Well, it might be or it might be different factors were taken into account. I mean whether we see that there might be a different outcome for a school bus run in Gulargambone as distinct from somebody doing a busy route in Sydney.

PN184

MR IZZO: Well, the difficulty is, one, I don't have the answer to how it was initially set. Two, when it was set, likely some time ago and we've had increases and all sorts of things that have happened in that period, which doesn't necessarily mean the original setting is correct anymore. But, three, we are still presently faced with a scenario where we have bus drivers now in the federal system earning significantly more than their counterparts, under the modern award. What you are about to undertake is you're going to increase all the modern award rates and you have this outlier. That's why I took you to the rate. You have an outlier that's sitting there above the award rates, so the question is, why would you just bump that up even further? Why would you magnify the disparity, if they're doing the same work? My submission is you should not.

PN185

JUSTICE HATCHER: If there's a 7 per cent inflation rate, so you're, in effect, urging us to inflict a 7 per cent wage cut on these drivers because they've started off at a higher base.

PN186

MR IZZO: Well, to begin with they have received a 1.9 per cent - - -

PN187

JUSTICE HATCHER: But that's voluntary, I'm talking about the award.

PN188

MR IZZO: Yes, the award rate itself would not increase. But because the award rate is a paid rate, there are different considerations that apply. When the Fair Work Commission issues its decision to vary the modern award, as you'd be aware, last year the increase was 5.1 per cent for the lowest awards, that doesn't mean that everyone on those classifications went up at 5.1 per cent. Once you end up at market rates, provided they're above the safety net, the market may have given them less, it may have given them more. But you're just adjusting the minimum safety net to ensure the safety net, how it develops, versus inflation, but that doesn't necessarily mean that market rates or pay rates should be adjusted by the same number. There's other considerations that come into account: capacity to pay, revenue, all sorts of considerations occur when the market determines what to pay above a minimum safety net.

PN189

The considerations that will overwhelmingly govern your exercise, in the coming months, will be what the minimum safety net should be.

PN190

JUSTICE HATCHER: Has there been any progress with the enterprise bargaining?

PN191

MR IZZO: Yes. There's been a large number of meetings. They commenced bargaining last year, they're still in bargaining. The intention is to reach an agreement with the RTBU to go to a vote. That's, broadly, all in the witness statement of Mr Gibson. The ACTU makes some point about, 'This shows that there's no impact on enterprise bargaining'. I'll deal with that now, that's completely not the point.

PN192

If a 5 per cent - sorry, I take that back, we factored in 4 per cent. We factored in four, in our submissions for analysis, but let's say it's four and half, let's say it's five. The number of that nature was imposed on the bargaining process. That would denude Busways all ability to offer anything, as part of its side of the bargaining. They're not going to be able to give anything on top. So when you talk about impact on collective bargaining, it's going to be material. They've just given 1.9. We're talking about additional, on top of that, so when they go to the union for an exchange of positions, there's, effectively, very little they can do in the number one thing an employer bargains with, which is wage increases. It's



just been taken out of their hands. So I think it will have a material impact on collective bargaining, particularly at this stage in the cycle.

PN193

When Mr Gibson says, 'We intend to reach an agreement', that's because, currently, they're operating under a copied state award that has not yet been subject to an annual wage review decision and which we are urging should not be subject. That's the basis on which his evidence was given.

PN194

JUSTICE HATCHER: I mean you've still got six or seven weeks to wrap this up, it sounds like a window of opportunity.

PN195

MR IZZO: We're hoping for a very swift approval. I don't have assurances today that it will be done in six or seven weeks, but I do know that it's relatively developed.

PN196

That's really what we have to say about the top up approach. But come to the exercise of the discretion, I don't need to take you to the provision in the transitional Act, I think it's uncontroversial that you are to review the awards and that you may make a determination varying them. I think it's uncontroversial that's a discretion, there's no compulsion.

PN197

The question becomes, how do you exercise that discretion. You're required to take into account the minimum wages objective and what I - what my clients say is that in exercising that discretion, you can properly take into account the minimum wages objective, it would impossible to do that without actually turning your mind to the wages in the instrument you are varying.

PN198

Now, Mr Clarke has made the submission that, 'The Commission doesn't do that anyway, generally, the Commission just looks at everything, on a holistic level, a higher level, they don't get into the weeds', that's not quite right. I mean whenever the Commission conducts its annual wage review it's aware of what the rates are in the awards, it's aware that there's relativities and sometimes it intervenes and interferes with those relativities because of what the people are paid. An example of that is last year.

PN199

Last year the Commission didn't grant a percentage increase, instead we were ended up, and I say this with the greatest respect, we ended up with a slightly more complicated arrangement. Why? Because you've taken into account that the lower paid need more.

PN200

That's not the only time that the Commission has intervened or departed from the conventional approach of a percentage increase, to do something slightly different. There are odd occasions where a dollar increase was awarded and, as I

said, we have the example of last year. All of that is done because the members of the Bench have turned their minds to particular employees on particular employees, on particularly lower rates that need to be particularly accommodated. That's an example of how you consider the award before you when you exercise your expression. You can only do that if you know what the rates are, is my respectful submission.

PN201

At this point I'd like to turn to the case of Busways. I've mentioned, a couple of times, the fact that the employees are receiving amounts substantially greater than the safety net, and just following up on Asbury VP's question, just to clarify, all the classifications are well above, it's just that two of them are low paid, was the point I was making, not that they are below the modern award equivalent.

PN202

The evidence is that if additional cost impost is opposed, above what Busways has already awarded, there will be a significant and material cost impost, that section of Mr Gibson's statement is redacted but I urge you to look at it, it's an eye-watering amount for a single operator, and that assumes, I think, a 4 per cent increase by the Commission. That's at paragraph 18 of the Gibson statement.

PN203

So that's the impact on Busways if they get a 4 per cent increase in full. Obviously if it's higher, that cost impact increases by whatever the higher percentage is.

PN204

The evidence is, and I take issue with what Mr Clarke said here, the evidence is, they have no ability to recover an increase of this nature, under their contract. Mr Gibson deals with that, at sections 9 to 13 of his statement. Nine is redacted, but it sets out how Busways is entitled to increase its labour costs under the contract.

PN205

Ten, 11, 12 and 13 talk about other measures and he makes it quite clear that outside what he's talked about, Busways does not have any other means to increase these as charges to Transport NSW to seek compensation for wage increases.

PN206

What he sets out is that a contract price is set, there's certain levers, one of them is wages, others might be cost of fuel and other things, and the service provider has certain mechanisms to adjust. The only mechanism they've got to adjust, in relation to labour, is the wage price index, discussed at paragraph 10 and that is certainly not anywhere near what is likely to be imposed, whatever the number is, by the Fair Work Commission, in July.

PN207

JUSTICE HATCHER: But Busways would have walked into that contract with its eyes open. It knew, when it entered into that contract, that it would enter the

federal system if it won the contract and they would be subject to annual wage reviews.

PN208

MR IZZO: I think the experience of last year, the gaggle of bus operators that ran to the Commission, in a state of desperation, demonstrates that the bus operators did not know, when they entered into those contracts. The Federal Court decision, as quoted in our submissions, involving Transit Systems, demonstrate that Transit Systems did not know.

PN209

When these contracts were awarded it appears that that is the case, they didn't know, so they all went to the Commission last year. The others have now made enterprise agreements. Busways is close, but has not.

PN210

JUSTICE HATCHER: So I raised, with Mr Clarke, the possibility of a deferred increase, which would allow a window of opportunity to finalise your enterprise agreement, what do you say about that?

PN211

MR IZZO: Busways does not consider that appropriate and urges against that course of action, probably for a couple of reasons. The first is, it still will have a - I withdraw that.

PN212

The first is, we're still talking about the underlying award. So for all the reasons I've talked about, in terms of comparative wage rates, et cetera, we say there still is not merit in awarding the same increase to workers earning significantly more, so that consideration does not change.

PN213

The second is, it quite, inevitably, will, materially, impact enterprise bargaining certainly in a disadvantageous way for Busways because it's difficult to see how the union would want any increase, other than what the Commission awards, on top of what Busways has already given.

PN214

JUSTICE HATCHER: Well, it depends upon what Busways is offering and what we decide to award.

PN215

MR IZZO: It does, but given - I suppose this is where we get to the history of the regimes. Because of the nature of the rates in New South Wales being higher, you can see, from the awards, that the amounts generally awarded are lower, in the state system. In fact, that's borne out by the ACTU's own analysis. So if you go to the schedule, at the back of the ACTU submissions, you'll see the annual wage review amounts and then the New South Wales system lagging behind, for public sector employees. Operators are working of WPI, wage price index, which is also lower.

PN216

So unless the Commission is going to award something more similar to wage price index, which it seems unlikely, it's going to have material impact on Busways ability to bargain anything other than what the Commission awards. I suppose Busways could agree to that, but then there's nothing - that's almost a default position and there's going to be an expectation, 'Well, that's the minimum, what else do you give?'. It still wedges Busways with little leverage to otherwise get a deal over the line. I suppose the point then becomes, 'Well, why enter into an EA', and the other reason is to avoid industrial action.

PN217

JUSTICE HATCHER: Well, there is that or it might be incentivised to have an earlier wage increase and there's the issue of what happens in the following years.

PN218

MR IZZO: Some of those factors will be relevant, yes.

PN219

But as a matter of merit, what we say is that might be a convenient mechanism to give Busways time, it might be a convenient mechanism for - when I say 'convenient', convenient for the Commission to adopt, I still don't agree it's convenient for Busways, but it doesn't properly grapple with the issues we're raising, and the issues we're raising is about disparity, it's about you, as a Commission, applying a minimum increase for a minimum safety net to a paid rates situation. A deferral doesn't deal with any of those matters.

PN220

The other thing, and it's a point the ACTU raised, is that in this workforce we're not just dealing with employers on a public state award. Now, there's no evidence of this, but I can give you the agreement reference. There is the Busways Driving Mentor Enterprise Agreement 2021, the reference is AE513529. There are other employees, at this worksite, in this business, on different terms, less advantageous rates, that the employees on the copied state award we're talking about. So any increase is going to magnify disparity within this worksite as well.

PN221

The ACTU raised this point that 'We're not talking about the other employees', well I think, to the extent that's raised, it's a matter that reinforces the problematic nature of intervening on a paid rates award and just magnifying it. Because other people on a paid rates instrument, because let's remember that an EA is, effectively, a paid rates instrument, in an industry like this, it's what people get paid. Well, they're not getting an increase, because they're above the minimum safety. Again, we just get these disparities for no particular reason.

PN222

For all of these reasons, we say it's warranted to take a specialised approach to Busways and exempt it from the annual wage review. That's our primary position. It's not an indefinite approach, it's unlikely this application will need to be made again. I suspect, if I was to appear again next year, you'd be saying - I think I may have said this to Hampton DP last year, but it's one we don't expect to be a medium term scenario. It's a short-term scenario and what you're being asked

to do is look at the specifics of this scenario and exempt it on this occasion. We're not asking for precedent for next year or anything like that.

PN223

JUSTICE HATCHER: I mean if we avoided no increase for the people at Busways, it won't be Busways (indistinct), why would we renegotiate an enterprise agreement? We'll pay nothing and pocket the difference, under the contract.

PN224

MR IZZO: Well, two things. One, if that was what Busways did and that's the evidence that comes forward, the RTBU a well resourced union, I'm sure they could put that before the annual wage review next year and get a very different outcome.

PN225

Secondly, what we'll find is that these award rates will eventually catch up to the copied state awards as well. It will only take a couple of years for those lower disparities to be picked up, depending on the value of the increase awarded.

PN226

But Busways' evidence is that's not what it's intending to do. I suppose the actual course of events will bear that out and Busways probably can expect a very frosty reception, in terms of any application next year, if that's what it does, and the RTBU is very well resourced and can bring that.

PN227

JUSTICE HATCHER: Mr Izzo, I assume your client will tell us if it makes some agreement prior to us issuing our decision?

PN228

MR IZZO: Most certainly.

PN229

JUSTICE HATCHER: If they make an agreement then does that basically relieve us of the need to resolve any Busways specific issues?

PN230

MR IZZO: It relieves you of the need to deal with anything Busways would raise.

PN231

VICE PRESIDENT ASBURY: There's no evidence of any other employer, is there, really?

PN232

MR IZZO: In terms of that subject of copied state awards? I'm not aware of any. Mr Clarke had some various references to instruments that may exist or may exist in the future, but it was all a bit hard for me to decipher whether there's actually anything concrete out there. I'm not aware of anything else.

PN233

JUSTICE HATCHER: Well, there's certainly no evidence which would permit us to take a differentiated or specialised approach for any employer, other than Busways.

PN234

MR IZZO: Well, we have up on substantive evidence - - -

PN235

JUSTICE HATCHER: I mean other than Busways?

PN236

MR IZZO: Yes. I was going to say, which warrants a special approach for Busways.

PN237

JUSTICE HATCHER: I'm talking to you with your ABI hat on now.

PN238

MR IZZO: Well, I'll come - the ABI NSW hat, which I will come to, briefly, is that there is - when I started this mission about Busways, as I said, you must have regard to the circumstances of the copied state award before proceeding, because you need to factor in all these things. So the ABI NSW position is, you shouldn't be doing any increases because if you don't have the instrument in front of you, you can't possibly turn your mind to the most important factor, which would be relevant to your discretion, which is, 'What are the people currently being paid?'.  
PN239

PN239

Now, I appreciate just coming to this, you're presented then, effectively, by two polar arguments. On the one side you have the ACTU saying, 'Justified', on the other side you have the employers saying, 'Don't apply anything because you don't know what you're applying it to'. In either case I suspect there is hesitation about which course you choose. The reason there is hesitation is that there's a blind spot. The blind spot is, 'What are they and who do they apply to?'. We say that can only be resolved in not intervening because at any point you can intervene, next year, you can - if you've become aware that a copied state award is not being increased and its rates are materially deficient, you could always do a specialised case for them, if that got brought to your attention by a relevant union.

PN240

VICE PRESIDENT AUBURY: But, effectively, you're shifting the onus from the employers to come and say - that's really what you're proposing, for the employers to come and say, 'We want an exemption', you're shifting it to the union's to come and say, 'This has fallen behind'.

PN241

MR IZZO: I am - - -

PN242

VICE PRESIDENT AUBURY: Otherwise there's no mechanism, really, is there, for that to happen, other than - because, in your proposal, in your submission, you say that the new approach should be that a case is made to adopt an increase, or to

pass on an increase, and what you're saying is, 'We shouldn't have to come and say no increase, they should have to come and say you should increase'.

PN243

MR IZZO: Yes, and the reason I'm saying that, Vice President, is because there's no obligation to increase. This is a review, primarily of the modern awards, and now it's being applied to copied state awards. Then you have a discretion to extend it. You have a discretion to intervene in a different instrument and apply an increase. I say you would only exercise that discretion if you thought there was a basis to do so, if you thought the rates required it. In the absence of any evidence being brought forward, you're venturing out into the darkness and hoping you get it right.

PN244

VICE PRESIDENT AUBURY: But you're benefitting from the darkness. Shouldn't somebody have to expose it and say, 'This is what it is. This is where it applies'.

PN245

MR IZZO: Well, this is the two polarised approaches that you're identifying and I suppose the difficulty of that is, at least history, over the last couple of years, has shown that employers weren't aware of this, which is why the bus companies all ended up in a bit of a spot of bother, so the positions, particularly being made clear by ACCI and AiG is that there's just going to be regulatory burdens imposed on those that don't know and then there's pecuniary penalties - there's significant consequences for getting it wrong.

PN246

But, on the alternate argument, if you were to leave it and someone brings this forward to you, you can always rectify that, because you can give a bigger increase, going forward, to try and address any deficiency from not increasing the copied state award earlier. You could make that up.

PN247

VICE PRESIDENT AUBURY: There's no requirement going back, is there, if people fall behind?

PN248

MR IZZO: I believe that the Commission found it can't retrospectively increase, I think that's a finding from last year's annual wage review, so that's correct.

PN249

VICE PRESIDENT AUBURY: At least if an enterprise agreement falls behind the base rate in the modern award there's the mechanism in the Act, there isn't here, is there?

PN250

MR IZZO: I don't think so. We'll check if a copied state award falls behind a base rate in a modern, but I'm not sure if that exists, we'll check if it does, because I think it's relevant, but I'm not sure that we'll be able to point you to - - -

PN251

VICE PRESIDENT AUBURY: I'm not aware that it does.

PN252

MR IZZO: Yes. The only way you could fix it, Vice President, is to when you award your increase next time, take into account that they didn't have the benefit of last time. A bit like, I think, I'm speculating a little, but I do think that there was a zero per cent increase, in the wake of the GFC, by the Fair Work Commission, and I suspect when they then the next year increased, they took into account the fact that it had been X period since the employees had had a wage increase, so on and so forth.

PN253

It's going to be a discretionary factor you can take into account to try to fix it next time, whether you can fix it entirely, perhaps no. I'm not - - -

PN254

VICE PRESIDENT AUBURY: And it would require some union or employee group to come and seek to have it fixed, wouldn't it?

PN255

MR IZZO: Mr Clarke's well resourced, well educated affiliates - - -

PN256

VICE PRESIDENT AUBURY: He may say the same thing about you.

PN257

MR IZZO: - - - will no doubt identify the members that have been left behind and they'll bring it forward.

PN258

JUSTICE HATCHER: Mr O'Neill, in his statement from last year, said:

PN259

*It is mine and Busways' expectation that a new enterprise agreement will be implemented this year -*

PN260

This is paragraph 33, that is 2022:

PN261

*which provides for wage increases from 1 January 2023, going forward.*

PN262

So that probably influenced last year's decision, but that didn't happen.

PN263

MR IZZO: That's correct, your Honour. I think there's a reference in the decision from last year that says that they're all bargaining, the operators and the decision just said, 'So there may be different circumstances to consider next year', that's where it led, it didn't express a view either way.



PN264

But there hasn't been any deliberate attempt to not enter into an enterprise agreement. Mr Gibson's evidence from this year demonstrates both Busways' bona fide. They gave a wage increase, they're not trying to get out of it, they gave 1.9 per cent at the beginning of the year, which is similar to what was traditionally awarded, under this award. They just haven't go there yet.

PN265

As I say, if they come back next year, in the same boat, I would expect a much frostier reception. I'm asking that the circumstances be considered for one more year.

PN266

JUSTICE HATCHER: Okay.

PN267

VICE PRESIDENT AUBURY: So we're not to be frosty this year but next year.

PN268

MR IZZO: I didn't say this was a frosty reception.

PN269

So I think, in response to President Hatcher's question, I've answered. I was going to come to the copied state awards, I think I've broadly answered what I was going to say, which is that they need to be considered on their own merits, so it's a discretion to be exercised. You need to look at the document. That's why we've urged the Commission not to intervene if there isn't a copied state award in front of them. So that's our position about them generally, I've explained our position about Busways.

PN270

If I can now, just very briefly, deal with the ACTU base case. I understand the base case to be that the copied state award should be varied so as to ensure the employees receive the increase they would have received in the state system.

PN271

We don't agree with this approach for all the reasons I've said but if you were minded to go with that approach, that would result in a 2.5 per cent increase being awarded to Busways, and we deal with this in our submissions in reply, at 35 to 41. The reason for that is in public sector wages cap, the wages cap does not just apply to last year or this year, it applies through to next year as well, so there is an instrument that's been created, the wages policy. It is current. It has not been withdrawn at this stage, and I'll come to your Honour's earlier question to Mr Clarke, so the answer to the base case, put by the ACTU, is that they should receive 2 and a half per cent and the reason I think Mr Clarke said three is because there's an allowance of super, for half a per cent. But that's the base case that we say would be the outcome if you took that alternate approach.

PN272

One point, just in our - there is a small typo, but an important one, in our submissions. At paragraph 38 of our reply submission we say the state Act allows

the Industrial Relations Commission to give effect to the wages policy, it's not 'allows', it 'compels'. So we just want to make that clear. But we've referenced, in our written submissions, all the relevant provisions about the wages policy.

PN273

Your Honour, to your question about where the new state government is at, with the wages policy, Mr Clarke is probably closer to that answer than I am. There was some comments made publicly about an intention to increase it, but the reality is, the Commission takes the law and the facts, as it finds them. If, as at the time you make your decision, the wages policy is the current wages policy, then that's what the employees would have received. I think it would be very difficult and dangerous to speculate what a government may or may not do, if it hasn't done it yet. I don't have authority for this, but I certainly understand the convention of the Commission to be that when it deals with matters and applies the law, it applies the laws as they currently are, as opposed to what they might be in the future.

PN274

JUSTICE HATCHER: Applying it to a current situation. This is a prediction about what might happen in the future. On the ACTU's base case scenario, it involves making a prediction about what will happen at some stage later this year, in respect of wages in the public sector.

PN275

MR IZZO: Yes. But I suppose, if I take the base case in that way, I mean these employees would have received the increase for this year, they would have received it on 1 January. So they received all their increases on 1 January. This year Busways gave a discretionary 1 January. If they were in the state system, the increase would have been on 1 January.

PN276

JUSTICE HATCHER: Then they'd receive another one 1 January next year.

PN277

MR IZZO: Next 1 January. But at least the way, if you have a six month kind of period to straddle, but the way the - the Commission certainly took into account last year that they received an increase for that year, of roughly 2 per cent, when it arrived at its decision, and I would say the same thing. If there was already a state increase you'd look at what that is.

PN278

JUSTICE HATCHER: Perhaps we could look at the Sydney Trains decision for a different type of base case.

PN279

MR IZZO: I didn't look at that in preparing for this, but I will after.

PN280

The only other point I make, before briefly responding to Mr Clarke, is this whole base case reinforces the notion of not varying the other copied state awards as well, because how do you even work out what the base case is if you don't know

what copied state awards you're talking about? That's a difficulty with the base case and reinforces the desire to just not exercise your discretion in relation to the copied state awards at large.

PN281

Very briefly, I think there's only one or two things I now need to respond to, so if you would just bear with me one moment.

PN282

I just want to point out, Mr Clarke took you, with some fervour, to the annual wage review decision in 2011 and 2012, that he handed up and, in particular, paragraph 133. He identified that there was this particular focus by the Commission on having regard to aggregate matters in setting the minimum safety net and that the Commission would have to deal with things on an aggregate basis in setting the minimum safety net and I think the submission from Mr Clarke was, 'Well, this is a holistic safety net so we should look at it all on aggregate and just apply the one increase'.

PN283

Littered throughout paragraph 133 and 134 is this repeated reference to a minimum wages, minimum safety net. The fact that the Commission is setting consistent minimum wage rates. All of this is about minimum. As I've repeatedly pointed out, we're not dealing with minima here, we're dealing with what a business is actually paying its staff.

PN284

The other thing I'd point out is, in relation to that, just because the Commission generally does things on an aggregate basis, it doesn't always. Hence the example in relation to the varied wage increases from last year as well as the fact that there were deferral of some awards, in response to the pandemic. You haven't always done everything on an aggregate level.

PN285

The - just bear with me one moment. Much was made, by Mr Clarke, of the division 2B state awards. They're a very particular beast. They were in place, by and large, for 12 months. As I understand it, the awards existed in the federal system for 12 months before the employees transitioned to the modern award.

PN286

I won't take you to it, but in our submissions from last year, that are attached to our submissions, as an annexure, to our submissions from this year, we deal in a bit more detail about these division 2B state awards and how they operated and we deal with that, in particular, at paragraph 30 of those submissions. Even then, when it was dealing with the division 2B state awards, the Commission started expressing concerns about impacts on - no, I withdraw that. What I was going to say, in our submissions we identify that they had a very limited lifespan and you shouldn't automatically assume, as Mr Clarke does, that just because the Fair Work Act has applied the architecture of division 2B to the copied state awards, the Commission's expected to exercise its discretion in the same way. You're expected to consider the factors that are in the national minimum wages objective.

PN287

The final thing I'd like to say is, the analysis of 2B also overlooks a period of five years, from 2012 to 2017, when the Commission was concerned about the copied state awards, was very concerned about double dipping and it was very concerned about making increases across the network of awards that would exacerbate increases that already existed. That is all extracted at paragraph 30 of our submissions from last year, that are annexed to this year's submissions.

PN288

Unless there are any further questions, they are the submissions for Busways NSW and ABI.

PN289

JUSTICE HATCHER: Thank you. Ms Bhatt?

PN290

MS BHATT: Thank you, your Honour.

PN291

We continue to rely on the written submission that were filed in these proceedings. And for the purposes of today I'll make the following three submissions which, essentially, seek to summarise our position.

PN292

Much of the ground that I had intended to cover has been canvassed by Mr Izzo, so I'll do my best to be as brief and curtail my submissions as I go.

PN293

In our submission, the Commission cannot proceed on the basis that the increase that it determines in the annual wage review can appropriately be applied to (indistinct). This is so because, as we've already heard today, copied state awards are, by their nature and character, different to modern awards.

PN294

The terms of copied state awards were established through different means, by reference to different statutory regimes, applying different considerations. In some cases they are, as referred today, pay rate instruments. They don't reflect minimum rates. They don't describe minimum rates that have been set and adjusted in the same way that (indistinct) has been set and adjusted over a number of years.

PN295

Now, to give a simple example of this, and this has been covered by Mr Izzo, to some extent, as is well known to the expert panel, in determining the increase to minimum wages the Commission will take into account the relative living standards and needs of the low paid as a mandatory statutory consideration.

PN296

Respectfully, the Commission cannot be confident that any employees covered by a particular copied state award are, in fact, low paid. They may not be. In such

circumstances it would plainly be inappropriate for the increase awarded in the annual wage review to automatically flow on to all copied state awards.

PN297

The same can be said of the top up approach that's been urged by the ACTU. It would result in the application of a generic formula, if you will, that would ultimately result in employees receiving the same increase as that which has been determined by the Commission, in the annual wage review, subject to any increases already afforded by the terms of the instrument.

PN298

JUSTICE HATCHER: So, Ms Bhatt, can you identified any copied state award in existence, other than Busways?

PN299

MS BHATT: I can't on my feet today.

PN300

JUSTICE HATCHER: That is, what are we talking about? Are we talking about anybody who actually exists?

PN301

MS BHATT: Your Honour, I am aware of members of Ai Group who are covered by copied state awards. I, without instruction, cannot identify whether they operate in New South Wales or in some other state or territory. In our submissions before the expert panel to date, we have not dealt with specific copied state awards because, as we apprehended it, these proceedings primarily concerned a consideration of how copied state awards will be dealt with, generally, in the annual wage review this year.

PN302

Depending on what decision flows from these proceedings, we recognise that it might be necessary to make submissions or perhaps file evidence of the nature that has been brought by Busways.

PN303

JUSTICE HATCHER: So does that submission assume that we're going to make some interlocutory decision about this, does it? If it does, that's, with respect, not right.

PN304

MS BHATT: Well, as I say, your Honour, as we apprehended it, these proceedings concerned how these instruments would be dealt with this year.

PN305

JUSTICE HATCHER: Yes.

PN306

MS BHATT: I take it from your Honour's comments that that's perhaps a misapprehension.

PN307

JUSTICE HATCHER: Well, you shouldn't assume that you'll get another opportunity. That is, we may simply deal with this in our final decision. In fact, it's likely that we will deal with this in our final decision.

PN308

MS BHATT: Well, again, covering some of the ground that has already been covered, we would say that that would, respectfully, result in an inappropriate exercise of the Commission's discretion. The Commission does not have these instruments before it.

PN309

DEPUTY PRESIDENT HAMPTON: Ms Bhatt, is there even the slightest indication there's a problem outside of the examples that have been raised to us?

PN310

MS BHATT: Yes.

PN311

JUSTICE HATCHER: Ms Bhatt, I think it's incumbent - if you've got information about the existence of other copied state awards it's incumbent for you to tell us about it.

PN312

MS BHATT: I'm not seeking to be obstructive, your Honour, I don't have that information to hand today. The information can be obtained and put before the Commission.

PN313

DEPUTY PRESIDENT HAMPTON: Ms Bhatt, anyone here last year ordered no increase to a group of employers who put their hand up and said, 'There's a problem'. You seriously expect us to believe that, in the light of that information, knowing that you have members that are in the situation, that no one has put their hand up, between last year and this year, to say, 'Next year's annual wage review we need to raise this'. That just does not seem to fit in reality, from my perspective.

PN314

MS BHATT: Deputy President, as we had understood it, the scope of these proceedings, the submissions that have been filed to date and the purpose of the hearing today was to determine the process or the approach, in general terms, that would be adopted by the Commission in this year's annual wage review, as to how copied state awards would be determined. We gleaned that that was the case, from the observations that were made at the conclusion of the Commission's decision, concerning copied state awards in last year's annual wage review, and the terms of the directions and perhaps an accompanying statement that was issued, at the outset of proceedings for this year's annual wage review.

PN315

It is not the case that we are making these submissions in the abstract. We know that there are copied state awards that are in operation and that these concerns are real. I simply don't have more information than that to hand today. As I say,

we've not filed submissions of that nature in these proceedings because that is what we understood.

PN316

DEPUTY PRESIDENT HAMPTON: Not withstanding what Busways, this year and last year - - -

PN317

MS BHATT: Busways approach.

PN318

DEPUTY PRESIDENT HAMPTON: - - - a group of employers raised specific cases, got some accommodation?

PN319

MS BHATT: Yes, Deputy President.

PN320

JUSTICE HATCHER: If you wanted to provide such information how long might it take for you to do so?

PN321

MS BHATT: Two weeks, your Honour.

PN322

JUSTICE HATCHER: Two weeks, right.

PN323

MS BHATT: We, of course, acknowledge that the Commission is required, by the statute, to review copied state awards. However, in our submission, applying the uniform increase or a uniform formula, without taking into account the specific circumstances of individual copied state awards would not, in our submission, amount to reviewing them, and that's why we say that, as a consequence of these proceedings, the Commission should not do so. Bearing an instrument without examining and considering its terms cannot constitute a review.

PN324

This comes to the heart of - - -

PN325

VICE PRESIDENT ASBURY: I'm sorry to cut you off, but at the risk of stating the obvious, I don't know how we can examine and review something that no one puts before us.

PN326

MS BHATT: There is a practical difficulty that arises from the fact that these instruments are not already before the Commission and cannot readily be identified, which is precisely why we say this; that the Commission should not adopt a blanket approach, that the Commission should consider copied state awards as and when they are identified by parties, in the annual wage review process. It should give parties an opportunity (indistinct) that this is the

opportunity to identify instruments that should be considered in the annual wage review as to how and whether the wage rates proscribed by them should be adjusted.

PN327

I mean Mr Clarke posed the question today, what is the purpose? What is the purpose of giving parties an opportunity to state a position about individual copied state awards? We say the purpose is it puts the instrument, the terms of the instrument before the panel, so that the panel can then make an informed decision, based on the terms of that instrument, how those wages should be determined.

PN328

The answer might be that the wages should be determined in line with the decision made, in relation to the minimum wage. Equally, the answer might well be very different.

PN329

JUSTICE HATCHER: Well, speaking for myself, I assume, from paragraph 447 of last year's decision, that that's what we're meant to be doing today. If AiG is operating under a misapprehension, well, we'll try to arrange some opportunity for that to be remedied.

PN330

MS BHATT: Yes, your Honour, and we would, of course, take that opportunity.

PN331

Can I say this; if - the grant of that opportunity might do away with this next submission but if, ultimately, the Commission were to decide that a uniform approach is to be adopted, in respect of all copied state awards, then it should, at the very least, afford interested parties to make submissions as to why that would not be appropriate, in the context of specific instruments. That is, to ask for an exemption of the nature that Busways has sought.

PN332

In any event, I think, in light of the comments that your Honour, in particular, has made today, we would seek the Commission (indistinct) to put before it material that will, at least, involve submissions. We might seek the Commission's leave to file evidence as well, that deals with the specific circumstances of concerned members.

PN333

VICE PRESIDENT ASBURY: But if we give you that leave, are you suggesting we should generally put this, I don't know, up on the website, attention all those who may be covered by the elusive copied state awards please come forth and provide a copy of it?

PN334

MS BHATT: Well, I think, in part, that might be a question for my friends appearing for ACCI, who have adopted a similar approach in their submissions as we have. That is to say that no increase should be granted to any copied state



award, absent a party identifying an instrument. Apart from the Busways' copied state award no other instruments have been identified in these proceedings.

PN335

VICE PRESIDENT ASBURY: So is the approach an increase should be granted unless they come forward and identify a basis for not receiving it?

PN336

MS BHATT: And as we've said, Vice President, that would be an inappropriate exercise of the Commission's discretion because it would be deciding to adjust wages without knowing what those wages are.

PN337

VICE PRESIDENT ASBURY: Why would it be less appropriate than deciding not to adjust wages without knowing what the affect of that is?

PN338

MS BHATT: As Mr Izzo said, those are the two ends of the spectrum of arguments that are presented before the panel.

PN339

JUSTICE HATCHER: All right. Anything further? All right, Ms Tinsley? Ms Tinsley?

PN340

MS TINSLEY: Thank you, your Honour. Having had the benefit of hearing oral submissions, we're content with relying on our written submissions. I don't believe that we've got anything additional that I can add or needs to be added.

PN341

If the Commission is minded to grant Ai Group additional time, say two weeks, to identify known copied state awards, we're in a similar boat, insofar as we're not aware of any, but we'd be appreciative of the opportunity to assist them in that and to file any additional evidence that we can.

PN342

JUSTICE HATCHER: All right, thank you. Mr Clarke? May I start off with this proposed additional opportunity, what's your view about all that?

PN343

MR CLARKE: Look, your Honour, my expectation coming in to this, based on what was said at the conclusion of last year's decision is, 'We're going to provide an opportunity for interested parties and bodies to come along and say what we should do with copied state awards'. What that ought to have provoked, in a traditional - well, we know the way industrial relations works, is that every person and their dog, in employer land, will come out and say, 'You can't adjust these, you're going to kill us. We're covered by this award, the wages are high, you're going to adjust it, we're going to go broke, we've got no money. The government's squeezing, it's impossible', and we got one. I don't think that procedural fairness necessitates an opportunity for the peak employer associations to go out and find people and get them to give statements that say, 'This is terrible,

it's all killing us', when, on our information, the affected employers are already talking to the assistant treasurer about getting extra money to fund wage increases.

PN344

VICE PRESIDENT ASBURY: And you know who they are?

PN345

MR CLARKE: I know who some of them are, yes. But we're an interested party, we've put a position about what we think should happen with copied state awards, and it's a position that's based on the way the safety net operates, construction questions in the statute, the instrument content rules. They are federal safety net instruments, this is the way they operate. Yes, they're different, not all safety net instruments are the same, but these questions have been revisited in the past and we've been able to find a way through to maintaining a relativity between them but continuing to maintain them.

PN346

I don't think a further opportunity is required and I have concerns about what's likely to be generated.

PN347

JUSTICE HATCHER: One difficulty may be that in the absence of more information we just may say on the (indistinct) before us, there are no copied state awards, apart from Busways, and therefore we don't have to deal with it. That's the difficulty I have, but I don't even know whether these things exist.

PN348

What we do with them is the secondary question. First of all, do they exist because if they don't we're just wasting our time.

PN349

MR CLARKE: Well, against that, your Honour, is, depending on which side you fall on, the perhaps unfortunate expression in the statute, which is no different to what's said about modern awards is that you must review them.

PN350

JUSTICE HATCHER: We don't need to review things that don't exist, that's my point. What is it that we are - even before we decide what to do about it, what is it that we are reviewing? That's my statement, Mr Clarke.

PN351

DEPUTY PRESIDENT HAMPTON: In practical terms, Mr Clarke, you do have an understanding that there are other copied state awards?

PN352

MR CLARKE: Yes.

PN353

DEPUTY PRESIDENT HAMPTON: That's right, isn't it?

PN354

MR CLARKE: Yes, absolutely.

PN355

DEPUTY PRESIDENT HAMPTON: As well as Ms Bhatt, correctly confirming.

PN356

MR CLARKE: Yes.

PN357

DEPUTY PRESIDENT HAMPTON: This is, what was the expression, not a black hole, but the - what was that expression that was used, the blind spot. So some light on the blind spot might be useful, from my perspective.

PN358

JUSTICE HATCHER: So the ACTU can provide us with a list?

PN359

MR CLARKE: Well, we can provide you with some. It may be that the instruments, there's only a handful of instruments, but there's a number of employers, and obviously they're individualised instruments, in a legal sense, a notional instrument. Both me and Ms Bhatt, we're both disability carers, we both have our own copied state award, but it's in identical terms because we transferred employment at exactly the same time. It might be the same as Mr Izzo's who works for a different care provider, that was privatised at the same time as the other ones, that derive from the same New South Wales based state instrument.

PN360

JUSTICE HATCHER: But you can identify the base state instrument - - -

PN361

MR CLARKE: Yes.

PN362

JUSTICE HATCHER: - - - and the relevant privatisation which gave rise to it?

PN363

MR CLARKE: Yes. We can give you some that we know about. I can't guarantee that that's all of them, but we - if that assists, we're happy to provide them. But what we don't think it appropriate, at this late stage in the proceedings, is to provide what was essentially provided last year, which is, 'Come along and get your material together and tell us how difficult it is for you operate under a copied state award and see if we can give it a (indistinct)'. Well, no. Had a go at that, didn't take the opportunity.

PN364

JUSTICE HATCHER: All right. And in reply, generally?

PN365

MR CLARKE: I'll sound like a broken record because I think most of what was covered was either reiterated by me today or already covered in the written material.

PN366

JUSTICE HATCHER: All right, thank you. Well, we thank the parties for their submissions and we'll now adjourn.

**ADJOURNED INDEFINITELY**

**[4.01 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #1 WITNESS STATEMENT OF WILLIAM O'NEILL DATED  
30/03/2022 ..... PN19**

**EXHIBIT #1 STATEMENT OF ROBERT GIBSON DATED 17/02/2023 ..... PN108**