



STATEMENT

Fair Work Act 2009

s.285—Annual wage review

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

Annual Wage Review 2022-23

(C2023/1)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 28 FEBRUARY 2023

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

[1] In a Statement¹ issued on 14 October 2022, a provisional timetable for the *Annual Wage Review 2022–23* (2022–23 Review) was published. That timetable was subsequently confirmed in a Statement² issued on 4 November 2022 (November Statement) and further amended in a Statement³ issued on 13 December 2022 (December Statement).

[2] The November Statement noted that the Expert Panel would hold a preliminary hearing in March 2023 to allow for full argument as to how the Expert Panel should deal with copied State awards. The November Statement noted that this matter would be listed for mention on 13 December 2022.⁴

[3] The December Statement was issued following the mention. It contained directions for the filing of written submissions in relation to how the Expert Panel should deal with copied State awards. Initial submissions were directed to be filed by 17 February 2023.⁵

[4] In accordance with these directions, Busways North West Pty Ltd (Busways) filed a submission (the Submission) and a witness statement of Robert Gibson (the Witness Statement). The documents were filed in redacted form and Busways proposed to send unredacted versions and a request for non-publication of those documents on 20 February 2023. In the interests of providing interested parties with access to the documents as soon as possible, the Commission contacted Busways and confirmed its consent to publish the redacted versions of the Submission and the Witness Statement. These were subsequently published to the Commission’s webpage for the 2022-23 Review.

[5] As foreshadowed, on 20 February 2023, Busways sent an unredacted version of the Submissions and the Witness Statement to the Commission. The covering email contained the following request:

“We respectfully request that accordance with its powers under s 289(3) of the Fair Work Act, the Commission permit the unredacted versions of the above mentioned documents not be published on the Fair Work Commission website or anywhere else, as we submit

that the contents of the following paragraphs in the documents contain both commercially sensitive information and information that it is contractually bound to keep confidential:

1. the contents of the following paragraphs of the Submissions filed on 17 February 2023 (Submissions):
 - a. 19 and 20
 - b. 22
2. the contents of the following paragraphs of the Statement of Robert Gibson dated 17 February 2023 (Gibson Statement):
 - a. 9 and 10;
 - b. 16;
 - c. 18 (only the monetary figure in the 3rd line of the paragraph and sub paragraphs (a) to (d)); and
 - d. 24.

[6] Busways made a similar request in the Annual Wage Review 2021–22. Non-publication was granted at that time.⁶

[7] Section 594 of the *Fair Work Act 2009* (Cth) (FW Act) empowers the Commission to make orders restricting or prohibiting publication of certain evidence, documents lodged or parts of Commission decisions or reasons in relation to a matter. However, s 594 does not apply to the publication of a submission made to the Commission for consideration in an annual wage review.⁷

[8] Section 289(2) of the FW Act requires that all submissions made to the Commission for consideration in an annual wage review must be published, subject to s 289(3). Section 289(3) of the FW Act provides:

“(3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:

- (a) may decide not to publish the information; and
- (b) may instead publish:
 - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
 - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)--a statement that

confidential or commercially sensitive information in the submission has not been published.”

[9] Busways submits that paragraphs 9 and 10 of the Witness Statement and paragraphs 19 and 20 of the Submission include information that is contractually bound to keep confidential. Busways submits that the monetary figures in paragraph 16, 18 and 24 of the Witness Statement and paragraph 22 of the Submission contain commercially sensitive information.

[10] As set out above, the documents have been published to the Commission’s website in redacted form.

Summary of the confidential information

[11] Paragraphs 19 and 20 of the Submission and paragraphs 9 and 10 of the Witness Statement describe the commercial relationship between Busways and a NSW State Government agency, Transport for NSW (TfNSW), to explain the means by which Busways obtains additional revenue to pay for wage increases.

[12] The monetary figures at paragraphs 16, 18 and 24 of the Witness Statement and paragraph 22 of the Submission set out Busways’ intended methodology for increasing the wages of transferring employees and explains what Busways estimates the cost to it would be if a 4 per cent wage increase was awarded by the Expert Panel.

Provisional view and next steps

[13] Having considered the application and documents submitted, it is my *provisional* view that, pursuant to s 289(3) of the FW Act, the Commission should not publish the confidential information on the grounds that it is confidential or commercially sensitive and that pursuant to s 289(3)(b)(i) of the FW Act, the Submission and Witness Statement should be published in a form that redacts the confidential information, to be read with this statement that summarises the confidential information.

[14] If any party wishes to contest this provisional view, they should raise this at the directions hearing listed for 9:30 am on Tuesday, 7 March 2023. In the absence of any party opposing the provisional view at the hearing, it shall be confirmed at the conclusion of that hearing.



PRESIDENT

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¹ [\[2022\] FWC 2756](#)

² [\[2022\] FWC 2934](#)

³ [\[2022\] FWC 3280](#)

⁴ [\[2022\] FWC 2934](#) at [9]

⁵ [\[2022\] FWC 3280](#) at [4]

⁶ [\[2022\] FWC 851](#)

⁷ *Fair Work Act 2009* (Cth) s 594(2)