

BEFORE THE FAIR WORK COMMISSION

MATTER NO. C2023/1

ANNUAL WAGE REVIEW 2022-23

ACCI REPLY SUBMISSION — COPIED STATE AWARDS

I Overview

1. ACCI wishes to only address four points in reply. The submissions of the Australian Industry Group are largely consistent with ACCI's initial submission and therefore will not be addressed. The submissions of Busways and Australian Business Industrial and Business NSW (**ABI**) are also largely consistent with ACCI's initial submission, except for one divergence regarding how the Fair Work Commission (**Commission**) should proceed if our proposed approach is not adopted.
2. This submission will address:
 - a. the ACTU's submission that workers covered by copied State awards must be left no worse off than they would have been had the transfer of business not occurred, which justifies the maintenance of the existing approach (**Part II**);
 - b. the ACTU's submission that increasing wage rates in copied State awards does not disincentivise bargaining (**Part III**);
 - c. the ACTU's submission that applying wage increases to wages in copied State awards only on a case-by-case basis on application would be inconsistent with the statutory requirement to "review" the instruments (**Part IV**); and
 - d. Busways and ABI's submissions that should the Commission decide to maintain its existing approach to wages in copied State awards, the Commission should exempt copied State awards which are created as a result of transfers of business from the NSW industrial relations system to the national system (**Part V**).

II Leaving workers no worse off

3. At paragraph [5] of their submission, the ACTU argued:

It is our position that, in applying this approach, the net result must not be that workers who are covered by copied state awards are left worse off than would be the case if they had remained in their respective State systems. In most circumstances this result will be achieved by applying any general increase to modern awards to copied state awards, as has been the practice in recent years.

4. ACCI agrees that, as noted in our initial submission,¹ Part 6-3A of the *Fair Work Act 2009* (Cth) (**FW Act**), in which the laws regarding copied State awards are primarily situated, is directed at "preserving" the terms and conditions of employees transferring into the national system.² However, this preservation is primarily achieved through the copying of those terms and conditions onto an industrial instrument within the national

¹ ACCI Initial Submission (17 February 2023) [11].

² *Annual Wage Review 2021-22* [2022] FWCFB 3500 [428].

system: a copied State award.

5. The ACTU's suggested approach of applying any general increase to modern awards to copied State awards will often not "preserve" these terms and conditions but materially improve them. This will occur when either (or both) the instrument provides for future wages increases and/or the instrument already was subject to a wage increase in the same year as a consequence of a state wage decision.
6. This impact on wages in copied State awards goes beyond the task required of the Commission. The minimum wages objective is to be taken into account when varying wages in copied State awards.³ Accordingly, once the terms and conditions of employees transferring into the national system have been preserved by copying them on to a federal industrial instrument, the Commission is required to "establish and maintain a safety net of fair minimum wages".⁴
7. The fact that Part 6-3A of the FW Act is directed at preserving the terms and conditions of employees transferring into the national system does not justify a variation under item 20 in div 2 of pt 5 of sch 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) that automatically increases the wages in copied State awards.

III Impact on enterprise bargaining

8. At paragraph [10] of their submission, the ACTU denied that increasing wage rates in copied State awards risked disincentivising bargaining, contrary to the Panel's finding in the Annual Wage Review 2021-22.⁵ The ACTU submitted:⁶

Decisions in Annual Wage Reviews have not identified any clear relationship between the extent of collective bargaining and past decisions, and it has been recognised that a multitude of factors may be involved. We do not consider there is any sound basis to favour a "general proposition" that upward adjustment to wage rates in copied state awards "may act as disincentive to bargaining in circumstances where the employers are already paying above modern award rates of pay". It is to be recalled that copied state awards have a limited period of operation, a factor which is likely to motivate employees covered by them to participate in bargaining. Successive wage increases, together with public sector derived conditions of employment, may well motivate an employer to bargain for alternatives.

9. The Expert Panel's prior findings that there is no clear relationship between annual wage review decisions and the willingness to engage in collective bargaining pertained to changes to modern award wages and minimum wages generally.⁷
10. With respect to copied State awards specifically, the Expert Panel reached a conclusion in the Annual Wage Review 2021-22 that "as a general proposition that an upward adjustment to wage rates in these copied State awards could act as a disincentive to bargaining, in circumstances where employers are already paying above modern award rates of pay".⁸ ACCI agrees with this conclusion, as indicated in our initial submission in respect of copied State awards in this year's review.⁹
11. ACCI agrees with the ACTU that the limited period of operation of copied State awards encourages parties

³ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [328].

⁴ FW Act s 284.

⁵ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [422].

⁶ ACTU Initial Submission (17 February 2023) [10] (footnotes omitted).

⁷ See, eg, *Annual Wage Review 2018-19* [2019] FWCFB 3500 [386]-[387].

⁸ *Annual Wage Review 2021-22* [2022] FWCFB 3500 [422].

⁹ ACCI Initial Submission (17 February 2023) [36].

to participate in bargaining.¹⁰ Generally, employers covered by copied State awards will seek to commence bargaining soon after the transfer of business. For example, the NSW bus company employees covered by the copied State awards under consideration in last year's review, besides those of Busways, appear to be now covered by enterprise agreements. In their initial submission, Busways has also noted that they are currently bargaining for new enterprise agreements.¹¹

12. ACCI does not agree with the submission that “[s]uccessive wage increases, together with public sector derived conditions of employment, may well motivate an employer to bargain for alternatives.”¹² Under copied State awards, employers can pay wages that substantially exceed comparable modern award wages, which will often be the case for NSW businesses due to the jurisdictional differences, as set out in our initial submission.¹³ Successive increases to these higher wages do not “motivate an employer to bargain for alternatives” but instead make the even higher wage levels that will inevitably result from entering into an enterprise agreement less economically viable and attractive.

IV Statutory requirement to “review” wages

13. At paragraph [18], the ACTU submitted:

Any contention that copied state awards should be ignored in an annual wage review absent a moving party contending for a particular adjustment, or that wages in copied state awards should be static unless or until an affected person seeks a particular outcome, is wholly inconsistent with the statutory requirement to “review” them. Inconvenient as it may be for some, those instruments are properly before the Panel in Annual Wage Review.

14. As a consequence of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Division 3 of Part 2-6 of the FW Act applies to the variation of wages in copied State awards during an annual wage review.¹⁴ Accordingly, the FWC must “review” the wages in copied State awards.¹⁵ The word “review” takes its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”.¹⁶
15. The Commission cannot, in a literal sense, confidently “survey, inspect, re-examine or look back upon” every copied State award individually. These instruments can significantly vary in their wage rates.
16. The approach advanced by the ACTU, which is to apply “any general increase to modern awards to copied state awards”,¹⁷ does not “survey, inspect, re-examine or look back upon” copied State awards any more than the approach advanced by ACCI and the other parties. To suggest that it does proceeds from a false assumption that automatically increasing wages in industrial instruments is somehow a sufficient proxy for evaluating whether their wages satisfy the need to maintain a safety net.
17. In fact, the approach advanced by ACCI and the other parties arguably involves a closer examination of the relevant instruments. By only applying wage increases on a case-by-case basis on application, the FWC is given the opportunity to inspect the wage levels in the instruments and compare them with modern awards; a proper “review” is able to be undertaken.

¹⁰ ACTU Initial Submission (17 February 2023) [10].

¹¹ Busways Initial Submission (17 February 2023) [23].

¹² ACTU Initial Submission (17 February 2023) [10].

¹³ ACCI Initial Submission (17 February 2023) Part IV.

¹⁴ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 9 pt 5 div 2 item 20.

¹⁵ *Fair Work Act 2009* (Cth) s 286(2).

¹⁶ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 [38].

¹⁷ ACTU Initial Submission (17 February 2023) [5].

V Exempting NSW only copied State awards

18. ACCI, ABI and Busways were in agreement about the approach the Commission should adopt with respect to copied State awards in annual wage reviews; however, there was one point of divergence. ABI and Busways both submitted that, should the Commission decide to not adopt the approach of only applying wages increases to copied State awards on application, the Commission should:¹⁸
- (i) 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
 - (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.
19. ACCI agrees with the proposed approach under (ii) as an acceptable approach to treating copied State awards, should the Commission reject our proposed approach.
20. With respect to the proposed approach under (i), ACCI had argued in our initial submission:¹⁹
- Regardless, if the Commission considered that a default approach of not applying annual wage review increases to wages in copied State awards is only justifiable where notable jurisdictional differences exist, thereby perhaps only for copied State awards created from transfers of business from NSW public sector employers, different approaches should not be taken depending on the originating state of the employment terms and conditions. Doing so would be contrary to the intention of the Fair Work Amendment (Transfer of Business) Act 2012 (Cth), which was to create “a nationally consistent set of transfer of business rules”. The Commission should, of course, adopt a consistent approach nationwide.
21. ACCI maintains that the Commission should adopt a nationally consistent approach to the treatment of copied State awards and that the particular characteristics of copied State awards created from transfers of business from NSW public sector employers alone justifies the more cautious nationwide approach that has been proposed.
22. However, if the Commission must choose between maintaining the existing approach to copied State awards irrespective of the origin of their terms and conditions or maintaining the existing approach to copied State awards but exempting those created as a result of transfers of business from the NSW public sector, ACCI submits that the second option should be chosen, consistent with ABI and Busway’s submissions.

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¹⁸ ABI Initial Submission (17 February 2023) [5.1(c)].

¹⁹ ACCI Initial Submission (17 February 2023) [24] (footnotes omitted).