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| [2022] FWC 851 |
| STATEMENT |

Fair Work Act 2009

s.285—Annual wage review; s.289(3)—Confidential or commercially sensitive information

Annual Wage Review 2021-22

(C2022/1)

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| JUSTICE ROSS, PRESIDENT | MELBOURNE, 12 APRIL 2022 |

Annual wage review 2021-22 – initial submission filed – application for confidentiality order – application not granted – confidential and commercially sensitive information not published.

1. In a Statement[[1]](#footnote-2) issued 19 January 2022, a provisional timetable for the *Annual Wage Review 2021–22* (2021–22 Review) was published; that timetable was subsequently confirmed in a Statement[[2]](#footnote-3) issued 9 February 2022.
2. The timetable for the 2021–22 Review provided that initial submissions and post-Budget submissions were to be filed by 1 April 2022.
3. In accordance with the published timetable, Busways North West Pty Ltd (Busways) filed a submission (the Submission) and a witness statement of William O’Neill (the Witness Statement). Busways also lodged an application for confidentiality orders under s.594 of the *Fair Work Act 2009* (the Act) in relation to certain parts of the Submission and Witness Statement (the *confidential information*).
4. The draft confidentiality order proposed by Busways would provide that:

* access to paragraphs 18 to 25 of the Witness Statement and paragraphs 48 (last sentence only), 49, 50, 53 and 75 of the Submission would be restricted to the Commission and entities that want to make submissions in reply to the Busways’ Submissions; and
* access to the monetary figures in paragraph 27 of the Witness Statement and paragraphs 57 and 75 of the Submission would be restricted to the Commission and union/employee representative parties that intent to make submissions in reply to Busways’ Submissions.

1. Section 594 of the 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.[[3]](#footnote-4)
2. Section 289(2) of the 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 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.”

1. The Commission’s power under s.289(3) permits it to not publish confidential or commercially sensitive information in submissions to the Annual Wage Review. It is my provisional view, however, that s.289(3) does not empower the Commission to make orders requiring parties to keep information confidential. Accordingly, the Commission could not make orders in the terms sought by Busways such that some parties could be given access to unredacted or partially redacted versions of the Submissions and Witness Statement. The Commission could determine not to publish the *confidential information* and to publish redacted versions of the Submission and Witness Statement instead.
2. Busways submits that paragraphs 18 to 25 of the Witness Statement and paragraphs 48 (last sentence only), 49, 50, 53 and 75 of its Submission include information that it is contractually bound to keep confidential. Busways submits that the monetary figures in paragraph 27 of the Witness Statement and paragraphs 57 and 75 of the Submission contain commercially sensitive information.
3. Having considered the application and documents submitted, I am satisfied that, pursuant to s.289(3) of the 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 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*.

**Summary of the *confidential information***

1. Paragraphs 48 (last sentence only), 49 and 50 of the Submission describe the financial relationship between Busways and the NSW State Department, Transport for NSW (TfNSW) to explain why Busways does not have a direct financial relationship with the customers who travel on its passenger bus service.
2. Paragraphs 53 and 75 of the Submission describe the financial relationship between Busways and TfNSW.
3. The monetary figures at paragraphs 57 and 75 of the Submission and paragraph 27 of the Witness Statement set out what Busways estimates the cost to it would be if a 3 per cent wage increase was awarded.
4. Paragraphs 18 to 25 of the Witness Statement describe Busways’ financial arrangements with TfNSW to explain why it submits that any increase to the 3 Copied State Awards would be directly borne and affect Busways.

**Next steps**

1. If any party wishes to contest the provisional view expressed above, they should notify [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au) by **4.00pm (AEST) on Wednesday, 20 April 2022**.

PRESIDENT

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1. [[2022] FWC 82](https://www.fwc.gov.au/documents/wage-reviews/2021-22/decisions/2022fwc82.pdf). [↑](#footnote-ref-2)
2. [[2022] FWC 263](https://www.fwc.gov.au/documents/wage-reviews/2021-22/decisions/2022fwc263.pdf). [↑](#footnote-ref-3)
3. *Fair Work Act 2009* (Cth) s 594(2). [↑](#footnote-ref-4)