



STATEMENT

Fair Work Act 2009

s.285—Annual wage review

s.289(3)—Confidential or commercially sensitive information

Annual Wage Review 2022-23

(C2023/1)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 24 MARCH 2023

Annual Wage Review 2022-23 – copied State awards – s.289(3) Fair Work Act 2009 – confidential and commercially sensitive information not published.

[1] In a Statement¹ issued on 13 December 2022, I outlined directions for the filing of written submissions in relation to how the Expert Panel should deal with copied State awards. Initial submissions were directed to be filed by 17 February 2023.²

[2] In accordance with these directions, Busways North West Pty Ltd (Busways) filed a submission and witness statement in redacted form on 17 February 2023.³ On 20 February 2023, Busways sent an unredacted version of its submission and witness statement to the Commission, with a request that the unredacted versions of the documents not be published on the Fair Work Commission website.⁴ In its submission, Busways also indicated that it would enter into a “confidentiality arrangement ... with any interested parties should they need to see the redacted materials.”⁵

[3] In a Statement dated 28 February 2023 I stated a provisional view that that Busways’ submission and witness statement should be published in a form that redacted the confidential information.⁶ As no party contested my provisional view at the directions hearing on 7 March 2023, it was confirmed at the conclusion of that hearing.⁷

[4] On 15 March 2023, the ACTU filed a submission responding to redacted material in Busways’ submission. In the covering email accompanying its submission, the ACTU requested, with the support of Busways, that its submission not be published on the basis that it quotes from and responds to material already considered to be confidential by the Commission pursuant to s 289 of the *Fair Work Act 2009* (Cth) (FW Act). The ACTU has advised the Commission that it has also provided a copy of the submission to Busways’ lawyers.

[5] Section 594 of the FW Act empowers the Commission to make orders restricting or prohibiting publication of certain evidence, documents lodged or parts of Commission

decisions or reasons in relation to a matter. However, s 594 does not apply to the publication of a submission made to the Commission for consideration in an annual wage review.⁸ Instead, s 289(2) of the FW Act requires that all submissions made to the Commission for consideration in an annual wage review must be published, subject to s 289(3). Section 289(3) of the FW Act provides:

- (3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
 - (a) may decide not to publish the information; and
 - (b) may instead publish:
 - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
 - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)--a statement that confidential or commercially sensitive information in the submission has not been published.

Summary of the confidential information

[6] Paragraph 2 of the ACTU submission refers, and responds directly to, a redacted section of Busways' witness statement. It refers to Busways' contract with Transport for NSW and discusses particulars of the contract price.

Order and next steps

[7] Consistent with the 28 February statement I have determined pursuant to s 289(3)(a) of the FW Act that the ACTU submission will not be published on the basis that is confidential and commercially sensitive, and I so order. Instead, I publish the summary in [6] above pursuant to s 289(3)(b)(i). If any party wishes to seek a variation of this order they are granted liberty to apply to my chambers.



PRESIDENT

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¹ [\[2022\] FWC 3280](#)

² [\[2022\] FWCFB 3280](#) at [4].

³ Busways submission, 17 February 2023.

⁴ [\[2023\] FWC 490](#) at [5].

⁵ Busways submission cover letter, 17 February 2023.

⁶ [\[2023\] FWC 490](#) at [13].

⁷ *Ibid* at [14].

⁸ *Fair Work Act 2009* (Cth) s 594(2).