

ANNUAL WAGE REVIEW 2021-22

SUBMISSION IN REPLY

06 May 2022

About ABI and Business NSW (NSW Business Chamber Ltd)

Australian Business Industrial (ABI) is registered under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members. NSW Business Chamber Ltd (trading as Business NSW) is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009*. As NSW's peak business organisation, Business NSW has more than 40,000 member businesses across NSW.

ABI is comprised of Business NSW members who specifically seek membership of a federally registered organisation.

This submission has been approved by the Council of ABI on behalf of its members and endorsed by the workplace policy committee of Business NSW.

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Introduction

1. This reply submission by Australian Business Industrial (ABI) and Business NSW is made specifically in response to the following four initial submissions in the Annual Wage Review 2021-22 dealing with the issue of copied State awards:
 - a. Busways North West Pty Limited
 - b. Keolis Downer Pty Ltd
 - c. Transdev Australasia Pty Ltd
 - d. Transit Systems West Services Pty Ltd(Collectively referred to as '**the copied State award submissions**')
 2. The copied State award submissions were filed by four different private bus industry operators who each individually have sought that the Fair Work Commission (**Commission**) not apply the Annual Wage Review to specified copied State awards.¹
 3. ABI and Business NSW's decision to focus solely on the issues raised in the copied State award submissions should not be taken as any concession or acknowledgement with respect to the submissions made by other parties in the annual wage review with regard to other matters.

Summary position

4. For the reasons set out further below, ABI and Business NSW agree with and support the position in the copied State award submissions that the Fair Work Commission should determine not to apply the Annual Wage Review decision to copied State awards as part of a generic or automatic decision affecting all copied state awards.
5. Rather, the Commission should instead only apply the Annual Wage Review decision to copied state awards on a case by case basis following submissions by parties with respect to the relevant copied state awards.
6. There are several reasons for the position adopted by BNSW and ABI, which are identified separately below.

¹ In the case of Transit Systems West Services Pty Ltd (**Transit**), a number of other orders are sought. This submission is concerned only with the submission by Transit to the effect that the 2021-2022 Annual Wage Review should not be applied to copied State awards covering it.

Copied State awards are likely to be of most significance in NSW

7. As the peak body representing business and employers in NSW, Business NSW (and its industrial affiliate, ABI) is particularly concerned that the current default approach of applying Annual Wage Review increases to all copied State awards is having a disproportionately negative impact on NSW businesses and fails to properly take into consideration the jurisdictional differences that exist in the setting of award rates in NSW compared with the Federal approach. Indeed, all four of the copied State award submissions pertain to NSW businesses.
8. Whilst the Commission has previously identified that there is no specific data available as to the exact number of copied State awards in operation,² it is logical to conclude that where the privatisation or asset recycling of State assets is occurring, these are more likely to be the jurisdictions in which greater number of copied State will come into existence.
9. The distribution of 'privatisable' assets among Australian states and territories is highly skewed, with NSW holding the largest holding of government businesses.³ NSW has also been far and away the biggest divestor of state assets by total value over the past five to ten years, divesting an estimated \$19.54 billion in assets between 2014 and 2019 alone.⁴ This trend is likely to continue in the state over coming years.⁵ As a result, it is reasonable to conclude that the current lion's share of copied State awards in operation apply to businesses operating in NSW. Meaning any decision of the Commission regarding the application of the Annual Wage Review decision to copied State awards will have a correspondingly skewed impact on NSW businesses.
10. This is particularly relevant as ABI and Business NSW agree with the contention put forward in the submission of Busways North West Pty Limited (**Busways**), that the current default approach of applying adjustment to the rates in modern awards determined in the Annual Wage Review uniformly to all copied State awards fails to properly take into consideration the clear jurisdictional differences that exist in the setting of award rates in NSW. As Busways rightly observed at [64] of its submission:

"NSW [wage reviews] operate in an entirely disconnected manner that does not accord with the national approach or any other state jurisdictions Industrial Relations statutes."

² Annual Wage Review 2016-17 [2018] FWCFB at [10] and [559].

³ The Australian Institute submission to the Asset Recycling Program, Submission 15, January 2015, pages 7 and 8.

⁴ Review of the National Partnership Agreement on Asset Recycling, January 2019, page 5.

⁵ NSW signals renewed focus on privatisation, will go it alone on fast rail, Sydney Morning Herald, 30 April 2021; Financial Review, \$60b of NSW assets face privatisation call, 25 September 2019; and The Examiner, NSW govt to mull WestConnex privatisation, 6 March 2020.

11. These jurisdictional differences are well set out and explained in the initial submission of Busways at [68] to [72] and we do not intend to repeat them here except to emphasise that as a result of the clear jurisdictional differences in approach and the insufficient alignment between the wage fixation cycles in NSW with the federal system, ABI and Business NSW share the concerns of Busways that the current default approach to copied State awards is disproportionately having a negative impact on NSW businesses currently operating under copied State awards.
12. The impact of the differences between the jurisdictional approaches to award wage fixation are well demonstrated by both the Busways submissions dated 1 April 2022 and the Transit submissions dated 1 April 2022 - which identify the NSW-based awards providing employees with anywhere from 16% to 52% more remuneration than the relevant modern awards would for the same work. The substantial difference in minimum wage payments for the same work between the two jurisdictions is of fundamental importance when it comes to the Commission exercising a discretion to vary a minimum payment safety net.
13. ABI and Business NSW therefore encourage the Commission in this year's Annual Wage review to adopt a greater level of nuance and appreciation for the ongoing distinctions that continue to exist where there is the interaction and movement between NSW state awards and Federal awards in exercising its discretion in this year's Annual Wage Review.

Double-dip wage increase

14. ABI and Business NSW agree with the Copied State Award submissions that it would be unfair to force the businesses covered by the relevant copied State awards to provide two wage increases in a single year.⁶ That is, one imposed by the NSW Industrial Relations Commission, the other by virtue of being subject to the Annual Wage Review decision.
15. Such an approach does not only result in double dipping.⁷ Rather, when an initial wage increase (say, in January 2022) is then subject to a further wage increase (say, in July 2022) the increases compound upon each other, such that the monetary cost of the two increases is greater than their combined sum had they been applied at the same time. Both the double dip increase and their compounding effect are inconsistent with the minimum wage objective set out in section 284(1) of the FW Act which

⁶ Busways North West Pty Limited, Initial Submission at [75]; Transdev Australasia Pty Ltd, Initial Submission at [5] to [8]; Keolis Downer Pty Ltd, Initial Submission at [6].

⁷ Transit Systems West Services Pty Ltd, Initial Submission at [38]; Busways North West Pty Limited, Initial Submission at [61] and [75].

requires that the Commission to establish and maintain a safety net of fair minimum wages.⁸

16. It is also particularly unfair on businesses which, as a result of standard contractual terms surrounding the sale of a state asset, are often legally constrained from taking measures to ameliorate unplanned labour cost increases. That is, these businesses do not often have the same measures available to them to increase the amount of revenue they collect in the manner a normal private sector operator might.⁹

Awareness of copied State award increases

17. Whilst the approach of the Commission to copied State awards adopted since 2017-2018 appears to have admirable intent, because it permits individual employers to come forward and proffer a different outcome to the Annual Wage Review applying to a particular copied State award, in practice, this has not been the experience.

18. As evidenced by both the lack of submissions from individual employers on the issue of copied State awards up until now, and the findings and effect of the recent Federal Court decision in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd*¹⁰, the Commission's current approach has placed a unrealistic expectation on employers to both be aware of and understand the history and the interaction between copied State awards and Annual Wage Review decisions.

Conclusion

19. Going forward, in order to ensure that perverse outcomes do not arise from the application of the Annual Wage Review to copied State Awards (as is currently being particularly experienced by Transit Systems) ABI and Business NSW submit that the following approach should be adopted by the Commission with respect to copied State Awards:

- a. Firstly, the Commission should not automatically apply the annual wage review decision to copied State awards as part of a generic or automatic decision affecting all copied State awards.
- b. The Commission should instead only apply the annual wage review decision to copied State awards on a case by case basis following submissions by parties with respect to the relevant copied State awards.

⁸ Busways North West Pty Limited, Initial Submission at [72] and Transdev Australasia Pty Ltd, Initial Submission at [19].

⁹ Busways North West Pty Limited, Initial Submission at [75]

¹⁰ [2021] FCA 1436

- c. To the extent that the Commission wishes to adopt a default approach to increasing copied State Award minimum wages, it should only seek to increase such wages when they are aligned with the modern award rates for the same work. The Commission should not adopt a default approach whereby wages which are higher than the relevant modern award for the same work are further increased. Such an outcome will ultimately set rates for work under the copied State Awards which are not *fair* wages nor *minimum* wages, as required by the minimum wages objective.¹¹

¹¹ s284(1) FW Act