IN THE FAIR WORK COMMISSION
OF AUSTRALIA

Application by Transit Systems West Services Pty Ltd and ors re:
Annual Wage Review 2018-2019 Decision [2019] FWCFB 3500
Annual Wage Review 2019-2020 Decision [2020] FWCFB 3500

ARTBIU, AMWU and ASU Outline of Submissions – 2018-19 and 2019-20 Retrospective Variations

1. **Transit Systems** West Services Pty Ltd, and an unidentified collection of its related entities,[1] have made an application seeking that the Expert Panel constituted in respect of the 2021-2022 Annual Wage Review vary the:

    a. Annual Wage Review **2018-2019 Decision** [2019] FWCFB 3500

    b. Annual Wage Review **2019-2020 Decision** [2020] FWCFB 3500,

    per s.603 of the *Fair Work **Act*** 2009 (Cth), to retrospectively rescind the increases awarded in respect of the:

    c. State Transit Authority **Bus** Operations Enterprise (State) **Award** 2018;

    d. State Transit Authority Senior and Salaried **Officers'** Enterprise (State) **Award** 2018; and

    e. State Transit Authority Bus Engineering and **Maintenance** Enterprise (State) **Award** 2018,

    as the **Copied State Awards** applying to Transit Systems on and from 1 July 2018.

2. The application is made in response to the decision of Rares J in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd* [2021] FCA 1436. His Honour found that:

[1] Transit Systems submissions at [1]

a. the 2018-2019 and 2019-2020 Decisions both operated to vary the listed rates of pay in the Bus Award, notwithstanding that the Awards contained listed pay increases; and

b. Transit Systems had, by not passing on these increases, contravened s.768AG of the Act.

3. In the event that this application is unsuccessful, Transit Systems will be required to make back-payments of approximately $3.5 million to the 932 employees covered by the Bus Award, relating to a 2.5 year period. If the application succeeds, in whole or in part, the matter returns to the Court to address the question of appropriate orders.[2]

4. No back-payments have been made to employees currently covered by the Officers Award or those who were covered by the Maintenance Award (noting that this ceased to operate on 27 May 2021).

5. The ARTBIU is a party to each of the Copied State Awards. The AMWU is a party to the Maintenance Award, and the ASU to the Officers Award.

6. The three **Unions** oppose the application, on the basis that:

a. the 2018-2019 and 2019-2020 Decisions are each decisions made under Part 2-6, and thus the Commission is prevented from making the variations sought by s.603(3)(d); and

b. even if the Commission did have power, the variations sought ought not be made, having regard to the principles governing variation applications of this kind.

The effect of the variations

[2] See *Australian Rail Tram and Bus Industry Union v Transit Systems West Services Pty Ltd (No 2)* [2022] FCA 389.

7. Transit Systems has annexed a number of tables to its submissions said to represent the present reality and the effect of each of its alternative variations. These tables confuse the issue.

8. The matter is more clearly illustrated in a stepped process with regard to an indicative classification in each Award, as set out below.

The Bus Award

9. The Bus Award provided the following weekly rates for the classification of Senior Bus Operator:

1 Jan 18	**1 Jan 19**	**1 Jan 20**
$1060.60	$1087.10	$1,114.30

10. Per Rares J's decision, the 2018-2019 and 2019-2020 Decisions varied these rates as follows:

1 Jul 19 – 3%[3]	**1 Jul 20 – 1.75%**
$1,119.71	$1,133.80

11. The following table illustrates the difference between what a Senior Bus Operator was entitled to be paid, and what they were paid, at the relevant points:

	1 Jan 18	**1 Jan 19**	**1 Jul 19**	**1 Jan 20**	**1 Jul 20**
Owed	$1,060.60	$1,087.101	$1,119.71	$1,119.71	$1,133.80
Paid	$1,060.60	$1,087.10	$1,087.10	$1,114.30	$1,114.30

Officers Award

[3] Note: this should be taken as a reference to the first pay period thereafter; it is listed as 1 July 2019 for convenience here.

12. The Officers Award required a Senior Officer Grade C Step 1 to be paid an annual salary as follows:

1 Jan 18	1 Jan 19	1 Jan 20
$112,113	$114,916	$117,789

13. Following the logic underpinning Rares J's decision, the 2018-2019 and 2019-2020 Decisions varied these rates as follows:

1 Jul 19 – 3%[4]	1 Jul 20 – 1.75%
$118,363	$119,850

14. The following table illustrates the difference between what the Grade C Step 1 employee was entitled to be paid, and what they were paid, at the relevant points:

	1 Jan 18	1 Jan 19	1 Jul 19	1 Jan 20	1 Jul 20
Owed	$112,113	$114,916	$118, 363	$118,363	$119,850
Paid	$112,113	$114,916	$114,916	$117,789	$117,789

Maintenance Award

15. The Maintenance Award expressly provided only one rate of pay, effective 1 January 2019. Given this was described as a 2.5% increase, the 'starting rate' can be inferred (using the Engineering Repair Tradesperson Level 2):

1 Jan 18	1 Jan 19
$1,181.17	$1,210.70

[4] Note: this should be taken as a reference to the first pay period thereafter; it is listed as 1 July 2019 for convenience here.

16. Per Rares J's decision, the 2018-2019 and 2019-2020 Decisions varied these rates as follows:

1 Jul 19 – 3%	**1 Jul 20 – 1.75%**
$1,247	$1,268.80

17. The following table illustrates the difference between what an Engineering Repair Tradesperson Level 2 was entitled to be paid, and what they were paid, at the relevant points:

	1 Jan 18	**1 Jan 19**	**1 Jul 19**	**1 Jan 20**	**1 Jul 20**
Owed	$1,181.17	$1,210.70	$1,247	$1,247	$1,268.80
Paid	$1,181.17	$1,210.70	$1,210.70	$1,210.70	$1,210.70

The effect of the variation sought

18. As the tables show, the failure by Transit Systems to implement the 2018-2019 and 2019-2020 Decisions has resulted in a running underpayment of its employees covered by the Copied State Awards.

19. The effect of its primary position – a variation of the 2018-2019 and 2019-2020 Decisions to simply exclude these particular Copied State Awards from the increase otherwise awarded is apparently to:

    a. reduce the rate of pay that employees covered by the Bus Award and Officers Award are currently entitled to be paid;

    b. reduce the rate of pay that at least the employees covered by the Bus Award are currently *actually* being paid, and have been paid since 28 November 2022; and

    c. expunge an existing entitlement to backpay for the underpaid amounts enjoyed by each employee.

20. As to its secondary, position, this involves reintroducing the 'tiered' system abandoned by the Commission in 2018 in respect of these particular Copied

State Awards. This system involved the determined minimum wage increase being passed on:

a. in full to copied state awards which had not been increased by a State minimum wages decision in the relevant financial year;

b. at a 50% ratio to those which had been increased by a State minimum wages decision in the period 1 July – 31 December of the relevant financial year; and

c. not at all to those which had been increased by a State minimum wages decision on or after 1 January in the relevant financial year.

21. Transit Systems' submissions assume that 'State minimum wages decision' refers to internal wage increases found in the particular copied state instrument. This is not apparently correct, noting the particular meaning that phrase has; in addition, it is inconsistent with its later insistence that its application should be granted because these are *paid* rather than minimum rates awards.[5] These submissions proceed on the basis that Transit Systems is, in substance, asking the Commission to apply that system in respect of the increases contained within the Copied State Awards.

22. The Bus Award and the Officers Award both contain 2.5% increases that were effective on 1 January 2019 and 2020 respectively. The effect of the 'alternative' position is identical to Transit Systems' substantive position. It is unclear why it has been cast as a purported alternative, except to confuse the issue.

23. In respect of the Maintenance Award, it contains an increase as at 1 January 2019, but not 2020. The alternative claim has at least some work to do in that sense, leaving the position as follows in respect of the Engineering Repair Tradesperson Level 2:

[5] Which, in any event, they strictly speaking are not: see s.406(1) of the *Industrial Relations Act 1996* (NSW).

	1 Jan 18	1 Jan 19	1 Jul 20[6]
Owed	$1,181.17	$1,210.70	$1,268.80
Paid	$1,181.17	$1,210.70	$1,210.70

The variations cannot be made

24. Transit Systems correctly acknowledges that the Commission's sole source of power to make variations to its decisions of this kind is found at s.603(1) of the Act. That broad power can be contrasted with s.602, which in essence replicates the slip rule, and which could not be relied upon to make the variations here sought.

25. Section 603(1) is expressly limited by s.603(3), which provides relevantly:

> *(3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:*
>
> *…*
>
> *(d) a decision under Part 2-6 (which deals with minimum wages).*

26. The policy reason for this is obvious. Decisions made under Part 2-6 provide employees with substantive rights as to the minimum wages they must be paid. Certainty is critical. This is in parallel with the residual subsections to (3), which all deal with matters similarly giving rise to substantive rights. Discussed below, decisions of this kind are not conventionally amenable to retrospective variation.

27. Notwithstanding the fact that each of the 2018-2019 and 2019-2020 Decisions were:

    a. made by the Expert Panel constituted per s.617(1)(a) for the purposes of the annual wage review required under Part 2-6; and

[6] It is worth observing that the *Transit Systems West Services Engineering and Maintenance Enterprise Agreement 2021* provides that an Engineering Repair Tradesperson Level 2 is to be paid only $1,241 per week.

b. in their terms, were determinations made under s.285(1)(b) and (c),

Transit Systems contends that the decision, *insofar as it applies to Copied State Awards*, was not made under Part 2-6.

28. Instead, in fairly cursory submissions at [41]-[43], it says that the decision was in fact made under Item 20(1) of Schedule 9 of the *Fair Work (**Transitional** Provisions and Consequential Amendments) **Act** 2009* (Cth), via s.768AW of the Act, an argument which has been previously (albeit obliquely) rejected by the Commission.[7]

29. Section 768AW restricts the Commission's power to vary a copied state instrument. The general power granted by s.603 is fettered by its specific restrictions.[8]

30. Notably, the *only* power to vary wage terms is that provided by 768AW(c): per '*item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments **in annual wage reviews**)…'* (my emphasis).

31. It is difficult to read this as reflecting a legislative intention other than that copied state instruments, insofar as the wages they contain are concerned could be varied, and could *only* be varied, by the Commission exercising its wage review powers under Part 2-6. It is wholly inconsistent with the idea that a stand-alone variation power is instead created by s.768AW(c).

32. This is reinforced when one considers Item 20 of Schedule 9 both in its terms and in its surrounding context. The item itself provides[9] (again, my emphasis):

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

[7] *Annual Wage Review 2016-17* [2018] FWCFB 2 at [37].
[8] *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (1980) 29 ALR 333 at 347.
[9] Item 20 is modified by s.768BY of the Act such that references to Division 2B State awards are taken as also referring to copied state instruments.

> *(1)* ***In an annual wage review****, the FWC may make a determination varying terms of a [copied state instrument] relating to wages.*
>
> *(2) For that purpose,* ***Division 3 of Part 2-6 of the FW Act*** *(other than section 292)* ***applies*** *to terms of a [copied state instrument] relating to wages in the same way as it applies to a modern award.*

33. Again, the text alone is not apt to support an interpretation that a completely separate power to vary is created. The better interpretation is that Item 20 simply operates to *expand* what the Commission can do under Part 2-6: but its exercise of those powers still, in substance, involves making a decision under that Part.

34. This is reinforced when one considers that:

    a. Schedule 9 itself is preoccupied with annual wage reviews, and amending that particular process, rather than creating any new system or systems; and

    b. the Transitional Act itself functions to amend and modify the Act's application, not to create entirely new obligations or powers.

35. This interpretation is also consistent with:

    a. basic common sense, in that it means that a decision made by the Panel constituted to perform the Commission's functions under Part 2-6, in the course of making decisions squarely within that Part, is itself made under that Part; and

    b. the policy objectives set out above: there is fundamentally no reason that decisions about the wage rates in copied state instruments could be retrospectively varied within a scheme that permits this for minimum wage decisions for *no other kind of instrument.*

36. As such, the Commission simply cannot make the variation(s) sought by Transit Systems. The application ought to be dismissed on that basis.

The variations should not be made

37. In the alternative, the Unions contend that even if the Commission does have power to make the variations sought, it should not do so.

38. It is established that s.603 provides the ability for the Commission to make orders which have retrospective effect. However, this is not the end of the enquiry. It is a matter of basic principle that the discretion to make such orders should not be exercised where the orders interfere with substantive rights.

39. In *Hartley Poynton Ltd v Ali* (2005) 11 VR 568, Ormiston JA (with whom Buchanan and Eames JJA agreed) set out a line of authority from 1884 onward discussing when orders nunc pro tunc could or should be made. His Honour concluded at [73] that orders of this kind had '*not been granted to alter the substantive rights of parties but only to overcome procedural irregularities and difficulties''.* See also *RTBU v Metro Trains* [2020] FCAFC 81.

40. Similarly, Handley JA (with whom Meagher JA and Young CJ agreed) in *Mealing v P Chand t/as Fastfix* (2003) 57 NSWLR 305, in considering an appeal from a refusal to grant, with retrospective effect, leave to commence proceedings out of time, concluded at 607 that such limitation provisions were procedural in nature and thus amenable to removal by orders made nunc pro tunc, in direct contrast to those which affected substantive rights.

41. The position was summarized pithily in *Castle Construction Pty Ltd v North Sydney Council* [2007] NSWCA 164 at [97] per Tobias J:

> *It is true that this Court has a general inherent power to make any orders that the interests of justice require. Nevertheless, the power to make an order nunc pro tunc having the effect of antedating an order will not be granted if it has the effect of altering the substantive rights of the parties as distinct from overcoming procedural irregularities and difficulties. No doubt this is because it would not be in the interests of justice to disturb such rights.*

42. This approach should guide the Commission's exercise of the discretion granted by s.603. Although it is accepted that the statutory remit is broader, given its functions involve the creation of new rights, as the High Court observed in *Esso Australia v AWU* (2017) 263 CLR 551, the fundamental reluctance to interfere with substantive rights or to reward negligence should be maintained:

> *If, in exercise of the power conferred by s 603, an order were made by the Fair Work Commission varying or revoking a previous order with effect from a time earlier than the alleged contravention, the effect would be that there would not have been a contravention of the order. If, however, it appeared that the failure to file the document on time or to file what was required by the previous order was the result of contumaciousness or unacceptably careless disregard for the terms of the order, or if it were thought that to alter the order retrospectively would amount to an inappropriate or unfair interference with the rights of the parties, it might be expected that the Fair Work Commission would decline to exercise the power conferred by s 603 with the effect that the immunity attaching to protected industrial action would not arise.'*

43. The matter is quite different to that considered in the *Vehicle Industry Public Holidays Case*[10], relied on by Transit Systems at [48]-[49]. That concerned a long-standing Award clause which had '*an accretion of operational practice more or less uninterrupted between 1952 and 1999',*[11] bolstered by various Commission decisions, disturbed by a contrary interpretation in Federal Court proceedings. The Commission in that matter was satisfied that the drafting, in these circumstances, did not represent the intent at the time the relevant awards were made, and this combined with the lengthy history of practice and reliance, constituted the necessary *'exceptional circumstances'* justifying a retrospective variation.

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[10] Print T1300
[11] *Ibit at [36]*

44. The situation was akin to the situation which arose in *Re Brack; ex Parte the Operative Painters and Decorators Union of Australia* (1984) 58 ALJR 125. In that matter, Morling J of the Federal Court had interpreted a particular award clause as requiring an allowance to be paid in certain circumstances. The matter came back before Brack C of the Australian Conciliation and Arbitration Commission, who acceded to an application to vary the Award to remove any such entitlement.

45. The High Court (admittedly with some hesitancy given what it described as Brack C's written reasons as in tone displaying a '*regrettable and surprising reluctance to accept the authority of a judicial interpretation of the Award'*) held that Brack C acted within power in determining that the '*award provision, so interpreted, was unsatisfactory'* in light of the extensive industrial background before him. Again, the point was that while the clause might have said that, *it was not meant to.*

46. This is not what has happened here. In both the 2018-2019 and 2019-2020 Decisions, the Commission intended to, and did, vary the wage rates in all copied state awards by 3% and 1.75% respectively, regardless of whether or not those instruments contained separate increases. The Expert Panel's decision in *Annual Wage Review 2016-17* [2018] FWCFB 2 at [43] that this was no slip; it was a product of a deliberate choice to abandon a '*decision rule'* involving a tiered system.

47. Transit System had an opportunity to make submissions in the 2018-2019 and 2019-2020 annual wage reviews. It could have put its case forward then; it might or might not have persuaded the Expert Panels as respectively constituted.

48. It did not do so. Its failure in this respect is unexplained – as, indeed, it was before the Federal Court. It knew that the Copied State Awards applied to it; as an employer it had an obligation to take sufficient steps to ensure it was complying with its obligations. Inadvertence or carelessness is not a defence to a contravention; and it is not an '*exceptional circumstance'* justifying the

dramatic interference in the existing substantive rights of employees which is sought.

49. At its highest – and noting that this assertion is not supported by any evidence and is not reflected in any evidence that was put before the Federal Court – the claim is that it had a different interpretation of the effect of the 2018-2019 and 2019-2020 Decisions: [11]. This interpretation:

    a. was wrong, as found by Rares J; and

    b. does not align with any contrary intention manifest in the Commission's decision.

50. It would be entirely contrary to principle to grant the applications sought on this basis. It is simply not open to an employer to sit on its hands (through error, inattention or otherwise), subsequently lose a case in the Federal Court, and in lieu of correcting its mistake, simply have the Commission rewrite history to erase the issue.

51. The outcome may well be inconvenient to Transit Systems. That inconvenience is hardly an '*exceptional circumstance'*; it is not nearly a sufficient basis to justify the extraordinary interference in long-standing decisions of this Commission. Granting the relief would do little more than diminish public confidence in the certainty of the Commission's decisions on crucial matters i.e. wages.

52. As to the idea of holding the union to the 'bargain' it struck, this makes rather too much of the 'negotiations' in the context of a rollover award which simply applied the NSW government's wages cap. In any event, that deal was not with Transit Systems.

53. Finally, Transit Systems neglects to mention that it is presently bargaining with its employees for an enterprise agreement to replace the Copied State Awards. Granting the applications would give it an enormous collateral advantage in that process. In circumstances where it has already been heavily criticized for neglecting its legal obligations in an attempt to do just that, it is a further reason that the applications ought to be refused.

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