

IN THE FAIR WORK COMMISSION
Annual Wage Review 2021-2022

SUBMISSION BY BUSWAYS NORTH WEST PTY LIMITED

Introduction

1. Under the *Fair Work Act 2009* (Cth) (**FW Act**) the Fair Work Commission (**FWC**), constituted by an expert panel (**Panel**), must undertake an annual wage review each financial year. Busways North West Pty Limited (**Busways**) is grateful for the opportunity to make a submission to the 2021-2022 Annual Wage Review.
2. This submission is filed by Busways with respect to whether the FWC should apply its annual wage review to copied State awards and, in particular, the following three copied State awards:
 - a. *the State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020*;
 - b. *the State Transit Authority Bus Operations Enterprise (State) Award 2021*; and
 - c. *the State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021*.

(the Three Copied State Awards)

3. This submission is divided into four parts:

Part I	Background to copied state awards and their interaction with the annual wage review
Part II	The circumstances faced by Busways with respect to the Three Copied State Awards
Part III	Why the Fair Work Commission should not apply any Annual Wage Review increase in 2022 to the Three Copied State Awards
Part IV	Outline of the specific findings sought by Busways
4. At a high level, the following summarises the overall position of Busways:
 - a. Busways is a bus service company, that presently operates a variety of passenger transport services throughout New South Wales (**NSW**) and South Australia.

- b. In 2021, Busways successfully acquired from the NSW State Government the right to operate bus passenger services under Greater Sydney Bus Contract 7, that principally covers suburbs in the North-West regions of metropolitan Sydney. These services were formerly operated by the State Transit Authority of NSW (**STA**) through the use of drivers and other operational employees historically employed by the Crown in NSW.
- c. Pursuant to the tender process, Busways was obliged to offer employment to many of the Crown employees working in the STA (**the Transferring Employees**) upon commencement of services.
- d. The engagement of the Transferring Employees by Busways following the tender constituted a transfer of business within the meaning of s768AD(1) of the FW Act.
- e. As a result of the transfer of business laws under Part 6-3A of the FW Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* (**Transitional Act**), the terms and conditions of the State Awards which had previously covered the Transferring Employees were transferred to the national system through the creation of copied State awards which replicate the terms and conditions of the original State Awards that previously applied to the Transferring Employees and their former state public sector employer.
- f. Section 285 of the FW Act provides that the FWC must review modern award minimum wages in an Annual Wage Review. As the provisions for Annual Wage Reviews apply to copied State awards (except section 292), the Panel is required to review, and may, if appropriate, make one or more determinations varying copied State awards as part of the Annual Wage Review process.
- g. In the 2012-13 Review decision, the Panel first discussed the operation of copied State awards which had been introduced via an amendment to the Transitional Act in late 2012. The Panel adopted a tiered methodology for adjusting wages in copied State awards recognising that some copied State awards already provided for wage increases in the relevant year as a result of State Industrial Relations Commissions award determinations. This approach was adopted consistently by the FWC Panel until the 2017-18 Review.
- h. In the 2017-18 Review decision, the Panel decided to change their approach and automatically adjusted the rates in copied State awards in the same way as adjustments in modern awards. In coming to this decision, the FWC proposed

to address any ‘double dipping’ issues that may arise as a result of this new approach on a case by case basis.¹

- i. The Three Copied State Awards have already been subject to wage increases this calendar year. This is a result of increases contained in the Three Copied State Awards which were determined (by consent) by the NSW Industrial Relations Commission (**NSW IR Commission**) prior to the transfer of business to Busways occurring.
 - j. As a result, if the 2017-18 approach to copied State awards is automatically applied to the Three Copied State Awards in this year’s annual wage review decision, Busways and the Transferring Employees will be subjected to two wage increases in a period of 6 months or less under Three Copied State Awards. Such a result would be contrary to the objects of the FW Act and the modern awards objectives because:
 - i. it generates a ‘double-dip’ effect whereby employees will receive a windfall gain and Busways would be subject to unbudgeted increased wage costs that it cannot recover;
 - ii. the Three Copied State Awards contain wage rates that were determined under a different jurisdiction where the wage rates were not intended to be a minimum safety net, but rather, were intended to create *fair and reasonable conditions of employment*;
 - iii. further to (and because of) sub paragraph (ii) above, the wage rates in the Three Copied State Awards manifestly exceed the rates for equivalent work under the equivalent modern awards, creating a difference in regulatory minimum payments for the same work; and
 - iv. finally, having regard to the very specific circumstances of Busways and the intended operation of the Three Copied State Awards, applying any annual wage increase decision will undermine collective bargaining for the Transferring Employees.
5. In light of these matters, and due to the special circumstances applicable to Busways (as outlined in the submissions that follow), Busways submits that the FWC should, in the case of the Three Copied State Awards, determine not to apply any federal minimum wage increase to the Three Copied State Awards.

¹ [2018] FWCFCB 2 at [43]; Annual Wage Review Decision 2017-18 at [444]

PART I - BACKGROUND

Statutory context - the introduction of copied State awards in the Fair Work Act

6. Prior to 2012, FW Act provisions related to transfers of business only extended to transfers between two national system employers.
7. In 2012, the *Fair Work Amendment (Transfer of Business) Act 2012 (Cth)* (**Transfer of Business Act**) was introduced amending the FW Act to deal with circumstances where a transfer of business occurs from a state government body employer (a non-national system employer) to a national system employer (private sector employer) as a result of a sale of assets or outsourcing of work.
8. In order to affect this change, the Transfer of Business Act created a new federal instrument in the FW Act known as a ‘copied state instrument’ which operates by copying a transferring employee’s existing terms and conditions of employment in a relevant State award or agreement into a new federal instrument known as a ‘copied state instrument’.² Although two classes of “copied State instruments” were introduced: copied State awards and copied State employment agreements, this submission is only concerned with the former.
9. The purpose of this new copied State award provision was to ensure that employees generally retain the benefit of their existing terms and conditions of employment, which have been determined by State industrial relations commissions, by retaining the terms and conditions already in place in a state award immediately before a transfer of business occurs between a state employer and an employer covered by the national workplace relations system.³
10. Copied State awards come into operation when the employment of a state public sector employee is employed by the national system employer.⁴ A copied State award continues in operation under the national system for a period of five years, unless terminated or extended by regulation.⁵
11. In addition, section 768AS(1) of the Transfer of Business Act makes clear that where a copied State award covers a transferring employee or employer, a modern award under the FW Act will not cover either party in relation to the transferring employee.

² Fair Work Amendment (Transfer of Business) Act 2012, Explanatory Memorandum, page 2.

³ Fair Work Amendment (Transfer of Business) Act 2012, second reading speech Bill Shorten MP, 11 October 2012.

⁴ Fair Work Act 2009, section 768AO

⁵ Fair Work Act, s.768AO(2)(a).

12. Section 768AW in Part 6-3A of the FW Act specifies the limited circumstances in which the FWC may vary the terms and conditions contained in a copied State instrument (including a copied State award). It also includes cross-references to Schedules in the Transitional Act where the mechanism for variation are not directly included in this section.

“768AW Variation in limited circumstances

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

(a) section 768AX; or

(b) item 20 of Schedule 3A to the Transitional Act (which deals with variation of discriminatory instruments) as that item has effect because of section 768BY; or

(c) item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY; or

(d) Division 4 of Part 3 of Schedule 11 to the Transitional Act (which deals with transfer of business) as that Division has effect because of section 768BY.”⁶

(emphasis added)

13. Item 20 of Part 5 of Schedule 9 of the Transitional Act states:

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

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

(emphasis added)

14. Section 768BY of the Transfer of Business Act provides that, from the time a transferring employee commences employment with a new (national system) employer, Item 20 of Part 5 of Schedule 9 of the Transitional Act applies in related to a copied State award in the same way as it applies to a Division 2B State award.
15. Section 285 of the FW Act provides that the Commission must review modern award minimum wages in an annual wage review. As the provisions for annual wage reviews apply to copied State awards (with the sole exception of section 292, relating to the publication of varied wage rates) in the same way that it applies to Division 2B State awards, the combined effect of s 285 (along with section sections 768AW, Item 2 in the

⁶ This section has effect by reference to section 768BY of the Transfer of Business Act which states that copied state instruments are in effect treated the same as Division 2B state instruments in the context of the Transitional Act.

table below section 768BY(1) and Item 14 in the table below section 768BY(2) of the FW Act) means the FWC must review copied state awards and may exercise its discretion in deciding whether to make a determination varying the terms of a copied State award during an Annual Wage Review.

Application of Item 20 in Division 2 of Schedule 9 of the Transitional Act

16. In order to better understand the purpose and application of the FWC's discretion with respect to the Annual Wage Review decision and copied State awards as set out above, it is beneficial to first consider how the discretion in Item 20 in Division 2 of Schedule 9 of the Transitional Act (which since 2012 also applies to copied State awards) was first applied in the context of Division 2B State Awards.
17. When the FW Act first took effect, some employers were considered new to the national system because of a referral from a state government (e.g. non-trading corporations, sole traders and partnerships in NSW, Queensland, Tasmania and South Australia). These employers would for the first time move into the national system under the FW Act on 1 January 2010.
18. As a result, the Australian Parliament enacted provisions to deal with the transition for employees and employers from State awards to modern award coverage in the Transitional Act.
19. Different rules applied to an employer and their employees, depending on whether the employer's business and / or the type of work that employees perform was covered by a State award immediately before 1 January 2010.
20. If the business and / or the type of work that the employee did was not covered by a State award immediately before 1 January 2010, the wages in modern awards applied in full from 1 January 2010 (with penalties loadings phased in).
21. If, however, the business and the type of work that employees did was covered by a State award immediately before 1 January 2010, a slower transition would apply with the terms and conditions in State awards generally continuing to apply in full until 31 December 2010, under a new federal instrument known as a "Division 2B state award". These new transitional "Division 2B state awards" would only exist for 12 months, terminating on 31 December 2010⁷, at which point coverage would move to modern awards.

⁷ Item 21(1) and (3) of Schedule 3A of the Transitional Act.

22. This meant state instruments were effectively preserved in the new national system for 12 months, with any increases in wages contained in State awards as at 1 January 2010 continuing to apply, at that point in time.
23. Further, as a result of Item 20 of Part 5 of Schedule 9 of the Transitional Act (the same section that now applies to copied State awards), the FWC had the discretion in the 2009-10 Annual Wage Review, to decide whether or not to apply the annual wage decision to Division 2B State awards.
24. During the 2009-10 Annual Wage Review, the Panel received a number of submissions on the issues from various industrial parties including unions, employer associations and state governments but after careful consideration decided not to apply the decision to Division 2B State Awards.
25. In deciding not to apply the annual wage decision to Division 2B State awards, the FWC observed that it was “*relevant that employees covered by Division 2B State awards have generally had the benefit of an increase in minimum wages in calendar year 2009.*”⁸
26. This approach was also considered “*consistent with the transitional provisions in modern awards which provide[d] for absorption of differences in pre-modern award and modern award wages into the amount awarded in this review*”.⁹

Copied State Awards and the Annual Wage Review

27. Following the introduction of copied State awards in 2012, the FWC invited interested parties during the 2012-2013 Review to comment on how copied State instruments (including copied State awards) created under Part 6-3 of the Transfer of Business Act should be considered in the Annual Wage Review.¹⁰
28. At that time, in response to the FWC consultation on transitional instruments, the ACTU submitted that any increase to copied State award rates should be differentiated on the basis of when the award’s most recent wage rates had come into effect, as some copied State awards may have included rates of pay that had been increased as a result of state Industrial Relations Commission minimum wage determinations in the previous 12 months. Specifically, the ACTU submission stated:

⁸ A significant number of NSW Division 2B State awards (“the NSW State awards) had recent wage increases flowing from the NSW State Wage Case 2009, an increase of 2.8%, and in some cases earlier State Wage Cases. A significant number of Division 2B State awards also had wage increases occurring during 2010, as late as 31 December 2010. AFEI Minimum Wage Review 2010 Submission

⁹ Annual Wage Review 2009-2010 [2010] FWAFB 4000 at [388].

¹⁰ Fair Work Commission, Annual Wage Review 2012–13: Questions for consultations, 15 May 2013 at 7.1

“[130]..because copied State awards reflect the content of State Awards as at the date those copied State awards come into operation, including orders of industrial bodies affecting those awards per section 768AI of the FW Act as amended, some of them would be affected by minimum wage cases in State industrial relations systems. We concede that it would be counter intuitive to permit “leapfrogging” of minimum rates merely by transferring from the State to the Federal system.”¹¹

(emphasis added)

29. In order to address this issue, the ACTU submitted that the FWC distinguish copied State awards in its determination by adopting the following tiered approach:

- “Copied State awards which reflect minimum rates as increased by a State industrial tribunal in the 6 months before the determination - we submit that no determination should be made in respect of those Copied State instruments.
- Copied State awards which reflect minimum rates as increased by a State industrial tribunal more than 6 months, but less than 12 months before the determination – we submit that there should be an increase of 50% of the increase (if any) provided to modern award minimum wages.
- Copied State awards which reflect minimum rates as increased by a State industrial tribunal 12 months or more before the determination – we submit that there should be an increase that matches the increase (if any) provided to modern award minimum wages.”¹²

30. The Panel in its 2012-13 Review decision acknowledged the ACTU’s submission, and determined a tiered methodology for adjusting wages in copied State awards as follows:

“[560] We have decided that for copied State awards currently in operation, **in order to limit the impact of any “double-dipping”** as a result of this decision and minimum wage increases previously awarded by state Industrial Relations Commissions, a tiered increase will be applied to these instruments in the following terms:

- an increase of 2.6 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 July 2013;
- an increase of 1.3 per cent applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 January 2013; and
- no increase applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2013 and before 1 July 2013.”¹³

(emphasis added)

31. Similar to the approach adopted with respect to Division 2B State Awards in 2010, this tiered approach to copied State awards under the same section of the Transitional Act

¹¹ ACTU Post Budget Submission, Annual Wage Review 2012-13 at [130].

¹² ACTU Post Budget Submission, Annual Wage Review 2012-13 at [130].

¹³ Annual Wage Review 2012-13 at [560].

was adopted in order to avoid a situation where employees received both the benefit of a state award increase, as well as the national wage increase during the same period.

32. This approach continued to be adopted in each of the Panel’s Annual Wage Review decisions up until 2017-18.¹⁴

Annual Wage Review 2017-18 – Significant change in approach

33. In early 2018, the FWC was forced to consider the application of the tiered approach to copied state awards due to a union application to correct an error in the wording related to the copied State award tiered approach in the 2016-17 Review decision.¹⁵

34. As a result of this application, on 4 January 2018, in publishing its decision correcting an error in the 2016-17 Review decision, the FWC expressed a provisional view that it might adopt a new approach to dealing with copied State awards, stating:

[43] “There is one final matter we wish to raise. The determination of the CPSU’s application has led us to consider the appropriateness of maintaining a tiered approach to the adjustment of copied State awards in future AWR decisions. It is our provisional view that AWR adjustments should generally apply to copied State awards, subject to a different outcomes being determined in respect of particular State awards. In other words, rather than seeking to apply a tiered approach as a decision rule to mitigate ‘double dipping’ we propose to address any ‘double dipping’ on a case by case basis”.¹⁶

35. The FWC invited submission on this provisional view to be made in the context of the 2017-2018 Review proceedings.¹⁷
36. No employer party made any substantive submission in response to the provisional view, other than ACCI, which asserted that employers would continue to require an ability to raise ‘double-dipping’ concerns with the FWC.¹⁸
37. On 1 June 2018, the Panel decided the 2017-18 Review.¹⁹ There, the Panel decided for the first time since the creation of copied State awards in 2012 (and contrary to the earlier treatment of Division 2B state awards) to alter its positions stating the following in Ch 5 at [443]-[447] and [451]-[453]:

[443] Also within this category of transitional instruments are copied State awards. These apply in relation to employees of non-national system State public sector

¹⁴ [2013] FWCFB 4000 at [560]; [2014] FWCFB 3500 at [572]; [2015] FWCFB 3500 at [536], [2016] FWCFB 500 at [593]; and [2017] FWCFB 3500 at [699].

¹⁵ [2018] FWCFB 2

¹⁶ [2018] FWCFB 2 at [43]

¹⁷ [2018] FWCFB 2 at [43]

¹⁸ [2018] FWCFB 3500 at [451]

¹⁹ [2018] FWCFB 3500

employers who transfer their employment to a national system employer as part of a transfer of business. The Panel is required to review and, if appropriate, make a determination varying minimum wages in copied State awards.

[444] The method for adjusting wages in copied State awards was the subject of a decision by the Panel issued on 4 January 2018. In that decision, the Panel expressed the following provisional view:

‘It is our provisional view that AWR adjustments should generally apply to copied State awards, subject to a different outcome being determined in respect of particular copied State awards. In other words, rather than seeking to apply a tiered approach as a decision rule to mitigate ‘double dipping’ we propose to address any ‘double dipping’ on a case by case basis. We invite submissions on our provisional view in the context of the 2017–18 Review proceedings.’

[445] Parties were invited to comment on our provisional views in the context of these proceedings.

[446] The ACTU submitted that ‘the Commission’s provisional view is consistent with the function of distinct Reviews in each year and is a more orderly approach, notwithstanding that it does rely on parties to come forward should they contend for a different outcome.’

[447] However, the ACTU also submitted that:

‘The difficulty from our perspective is the lack of certainty regarding how a future Panel might deal with an application that a different increase, or no increase, apply to employees to whom a particular copied state award applies. If the Panel were inclined to confirm its provisional view, it would in our view be usefully supplemented by an expression of support for the merits of the approach adopted in the 2012–13 decision - and re-applied to the 2016–17 decision by the correction order issued this year – when dealing with requests for an exemption.’

...

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

[452] We confirm the provisional view expressed in our decision of 4 January 2018. The adjustment to the rates in modern awards that we have determined in this Review will be applied to copied State awards.

[453] There is no requirement to publish the variations.

(emphasis added, footnotes omitted)

38. The Commission set out its conclusions in chapter 6 of the decision as to variations of copied State instruments as follows:

[495] In relation to transitional instruments, from the first full pay period on or after 1 July 2018, wages in those instruments will be varied by 3.5 per cent per week, with commensurate increases in hourly rates based on a 38-hour week. Copied State awards will be varied on the basis discussed in Chapter 5 of this decision.

39. The consequence of the decision to abandon the tiered approach first adopted in 2012-13 was to treat all copied State awards on the basis that, regardless of whether they had recently had increases to wages on account of previous State Industrial Relations Commission determinations, the Annual Wage Review would be paid on top of the rate of pay as it stood on 30 June.²⁰ This in turn meant that employees under copied State awards could receive multiple wage increases in the same calendar year.
40. Importantly, however, at all times the Commission left open the ability for individual employers to seek differential treatment from the general approach adopted in order to avoid ‘double-dipping’ scenarios.
41. The Commission applied a similar methodology and reasoning in arriving at its decisions in its next three annual wage reviews,²¹ namely, to vary copied State awards in line with the Annual Wage Review decisions applying to modern awards.
42. Despite the Panel’s offer to deal with any “double dipping” matters that may arise with respect to copied State awards on a “case-by case basis”, Busways is unaware of any submissions being made to date regarding individual copied State awards in any Annual Wage Reviews since the change of approach in 2017-18, until now.

²⁰ [2012] FCA 1436 at 55

²¹ [2019] FWCFB 3500 at [460]); [2020] FWCFB 3500 at [471]; [2021] FWFCB 3500 at [306]-[308]

Part II - The Circumstances of Busways

- 43. Busways is a bus service company that presently operates bus services throughout NSW and South Australia.
- 44. In 2021, Busways successful tendered for the right to acquire from the NSW State Government the right to operate services under Greater Sydney Bus Contract 7²², which operates primarily in the North-West suburban region of metropolitan Sydney.
- 45. As a part of the tender process, Busways was required to offer employment to many of the STA’s operational employees upon commencement of services (namely, the Transferring Employees).²³
- 46. By operation of Part 6-3A of the FW Act, the engagement of the Transferring Employees by Busways constituted a transfer of business and gave rise to the creation of the Three Copied State Awards.

The terms of Busways’ agreement with TfNSW

- 47. Busways’ tender bid was based on a costing regime that factored in the terms, conditions and anticipated wage increases in the State Awards on 1 January 2022, which covered STA and its employees at the time of the tender as determined by the NSW IR Commission.²⁴
- 48. Under the contract entered into between Busways and the NSW State Government (the specific terms of which are commercial in confidence), Busways provides a passenger bus service to the NSW State Department, Transport for NSW (TfNSW). In providing this service, Busways does not have a direct financial relationship with customers who travel on its passenger bus service. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²² Witness Statement of William O’Neill at [7], [13] (O’Neill Statement)
²³ O’Neill Statement at [14(a)]
²⁴ O’Neill Statement at [14], [15]
²⁵ O’Neill Statement at [24]
²⁶ O’Neill Statement at [18]-[21]

Treatment of wage fluctuations for Busways' labour

51. Naturally, over the course of Busways' 8 year contract, the cost of its labour is likely to increase over time.
52. It is very common in the NSW private sector bus industry that these increases are regulated by enterprise agreements.²⁷ Busways has given evidence that both it and the relevant unions representing a large number of the Transferring Employees are intending on implementing enterprise agreements in the very near future (ie. this year) to regulate conditions of the Transferring Employees (including wage entitlements). It is expected that enterprise agreements will shortly apply to the Transferring Employees,²⁸ thereby preventing the parties from being the subject of future annual wage review increases.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

54. These wage increases underpin the enterprise bargaining between the parties and it is common in the industry for the timing and quantum for wage increases to align with the relevant bus operator contracts with TfNSW.³⁰
55. Notwithstanding the above, given that Busways has only recently entered into the Greater Sydney Bus Contract 7, enterprise agreements are not likely to be in place by 1

²⁷ O'Neill Statement at [28]-[30]

²⁸ O'Neill Statement at [29]-[34]

²⁹ O'Neill Statement at [18]

³⁰ O'Neill Statement at [20]

July 2022 - when the Three Copied State Awards would ordinarily be varied by the FWC's annual wage review.

56. This means that, without a deviation in course by the FWC with respect to the Three Copied State Awards, Busways' typical approach to processing wage increases (and the approach which is funded through its contract with TfNSW) is likely to be overridden - exposing Busways to unbudgeted financial costs, which are significant.³¹
57. In fact, Mr O'Neill estimates that the actual cost for Busways will be approximately [REDACTED] over the life of the contract. This figure has been calculated by adding a nominal 3% wage increase to all expected employee wages (covered by the Three Copied State Awards) for the life of Busways' contract on top of:
- a. the 1 January 2022 increase already determined by the NSW Industrial Relations Commission; and
 - b. annual increases in future years.

Increases already received by the Transferring Employees

58. Under the Three Copied State Awards, wage increases are provided for every 12 months based on a former determination of the NSW Industrial Relations Commission arrived at by consent between the parties under the State awards.
59. As at the time of this year's annual wage review decision, 1 July 2022, the Busways employees covered by the Three Copied State Awards will have already had the benefit of the following wage increases within the last 6 months:
- a. employees operating under *the Copied State Transit Authority Bus Operations Enterprise (State) Award 2021*, a **2.5%** wage increase on 1 January 2022;
 - b. employees operating under the *Copied State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020*, a **2.04%** wage increase on 1 April 2022; and
 - c. employees operating under the *Copied State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021*, a **2.04%** wage increase on 1 January 2022.
60. These wage increases set out above were naturally factored into Busways' bid in relation to the Greater Sydney Bus Contract 7 tender and were a significant factor in determining

³¹ O'Neill Statement at [26]-[27]

the contract price. Busways is not remunerated by TfNSW for any further increases in the wages under the Three Copied State Awards this year.³²

³² O'Neill Statement at [21]

Part III Why the Fair Work Commission should not apply any increase to the copied State awards covering Busways that have already had the benefit of a wage increase in the preceding six months?

61. When the FWC changed its approach to copied State awards in the 2017-18 Annual Wage Review decision, it stated that going forward it would “address any ‘double dipping’ on a case-by-case basis”³³
62. Busways respectfully submits that the Three Copied State Awards covering it and the Transferring Employees (who have already been subject to minimum wage increases this calendar year) should not be subject to the 2021-22 Annual Wage Review decision for the following four reasons.

Jurisdictional distinction

63. Firstly, the current uniform approach of applying the adjustment to the rates in modern awards determined in the Annual Wage Review directly to all copied State awards should be reconsidered in the case of Busways’ Three Copied State Awards due to the significant jurisdictional differences between NSW and Commonwealth approaches to both setting and increasing of award wages.
64. Busways’ Three Copied State awards duplicate existing terms and conditions of employment contained in State Awards which are already affected by wage increases previously determined and set by the NSW Industrial Relations Commission (NSW IR Commission).
65. Whilst some states like Queensland operate in a manner consistent with the current national approach, with yearly general wage rulings of the Queensland’s Industrial Relations Commission uniformly amending wages in all state industrial instruments including State Awards in accordance with the purpose of the State Act³⁴, other states like NSW operate in an entirely disconnected manner that does not accord with the national approach or any other state jurisdictions Industrial Relations statutes.
66. In NSW, the Industrial Relations Commission may make an award in accordance with section 10 the Industrial Relations Act 1996 (NSW) (**NSW IR Act**) “*setting fair and reasonable conditions of employment for employees*” which typically includes the setting of wages and wage increases in the particular State award being made.³⁵

³³ [2018] FWCFB 2 at [43]; Annual Wage Review Decision 2017-18 at [444]

³⁴ Industrial Relations Act 2016 (Qld) s 3 and s 458

³⁵ Industrial Relations Act 1996 (NSW) section 10.

67. This approach to setting and increasing wages in NSW State awards is entirely different its application to the National minimum wage setting approach in three ways:
68. **Firstly**, unlike modern awards in the national system, NSW State Awards are largely determined by the NSW IR Commission by consent between the parties to which the award applies, particularly in circumstances like Busways where an award sets the conditions of employment for employees of a single employer.³⁶ This enables operational considerations to influence the specific rate increase and, as a result, the increases determined may go beyond the typical considerations that govern federal award minimum wage increases. That is, the enterprise specific awards tend to be ‘*paid rates awards*’ (that is, awards setting the actual rate of pay) as opposed to ‘*minimum wage awards*’ (that is, awards setting a minimum safety net for payments that do not necessarily reflect the actual wages paid to employees).
69. **Secondly**, there is no general overriding minimum wage decision made by the NSW IR Commission which automatically affects all NSW State awards. Whilst there is a yearly NSW State Wage Case which considers whether the minimum wage decision in the Annual Wage Review should be adopted in State awards,³⁷ the NSW IR Act does not mandate the adoption of the minimum wage decision and, as early as 1993, the NSW IR Commission decided that the adjustment provided by the Annual Wage Review decision would not be applied to paid rates awards.³⁸ This approach was later formally adopted in the NSW Wage Fixing Principles in the following terms “*the State Wage Case adjustments will only be made in respect of rates in awards which have not been increased, other than by State Wage Case adjustments*”.³⁹ Since 2010, all adjustments to awards ordered as part of State Wage Cases have been made only to minimum wage awards. As acknowledged by the NSW IR Commission in the State Wage Case 2010:

[27] “Since 2006 there has been such a disconnect between the federal system of fixing minimum wages and that applicable in New South Wales...”

[28] “...we do not consider it to be an option to abandon the concept of wage fixing principles in order to follow the federal example. Whilst federally such principles may have no utility because of the federal approach to wage fixing

³⁶ Industrial relations Act 1996 (NSW), sections 15 and 17.

³⁷ Industrial Relations Act 1996 (NSW) section 50(1)

³⁸ (1993) 52 IR 157

³⁹ Wage Fixing Principles, sub principles 4.1 and 4.2 as determined in the State Wage Case 2019 [2019] NSWIRComm 1065.

and the absence of access to arbitration in the ordinary course, that is not the case under New South Wales law.”⁴⁰

70. Following the above reasoning, the Three Copied State Awards were not subject to the NSW State Wage Case but were subject to their own specific wage rate increases.

71. **Thirdly**, the Annual Wage review, in line with the modern awards objective of “*providing a fair and relevant minimum safety net of terms and conditions*”, sets minimum award wages. This is to be contrasted with the situation under the NSW IR Act (and the Three Copied State Awards), where wages and wage increases that are provided for are not a minimum safety net. Rather, they are what is determined by the independent NSW IR Commission to be “*fair and reasonable*” terms and conditions of employment.⁴¹ As was outlined by the Full Bench in the *City of Sydney Wages/Salary Award 2014 Case*⁴², in considering what constitutes “fair and reasonable” under section 10 of the NSW IR Act:

“[19] The terms 'fair' and 'reasonable' in s 10 of the Act import a requirement that the conditions of employment set represent a proper and proportionate balance between the entitlements afforded employees and the interests of those employing them.

[20] Consideration of what is fair and reasonable for an employee will necessarily involve a consideration of what is fair and reasonable having regard to the nature and circumstances of the employment afforded to the employee by an employer. That inquiry cannot be made in a vacuum. It must also extend to the broader context in which the employment occurs and ultimately, by effect of s 146 of the Act, the state of the economy in New South Wales.

[21] The assessment required by s 10 will often involve consideration of collective relations between unions and employers or employer associations and, in appropriate cases, consideration of the history of terms and conditions that the parties chose to apply, formally and informally, to employees who will now be covered by the proposed award.

[22] In particular cases, the Commission may be required to take into account not only differences between employers or industries in which employment is undertaken, but relevant differences between employees or classes of employees in a workplace, enterprise, project or industry. What may represent a fair and reasonable condition for one set of employees may not be for another, even where the employees are engaged

⁴⁰ State Wage Case 2010 [2010] NSWIRComm 183 at [28].

⁴¹ Unions NSW Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Bill 2008, page 11.

⁴² [2014] NSWIRComm 49

by the same employer. That particular assessment may depend on the history as well as consideration of the present circumstances of the work to be performed.”

72. The wage increases contained in the Three Copied State Awards that have already applied to Busways’ and its employees in first half of 2022 do not reflect an increase to minimum wages but an increase to ‘fair and reasonable’ terms and conditions as determined by the NSW IR Commission. To apply a further increase on top of wages that have been determined to be fair and reasonable for a 12 month period on the basis of Federal minimum wage setting principles to that same industrial instrument is to do something other than setting a minimum wage and would in practice be contrary to the very principles and objectives the FWC Panel is to apply in determining the Annual Wage Review.

Fairness

73. Secondly, in determining the award wage that would be consistent with the need to provide a “fair and relevant safety net of terms and conditions”⁴³ fairness is said to be assessed from the perspective of both employees and employers, and the term ‘relevant’ is intended to convey that modern awards should be suited to contemporary circumstances.

74. If the 2021-22 Review decision is applied to the Three Copied State Awards covering Busways and its employees, it will not be fair on Busways as an employer, as it will require Busways to provide two wage increases under each of the Three Copied State Awards within a six-month period. One imposed by the NSW Industrial Relations Commission, the other by virtue of being subject to the Annual Wage Review decision.

75. Two wage increases in a six-month period would be difficult for most employers to manage and implement but is especially problematic for Busways as a result of the contractual arrangements placed on it by the NSW State Government pursuant to the tender process for the Greater Sydney Bus Contract 7 bus passenger services. Specifically, under Busway’s contract with the NSW State Government, [REDACTED]
[REDACTED]
[REDACTED]⁴⁴, meaning Busways has no ability to take any ameliorating action to recuperate and cover losses if they are subject to a further unplanned wage increase. Therefore, if the Annual Wage Review decision applies to Busways it will unfortunately

⁴³ Fair Work Act section 134

⁴⁴ O’Neill Statement at [22] - [25]

have a direct impact on the businesses' profitability and accordingly sustainability going forward. The value of this cost is substantial - approximating to [REDACTED].⁴⁵

76. Conversely, not applying the Annual Wage Review decision to the Three Copied State Awards that have already had increases in the past six months does not mean Busways' employees will miss the benefit of future Annual Wage Review decisions.
77. The most likely outcome is that employees will be entitled to future wage increases from 1 January 2022 pursuant to the enterprise agreements Busways expects to implement with the relevant unions.⁴⁶ Bargaining for such agreements will be underpinned by the common knowledge that Busways is due to receive an increase to its remuneration from TfNSW on 1 January 2023 (equivalent to WPI), which is inevitably going to flow to the Transferring Employees.
78. If exempted from the Annual Wage Review decision, Transferring Employees will not lose future increases to their safety net and will not be faring worse off than had they instead been covered by the relevant modern award and subject to the Annual Wage Review decision.⁴⁷
79. In addition, Busways has inherited an instrument that, unlike the Annual Wage Review decision, was made by consent. As a result, Busways had a fair and reasonable expectation in tendering for and being subject to the transfer of business from the NSW State Government that no further minimum wage adjustments could be expected beyond those contained in the State Award covering it and its transferring employees until twelve months after the last increase.
80. Operating on that fair and reasonable basis, Busways submits that permitting the leapfrogging or double dip hit of wage increases in the Three Copied State Awards merely by nature of their transfer from a state to the federal system would not be consistent with the need to provide a 'fair and relevant safety net of terms and conditions'

Disparity between Copied State Award wages and Modern Award Wages

81. Thirdly, there is already a disparity between the wages currently paid under the Three Copied State Awards applying to Busways and those applicable under the equivalent

⁴⁵ O'Neill Statement at [27]

⁴⁶ O'Neill Statement at [31]-[33]

⁴⁷ This argument is developed further overleaf, where the Three Copied State Award rates are compared to modern award rates

modern awards: the *Passenger Vehicle Transportation Award 2020*, the *Vehicle Repair, Services and Retail Award 2020* and the *Clerks -Private Sector Award 2020*, as shown in Table 1 below.

Table 1 – Example of difference between Copied State Award and Modern Award Wages – 2022

Classification (equivalents across the modern/copied State Award)	Weekly Rate	Difference
Passenger Vehicle Transportation Award 2020 Grade 3 – full time	\$902.50	+22.78%
Copied State Transit Authority Bus Operations Enterprise (State) Award 2021 Bus Operator Level 2 (equivalent to Grade 3 above)	\$ 1108.10	\$205.60
Passenger Vehicle Transportation Award 2020 Grade 4 – full time	\$934.20	+20.87%
Copied State Transit Authority Bus Operations Enterprise (State) Award 2021 Senior Bus Operator (equivalent to Grade 4 above)	\$ 1129.20	\$195.00
Passenger Vehicle Transportation Award 2020 Grade 6 – full time	\$1,029.20	+18.8%
Copied State Transit Authority Bus Operations Enterprise (State) Award 2021 Bus Operator Trainer 2 (equivalent to Grade 6 above)	\$1222.30	\$193.10

Classification (equivalents across the modern/copied State Award)	Weekly Rate	Difference
Clerks – Private Sector Award 2020 Level 1 – Year 1 - full time	\$821.40	+16.3%
Copied State Transit Authority Senior and Salaried Officers Enterprise (State) Award 2021 Clerk Grade 1', 1 st year (equivalent to Level 1 above)	\$ 955.63	\$134.23
Clerks – Private Sector Award 2020 Level 5 – full time	\$1038.20	+52.24%
Copied State Transit Authority Senior and Salaried Officers Enterprise (State) Award 2021 Clerk Grade 6', 3 rd year (equivalent to Level 5 above)	\$1580.52	\$542.32

Classification (equivalents across the modern/copied State Award)	Weekly Rate	Difference
Vehicle Repair, Services and Retail Award Vehicle Industry RS&R Level 1 – full time	\$772.60	+27.5%
Copied State Transit Authority Bus Operations Enterprise (State) Award 2021 Engineering Repair Assistant Level 1: (equivalent to RS&R Level 1 above)	\$985.10	\$212.50
Vehicle Repair, Services and Retail Award RS&R Tradesperson Level 1 – full time	\$899.50	+36.9%
Copied State Transit Authority Bus Operations Enterprise (State) Award 2021 Engineering Repair Tradesperson Level 1: (equivalent to RS&R Tradesperson Level 1 above)	\$1231.10	\$331.60
Vehicle Repair, Services and Retail Award RS&R Level 4 – full time	\$853.60	+42.16%
Copied State Transit Authority Bus Operations Enterprise (State) Award 2021 Storeperson (equivalent to RS&R Level 4 above)	\$1213.50	\$359.40

82. If there is a further increase to rates of pay in the Three Copied State Awards (which are already higher than rates of pay in the Modern Award) then this will lead to a clear disparity between Busways and other national system employers as Busways will be subject to cost increases resulting from both the NSW State industrial body and the Fair Work Commission.
83. Moreover, given that the modern awards set the safety net of “*fair minimum wages*”, and that ensuring fair minimum wages governs the exercise of the FWC’s discretion during the annual wage review⁴⁸, it is not apparent why the FWC should exercise a discretion during the annual wage review to increase wages awards applying to one particular business that extend beyond the modern award wages for employees performing exactly the same type of work.

The need to encourage collective bargaining

84. Finally, even though the ‘need to encourage collective bargaining’ is not an element of the minimum wages objective, this is an important consideration for the Expert Panel because it is an element of the modern awards objective.⁴⁹

⁴⁸ See minimum wages objective at s284 of the FW Act

⁴⁹ Annual Wage Review 2015-16 Decision, [519]

85. At the theoretical level, the Panel has previously endorsed and often re-stated the proposition that the gap between minimum wages and bargained wages is likely to increase employee's incentive to bargain.
86. State awards transfer over to the national system as copied State award with a finite life. They have an operational existence of up to five years,⁵⁰ with the objective behind such an arrangement said to encourage parties in the interim period to seek to bargain for an enterprise agreement.⁵¹
87. However, if wages under the Three Copied State Awards already leapfrogged equivalent arrangements in similar business/industries (due to the impact of two wage increases in a 6 months period), any incentive to Busways to bargain will be dissolved. In fact, such an approach is likely to render any interest from Busways in operating under an enterprise agreement significantly less attractive and less economically viable.

⁵⁰ Fair Work Act section 768AK

⁵¹ Fair Work Amendment (Transfer of Business) Act 2012, second reading speech, Bill Shorten, 1 November 2012

Part IV – Outline of Specific Findings Sought by Busways

88. For the reasons set out above at Parts I to III above, Busways submits that the FWC should exercise its discretion under section 768AW(c) of the FW Act with respect to Busways' unique circumstances by excluding the Three Copied State Awards from the Annual Wage Review decision, in recognition of Busways' unique circumstances and because the employees covered by the Three Copied State Awards have already had the benefit of an increase in wages in the calendar year 2022.
89. As this submission has sought to make clear there is a strong case⁵² for the FWC take a more nuanced case-by-case approach to applying any annual wage review decision to copied State awards which cover Busways.

Filed for and on behalf of Busways North West Pty Ltd

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1 April 2022

⁵² [2020] FWCFB 3500 at [145]

**IN THE FAIR WORK COMMISSION
ANNUAL WAGE REVIEW 2021-22**

WITNESS STATEMENT OF WILLIAM O'NEIL DATED 30 MARCH 2022

I, William O'Neil, of 5 Bridge Street Pymble NSW 2073, say as follows:

Background

1. I am the Chief Financial and Commercial Officer (**CFCO**) of Busways Group Pty Ltd (**Busways**).
2. I have held the position of CFCO for approximately 3 and a half years, since on or around October 2018.
3. Prior to this, from about October 2014 to around May 2017 I held the position of Director - Group Strategic Development.
4. I joined Busways in or around October 2014 in the position of Group Manager, Strategy.
5. Prior to joining Busways, I was an Executive Director of Kelly+Partners Chartered Accountants and prior to this a Partner at KPMG.
6. In my role as CFCO, I am responsible for, amongst other things:
 - (a) The tendering activities of Busways, including pricing and scoping of bids for new work.
 - (b) The day-to-day financial operations of Busways.
 - (c) The commercial matters pertaining to Busways including, having an involvement in the oversight of contractual commitments.
7. In particular, I was intimately involved in the tendering activities and contract negotiation process for the Greater Sydney Region 7 (**Region 7**) bid to perform passenger transport services for Transport for New South Wales (**TfNSW**) which Busways ultimately succeeded in winning in or about July 2021.

Bus passenger transport industry in Sydney

8. In the Greater Sydney region, TfNSW contracts out the performance of public passenger bus services to a range of different providers and operators for each region.
9. One of those providers and operators is a Government owned entity, namely, the State Transit Authority of New South Wales (**STA**).
10. Other regions in Greater Sydney are serviced by private operators, of which Busways is one.

Region 7

11. On or around 2020, TfNSW commenced the process to request tendering of bids for the Greater Sydney regions 7, 8 and 9 to procure new private bus operators for each region.
12. At the time, each region was serviced by buses operated by the STA. For historical reasons that are not presently relevant, the employees delivering the bus services were employed by the Crown in New South Wales, working for the STA (**the Transferring Employees**).

13. Busways lodged its bid to perform services in Region 7 on 18 December 2020.
 14. Whilst the requirements of the request for tender by TfNSW are commercial in confidence and Busways is contractually bound to keep them confidential, the following factors that dictated Busways' tender bid and are in the public domain are as follows:
 - (a) Tenderers were required to offer employment to the Transferring Employees in each region.
 - (b) There were three industrial instruments operating at the time the tenders were offered, being:
 - (i) the *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020* (**Bus Engineering and Maintenance Award**);
 - (ii) the *State Transit Authority Bus Operations Enterprise (State) Award 2021* (**Bus Operations Award**); and
 - (iii) the *State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021* (**Senior and Salaried Officers Award**).(Together, the **Three Copied State Awards**).
 - (iv) A copy of each of the Three Copied State Awards is annexed and marked "A", "B" and "C".
 - (c) An express requirement of the tendering process was that the successful bidder would comply with the transfer of business provisions outlined in the *Fair Work Act 2009* (**FW Act**) - meaning that the instruments governing the Transferring Employees would transfer to Busways. This included the Three Copied State Awards.
 - (d) At the time of the request for tender, no specified wage increase for the Transferring Employees covered by the Bus Operations Award was in place for 2022 as this was yet to be negotiated with TfNSW. However, bids were required to be made taking into account that an increase of wages would take place from 1 January 2022. That is, bidders were to expect a wage increase on 1 January 2022 – although the amount of the wage increase was yet to be determined.
15. Ultimately, as is now clear from documents in the public domain, a wage increase of 2.5%, inclusive of superannuation, was agreed to between TfNSW and the Transferring Employees as part of New South Wales Industrial Relations Commission proceedings held in 2021 pertaining to the Bus Operations Award. Following this development, by 1 January 2022, the Transferring Employees were entitled to the following wage increases under their respective NSW Awards;
 - (a) Transferring Employees covered by the Bus Operations Award were entitled to a 2.5% increase inclusive of superannuation (which equates to a 2.04% wages only increase) on 1 January 2022.
 - (b) Transferring Employees covered by the Bus Engineering and Maintenance Award were entitled to a 2.5% increase inclusive of superannuation (which equates to a 2.04% wages only increase) on 1 April 2022.
 - (c) Transferring Employees covered by the Senior and Salaried Officers Award were entitled to a 2.5% increase inclusive of superannuation (which equates to a 2.04% wages only increase) on 1 January 2022.

Tendering process

16. During the process of tendering for Region 7, Busways was required to submit its costings for the bid.

cost for Busways will be approximately [REDACTED] over the life of the contract. This figure has been calculated by adding a 3% wage increase to all employee wages for the life of the contract on top of:

- (a) the 1 January 2022 increase; and
- (b) annual increases in future years.

Bargaining in the industry

- 28. The private passenger transport industry in NSW is widely and generally known to engage bus driving employees under an enterprise agreement as the primary instrument to apply to its workforce.
- 29. All six of Busways' main operator competitors in the NSW private sector bus industry currently engage their bus driving employees under enterprise agreements, which all provide for yearly wage increases. These include the following agreements:
 - (a) *Interline Bus Services and Transport Workers Union of Australia Fair Work Agreement 2018*
 - (b) *Transit (NSW) Services Pty Ltd, Transport Workers Union and Bus Drivers Enterprise Agreement 2017*
 - (c) *CDC and TWU Drivers Agreement 2018*
 - (d) *Transdev NSW Bus Enterprise Agreement 2018-2021*
 - (e) *Forest Coach Lines Passenger Vehicle Drivers Enterprise Agreement 2019*
 - (f) *Busabout and the Transport Workers' Union of Australia Fair Work Agreement 2018.*
- 30. All of Busways' bus contracts in Australia also involve the provision of driving services by bus driving employees who are governed by enterprise agreements, namely:
 - (a) *Busways Group, Transport Workers' Union of Australia and Drivers Enterprise Agreement 2018*
 - (b) *Busways SA Bus Drivers Enterprise Agreement 2021*
 - (c) *Busways Pacific Fair Work Agreement 2020*
 - (d) *Busways, Transport Workers' Union of Australia and Drivers Enterprise Agreement 2020.*

Bargaining at Busways in Region 7 for bus drivers

- 31. Busways is imminently about to commence enterprise bargaining for an agreement to cover its Region 7 bus driving employees.
- 32. Notices of Employee Representational Rights were issued to the Region 7 workforce on 16 February 2022 and the first bargaining meeting has been scheduled to be held on 6 April 2022. The Australian Rail Tram and Bus Industry Union (**RTBU**) will be involved in this bargaining process as will other employee bargaining representatives.
- 33. It is mine and Busways' expectation that a new enterprise agreement will be implemented this year which provides for wage increases from 1 January 2023 going forward, to ensure that employees continue to receive wage increases on a yearly basis, on top of their existing 1 January 2022 increase under the Bus Operations Award.

Other region 7 employees

- 34. In relation to the other employees engaged in Region 7:

- (a) It is Busways' intention to commence negotiations with the employees covered by the State Transit Authority *Senior and Salaried Officers (State) Award 2021* for a replacement agreement in advance of the copied State Awards expiry date of 31 December 2022. This will ensure that these employees receive an annual increase on or about 1 January 2023 and ongoing increases under any replacement Agreement.
- (b) The *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020* expires 31 March 2023. Busways will commence negotiations for a replacement agreement in advance of the of the copied State Awards expiring. This ensures that employees covered by this copied State Award receive an annual increase on or about 21 March 2023 and ongoing increases under any replacement Agreement.



William O'Neill

30 March 2022

Date