

AUSTRALIAN BUSINESS INDUSTRIAL

C2023/1 – ANNUAL WAGE REVIEW – COPIED STATE AWARDS

SUBMISSION

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

17 FEBRUARY 2023

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.

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1. INTRODUCTION

- 1.1 The following submissions are made by the Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the Directions issued by the Fair Work Commission (**Commission**) on 13 December 2022 related to the future treatment of copied State awards by the Expert Panel in undertaking the Annual Wage Review each financial year.

2. SUMMARY POSITION

- 2.1 For the reasons set out further below, ABI and Business NSW submit that the Fair Work Commission should determine 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, as has been the Commissions practice since the 2017-2018 Annual Wage Review decision.
- 2.2 Instead the Commission should adopt a new approach to copied State awards which only applies the Annual Wage Review decision to copied State awards where a case is made to do so, following submissions by parties with respect to individual copied State awards during the Annual Wage Review process
- 2.3 Should the Commission decide not to follow the above and instead decide to maintain a default approach which applies the Annual Wage Review decision to copied State Awards, it should nevertheless do the following:
- (a) exempt copied State awards which exist as a result of public sector employees transferring from the NSW industrial relations systems to the national system from the default approach applying the Annual Wage Review decisions to copied State awards; and/or
 - (b) limit any applicable increases to copied State awards wage rates to operate so as to only ensure that the rates of pay in the copied State Award equate to the equivalent rates in Modern Awards. That is, the increases should go no further than ensuring that the copied State Award wages equate to the modern award classification rates for the same work.

3. DISPROPORTIONATE IMPACT OF COPIED STATE AWARDS ON NSW BUSINESSES

- 3.1 Business NSW (and its industrial affiliate, ABI) is the peak body representing business and employers in New South Wales (NSW).
- 3.2 Business NSW is concerned that the current default approach to copied State award and the implementation of the Annual Wage Review is having a disproportionately negative

impact on NSW businesses compared with other states, as a result of its strength in asset recycling.

3.3 Whilst there is no specific data about the exact number of copied State awards in operation according to the Commission,¹ ABI and Business NSW submit that it is still possible to draw conclusions about the quantum of copied State awards coming into existence and their originating state industrial relations jurisdiction by reference to the level of asset recycling or privatisation that is going on in any particular state at one time. This is because it is far more likely that copied State awards will be coming into existence in states where there are higher rates of asset recycling/privatisation of public assets.

3.4 ABI and Business NSW submitted to the 2021-2022 Annual Wage Review that:

“The distribution of ‘privatisable’ assets among Australian states and territories is highly skewed, with NSW holding the largest holding of government businesses.² 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.³ This trend is likely to continue in the state over coming years.⁴ 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.”⁵

3.5 This position of ABI and Business NSW remains unchanged for the purposes of the 2022-2023 Annual Wage Review and hearings related to the approach to copied State awards. NSW is still far and away the state which has and is divesting the largest number of public assets to the private sector. This is well evidenced by the below charts from Infrastructure Partnerships Australia, which graphically highlights the disproportionate number, value and volume of public asset sales transactions by NSW compared to all other Australian state and territory jurisdictions since the Fair Work Amendment (Transfer of Business) Act 2012 (Cth) introduced copied State awards in the national industrial relations system.

¹ Annual Wage Review 2016-17 [2018] FWCFB at [10] and [559]

² The Australian Institute submission to the Asset Recycling Program, Submission 15, January 2015, pages 7 and 8.

³ Review of the National Partnership Agreement on Asset Recycling, January 2019, page 5.

⁴ 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.

⁵ ABI Submission, 6 May 2022, page 3.

Chart 1 – Value and volume of asset sale transaction between 2012 and 2022, Infrastructure Partnerships Australia

PRIVATISATIONS BY JURISDICTION

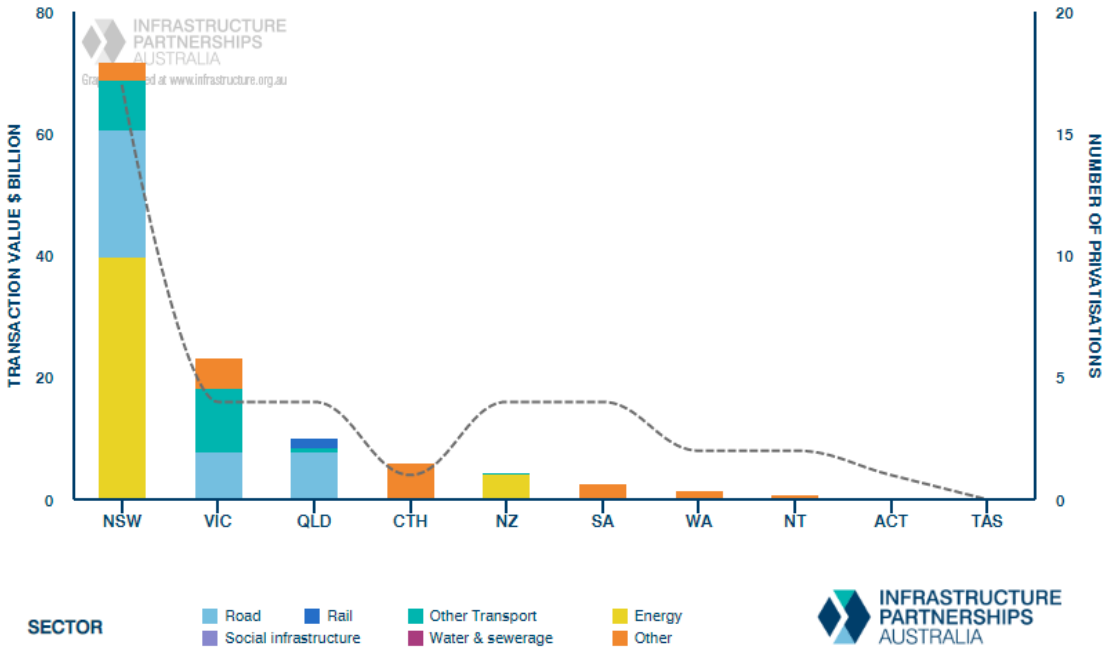
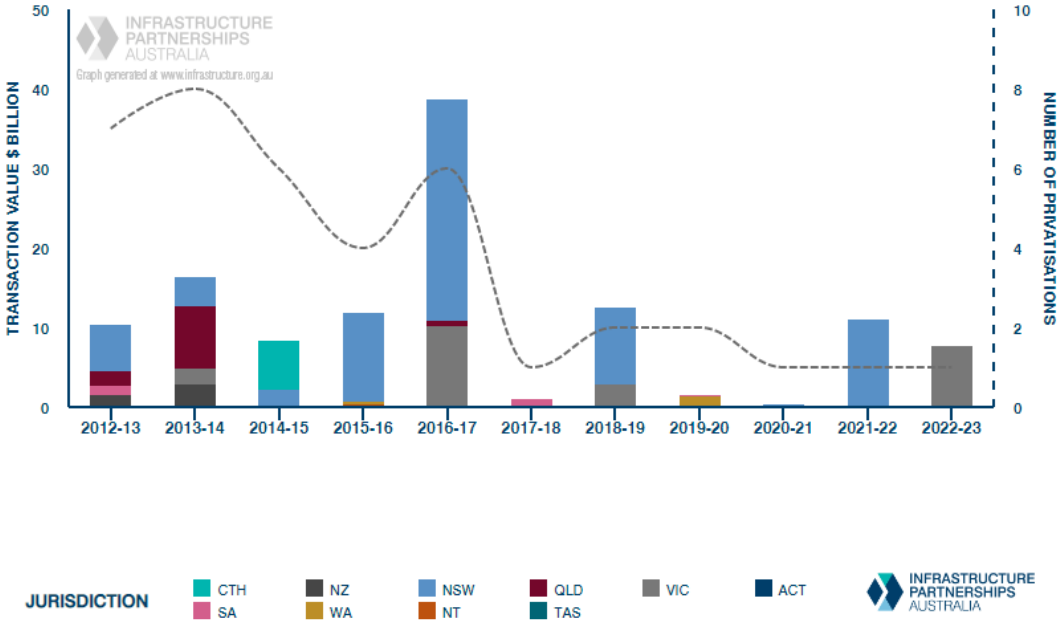


Chart 2 – Privatizations by year 2012-13 to 2022-23, Infrastructure Partnerships Australia

PRIVATISATIONS BY YEAR



- 3.6 The disproportion rate of privatisation and therefore in the corresponding numbers of copied state awards in NSW means any decision of the Fair Work Commission regarding the application of the Annual Wage Review to copied State awards will have a correspondingly higher impact on NSW businesses.
- 3.7 A greater weight should therefore be attributed to issues that arise as a result of the jurisdictional differences between NSW and the National system as set out in Part 4 below. As well as the views and opinions of those who operate in NSW and are subject to copied State awards, given the disproportionate impact any decision regarding the application of the Annual Wage Review to copied State awards will have on NSW businesses.

4. JURISDICTIONAL DIFFERENCES BETWEEN NSW & NATIONAL WAGE SETTING ARRANGEMENTS

4.1 NSW State wage reviews operate in an entirely different and disconnected manner that does not accord with the national approach or any other state jurisdictions Industrial Relations statutes.

4.2 As the Commission acknowledged during the 2021-2022 Annual Wage Review:

[376] “.... much has been made of the different nature of awards made under the NSW industrial relations system and modern awards; and we think correctly so. The IRCNSW’s statutory functions of ‘setting fair and reasonable conditions of employment for employees’ is different to our objectives in an annual wage review and in particular pursuant to the minimum wages objective in s.284 (‘establishing and maintaining a safety net of fair minimum wages’) the modern awards objective in s.134 (ensuring that ‘modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions’) and s.3(b) of the Act (‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions’).”

4.3 The specific jurisdictional differences between the NSW and the national industrial relations systems were well canvassed by Transit Systems⁶ in their initial submission to the 2021-2022 Annual Wage Review and are exemplified by the submission of Busways in this yearly annual wage review.⁷ Accordingly we do not intend on repeating the differences here in detail, except to emphasise that:

- (a) as a result of the jurisdictional differences between the NSW and the National systems of wage setting systems, wage rates in copied State awards that have transferred from the NSW industrial relations system can often be far in excess of

⁶ Transit Systems Initial Submission, dated 1 April 2022.

⁷ Busways Submission, dated 17 February 2023 at [39] to [41].

the wage rates in comparable modern awards. This is well documented by Busways submission to this years Annual Wage Review which shows a marked difference between the state award wages for applicable classifications and the equivalent modern award wages for the same work;⁸ and

- (b) this misalignment (which does not affect copied State awards that have come into existing by virtue of other state jurisdiction such as Queensland, South Australia or Tasmania) serves to disproportionately and negatively impact NSW business operating under copied State awards where they are also subject to the Annual Wage Review decision.

4.4 ABI and Business NSW therefore encourage the Commission to both recognise the jurisdictional discrepancies which effect NSW and adopt a greater level of nuance in its approach to the interaction between NSW state awards and the national industrial relations system when exercising its copied State award discretionary powers in the Annual Wage Review.

5. CONCLUSION

5.1 Moving forward, in order to ensure unfair outcomes do not arise from the application of the Annual Wage Review to copied State Awards, particularly copied State award originating in NSW, ABI and Business NSW submit that the following approach should be adopted going forward:

- (a) 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, as has been the Commissions practice since the 2017-2018 Annual Wage Review decision.
- (b) Rather the Commission should instead adopt a new approach to copied State awards which only applies the Annual Wage Review decision to copied State awards where a case is made to do so, following submissions by parties with respect to individual copied State awards during the Annual Wage Review process.
- (c) Finally, should the Commission decide not to follow the above and instead decide to maintain a default approach which applies the Annual Wage Review decision to copied State Awards, it should nevertheless do the following:
 - (i) exempt copied State awards which exist as a result of public sector employees transferring from the NSW industrial relations systems to the

⁸ Ibid.

national system from the default approach applying the Annual Wage Review decisions to copied State awards; and/or

- (ii) limit any applicable increases to copied State awards wage rates to operate so as to only ensure that the rates of pay in the copied State Award equate to the equivalent rates in Modern Awards. That is, the increases should go no further than ensuring that the copied State Award wages equate to the modern award classification rates for the same work.

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