

**FAIR WORK COMMISSION
MATTER NUMBERS AM2020/99; AM2021/63; AM2021/65**

WORK VALUE CASE – AGED CARE INDUSTRY

**SUBMISSIONS OF THE AGED & COMMUNITY CARE PROVIDERS
ASSOCIATION LTD AND AUSTRALIAN BUSINESS INDUSTRIAL - THE
JOINT EMPLOYERS**

20 JANUARY 2023

I. INTRODUCTION AND SUMMARY

Introduction

1. This submission is made on behalf of the Aged & Community Care Providers Association Ltd and Australian Business Industrial (the **Joint Employers**) in accordance with the **Statements** of the Full Bench of the Fair Work Commission (**Commission**) dated 17 November 2022 ([2022] FWCFB 208), 23 November 2022 ([2022] FWCFB 214) and amended directions of 6 December 2022 referring to the Full Bench's decision on 4 November 2022 ([2022] FWCFB 200) (the **Decision**).
2. The Commission has invited further submissions (and evidence) on:
 - (a) the modern awards objective and its provisional views on the modern awards objective set out at [1001]-[1071] of the Decision;
 - (b) the minimum wages objective and its provisional views on the minimum wages objective set out at [1073]-[1083] of the Decision;
 - (c) the timing and phasing of the 15% interim increase to direct care workers¹ and the principles set out at [974]-[990] of the Decision; and
 - (d) Head Chefs/Cooks and Recreational Activities Officers (**RAOs**)/Lifestyle Officers.

The Joint Employers' Position in Summary

3. The Joint Employers support the proposed interim increase on the basis that their operation is aligned to the additional Commonwealth funding as proposed by the Commonwealth in its submission of 16 December 2022 paragraphs 8 to 18. The timing and phasing in of the interim increase as proposed by the Commonwealth is disappointing to aged care employers and employees. Given the central role of Commonwealth funding in the Sector

¹ Refer [49] of the Decision.

however, the Joint Employers cannot oppose that approach on the basis of ensuring the ongoing viability of the Sector.

4. The Commonwealth have committed to providing funding in two phases with the following timing:
 - (a) an increase in funding corresponding with a 10 per cent increase in wages (including on-costs) from 1 July 2023; and
 - (b) a further increase in funding corresponding with the remaining 5 per cent increase in wages (including on-costs) from 1 July 2024².
5. The alignment of the operation of the interim increase for direct care workers to additional Commonwealth funding is material to the Commission's further consideration of:
 - (a) section 166 of the *Fair Work Act 2009* (**FW Act**);
 - (b) the modern awards objective; and
 - (c) the minimum wages objective.

These submissions require consideration of certain changes to the FW Act arising from the commencement of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the **Amending Act**).

6. The Joint Employers consent to apply the direct care worker interim increase to Head Chefs/Cook and RAOs/Lifestyle Officers on the basis that the increase is to be funded by the Commonwealth.

² Refer paragraph 5 of the Commonwealth submission 16 December 2022.

II. STATUTORY SCHEME

7. In the current context the Commission is required to consider:
 - (a) its obligation to "*establish and maintain a safety net of fair minimum wages*" taking into account the matters set out in s 284(1) of the FW Act;
 - (b) its obligation to ensure that modern awards (with the NES) provide a "*fair and relevant minimum safety net of terms and conditions*" taking into account the matters set out in s 134(1) of the FW Act;
 - (c) that in varying the relevant modern award minimum wages the Commission only does this if it is satisfied that the variation is justified by work value reasons (s 135(1) and s 157(2), (2A) and (2B));
 - (d) that terms included in the relevant modern awards are only to the extent necessary to achieve the modern awards objective and the minimum wages objective (s 138); and
 - (e) that 1 July 2023 is the (statutory) default operative date for the variation unless the Commission is satisfied otherwise (s 166).

Section 157

8. The Commission has satisfied itself that the variation to minimum wages for direct care workers is justified by work value reasons so much is evident from the Decision.
9. At the time of making the Decision s 157(2B)³ was not in operation. That section requires that the Commission's consideration of work value reasons is 'free from assumptions based on gender and includes a consideration of whether historically the work has been undervalued because of assumptions based on gender'.

³ Item 352 of the Amending Act.

10. The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Explanatory Memorandum**) explains the purpose of new s 157(2B) as follows:

346. This item would introduce subclause 157(2B) to clarify that the FWC's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions. This item is modelled after subsection 248(3) and paragraph 248(4)(c) of the Industrial Relations Act 2016 (Qld) and would ensure that the FWC's consideration of work value applications cannot be affected by gender-based assumptions about the value of work.

347. In the Equal Remuneration Decision 2015, the Full Bench of the FWC expressed a view that the definition of work value reasons would be sufficiently broad to allow a party to advance a claim that minimum rates of pay in a modern award undervalue work due to historical gender-related reasons [(2015) 256 IR 362, [292]]. This item would have the effect of confirming the Full Bench's view in the FW Act.

11. The Commission has not yet made a determination varying the relevant modern awards and it is necessary for the Commission to be satisfied that its consideration of work value reasons conforms with the new s 157(2B).
12. The Commonwealth in its submission of 16 December 2022 submits that the Commission can be satisfied of this (refer paragraphs 51 to 69) and the Joint Employers support the Commonwealth's conclusion at paragraph 69.
13. As part of the case advanced by the Applicant's was based on the theory of gender based undervaluation and that the Commission extensively considered and accepted this applied⁴, the Commission can be comfortable that any new obligations arising from s 157(2B) have been met and that it can conclude as much.

⁴ Refer for instance [42], [293], [356], Chapter 7.3.1, Chapter 7.3.2 of the Decision.

Minimum Wages Objective

14. The Commission set out its provisional views on its consideration of the minimum wages objective at [1073]-[1083] of the Decision.
15. As the Commission has commented, the consideration arising from the s 284 overlap with those in s 134 with s 284 focusing on those matters that operate at a more macro level.
16. The Joint Employers accept the provisional views of the Commission.
17. Section 284(1)(aa) was introduced into the FW Act by the Amending Act⁵ and in effect replaces the repealed s 284(1)(d) in the following terms:

the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps
18. With the repeal of s 284(1)(d) the specific question posed by the Commission at [1083] of the Decision would no longer seem to require a response.
19. Section 284(1)(aa) is a new factor to be taken into account when the Commission establishes and maintains a safety net of fair minimum wages and as such will require consideration by the Commission.
20. The primary focus of s 284(1)(aa) is the '*achievement of gender equality*' with the section including certain requirements in this regard. These are not exhaustive and the notion of gender equity should be construed consistent with its ordinary grammatical meaning - fairness between the genders⁶.

⁵ Item 350 of the Amending Act.

⁶ This is reinforced by a consideration of the Explanatory Memorandum as referenced in paragraph 27 below in these submissions.

21. The Commission is to "*ensure*":
 - (a) equal remuneration for work of equal or comparable value;
 - (b) eliminating gender based undervaluation; and
 - (c) addressing the gender pay gap.
22. The first limb is terminology that is defined in s 302(2) of the FW Act and this is further developed in the new s 302(3A) introduced by the Amending Act.
23. The notion of gender based undervaluation is not new as is evidenced by the Commission considering the issue at length in its Decision. The requirement is to 'eliminate' this and by properly setting fair minimum wage rates in the relevant awards the Commission has rightly concluded that this has been achieved.
24. The third limb involves "*addressing*" the gender pay gap and this has been done by the Commission as set out in Chapter 7.3.3 of the Decision although we continue to submit that some care needs to be applied to how a statistical concept derived at the aggregate level of actual pay should be translated into a jurisdiction concerned with setting "fair minimum rates".
25. The Decision provides clear indications that the Commission has 'taken into account' and properly considered the need to achieve gender equity in setting fair minimum wages having exhaustively considered the question of historical undervaluation because of gender-based assumptions.
26. This is in harmony with the new inclusion of the phrase "*gender equity*" in s 3(a) of the Objects of the FW Act arising from the Amending Act⁷.

⁷ Item 346 of the Amending Act.

27. The Explanatory Memorandum describes the purpose of the amendment to the object in s 3(a) of the FW Act as follows:

333. The existing paragraph 3(a) sets out one of the means by which the object of the FW Act is achieved. This item would amend that means to add job security and gender equality as considerations.

334. The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment. The reference to promoting gender equality recognises the importance of people of all genders having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay. The intention of the references to 'gender equality' in each of these provisions is to use language that is consistent with the Convention on the Elimination of All Forms of Discrimination against Women and ILO Convention concerning Discrimination in Respect of Employment and Occupation (No 111). It is also intended to reflect the policy objective of both formal and substantive gender equality.

335. Job security and gender equality would sit alongside existing considerations in the object of the FW Act, such as providing workplace relations laws that are flexible for business, assisting employees to balance their work and family responsibilities, and achieving productivity and fairness (see existing paragraphs 3(a), (d) and (f)).

28. Section 3 of the FW Act now provides for a '*balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*' by, amongst other things, the following:

(a) *providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations*

(addition underlined)

29. Ultimately the question posed by the Commission in regard to the minimum wages objective was whether the interim increases to modern award minimum wages applicable to direct care aged care employees are necessary to achieve the minimum wages objective⁸?
30. The primary focus of the objective is the establishment and maintenance of a safety net of fair minimum wages.
31. This matter does not concern the setting of fair minimum wages but rather the variation of fair minimum wages and the corner stone of fairness in such a case is ensuring that the minimum wages are set on the basis of work value reasons (s 157 and s 135).
32. Given that this is what the Commission has done then the outcome the minimum wages objective is focussed on is achieved. Accordingly, the Commission's question is answered in the affirmative.
33. In arriving at this outcome, the Commission has properly taken into account the matters set out in the recently amended s 284(1) but will need to formally affirm this.

The Modern Awards Objective

34. The modern awards objective requires the Commission to establish a fair and relevant minimum safety net. It is settled that this must be both fair and relevant for employees and employers and as such involves a careful balance of interests.
35. While we accept the observations from [911]–[916] of the Decision, including that there is no primacy to any of the s 134(1)⁹ considerations, the approach the Commission adopts will introduce varying degrees of tension that need to be carefully balanced.

⁸ Paragraph 4 of the November Statement.

⁹ Decision, [914], quoting *4 yearly review of modern awards – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive claims* [2019] FWCFB 6067 at [136]–[137].

36. The Commission invited submissions on the now repealed s 134(1)(e)¹⁰ and the need for this now falls away.

37. This has been replaced through the Amending Act with s 134(1)(ab)¹¹ in the following terms:

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation

38. Section 134(1)(ab) is similar to s 284(1)(aa). The former is more specific and exhaustive than the latter. The former also does not include a reference to the gender pay gap which contextually makes sense as s 284 is exclusively concerned with minimum wages while s 134 has application at large to modern award terms and condition. Thus, the additional reference in the former to "workplace conditions".

39. The submissions set out in paragraphs 17 to 28 above apply to those parts of s 134(1)(ab) that are relevant to the variation of minimum wages.

40. We now turn to a consideration of s 134(1)(f).

41. The modern awards objective in s 134(1)(f) of the FW Act requires the Commission to take into account:

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

42. The focus on this is the "likely impact...on business". This impact could be negative, neutral or positive.

¹⁰ Item 347 of the Amending Act.

¹¹ Item 348 of the Amending Act.

43. The section includes reference to three indicia for this but these are not exhaustive and do not detract from the broader consideration in paragraph 42 above.
44. It should be uncontroversial that the “likely” impact on business is fundamentally conditioned by Commonwealth funding.
45. In this regard, at [1066] of the Decision the Commission restated the position advanced by the Joint Employers:

... there is a direct correlation between employment cost and funding:

- *the funding is not sufficient to support the provision of necessary care services and sufficient staff numbers to provide those services*
- *the regulations dictating the provision of consumer centred care require the provider to meet the gap, and*
- *the gap being met by providers to ensure that compliant and quality care services are provided to consumers has left major providers within the aged care sector to operate at a deficit.*

46. While employers and employees would have welcomed an earlier single stage funding commitment, the contribution of the Commonwealth must be acknowledged by all parties especially in the current challenging economic and budgetary environment.
47. With full (direct costs and all on-costs) and on-going funding the consideration invoked by section 134(1)(f) becomes neutralised. Without it, it becomes materially negative. There may still be an issue in Home Care despite this funding which we develop below.

48. There is also the issue of ensuring that the Commonwealth will fund all on-costs and this issue has been discussed with them separately to our submissions in this matter. To provide further clarity on this matter the position of the Joint Employers is that the following on-costs need to be funded by the Commonwealth:
- the increased hourly wage rates plus any applicable penalty rates;
 - the increased hourly rate of overtime;
 - the increased rate applicable when various types of leave is taken;
 - the increased rate applicable with accrued leave is paid out on termination;
 - increased superannuation;
 - increased payroll tax; and
 - increased workers' compensation contributions.
49. This accords with the Commission's observations that the 'extent to which the Commonwealth funds any outcome from these proceedings is plainly relevant to [the Commission's] consideration of the impact of any increase in employment costs on the employers in the aged care sector'.¹²
50. This issue looms large in the context of the operation of the interim increases. If they are aligned to the Commonwealth's funding proposal (and the funding mechanisms deliver the funding to employers to pay) this neutralises the matter.
51. If the interim increases are introduced without funding (or the funding mechanisms don't deliver the funding to employers to pay) the impact on business will be materially negative and this would weigh heavily against such an outcome.

¹² Decision at [904].

52. Whether any party proposes to de-link the implementation of the interim increases from the Commonwealth's funding proposal is, at this point in time, speculative and will need to be dealt in reply if it arises as such an approach will materially negatively impact providers in the Sector to:
- (a) viably operate; and
 - (b) provide critical services to vulnerable members of the community.
53. Section 134(1)(f) - '*the likely impact on business*' - weighs heavily in favour of aligning the operation of the interim increase with the Commonwealth's funding timetable.
54. The Commission's approach to productivity at [1065] of the Decision is appropriate and aligned with its approach generally to this notion¹³.
55. As to regulatory burden, the approach for funding may well introduce additional regulatory burden even with full and on-going funding, at least initially in Home Care, as any change in service pricing will require the client to agree to the change.
56. The Home Care operator will need to procure this change in service pricing by agreement with the client or otherwise the client may simply use the funding to acquire additional services at the original pricing as contracted with the operator. Given the increase in pricing that will likely be necessary to cover the increase in costs to operators, clients may be more hesitant to agree to a change in the pricing in their agreement.
57. This could mean that even with additional funding being paid into home care packages by the government, some Home Care operators could be required to pay the interim increases without the ability to recover costs from the increased package funding. This is a significant risk to operators considering the level of increase in wages that is going to occur.

¹³ See for instance *Parks Victoria v AWU* [2013] FWCFB 950; *Transport Workers Union of Australia v Qantas Airways Ltd and Anor* [2012] FWA FB 6612.

58. Noting the security of tenure provisions specified in the User Rights Principles 2014, home Care operators cannot simply bring their home care package agreement with a vulnerable elderly client to an end if the client does not agree to a change in prices under the package. Putting aside the commitment of Home Care operators and staff to provide services to their vulnerable elderly clients, these government regulations limit the ability for operators to cease an agreement. It is seen as a last resort and the operator is to find another operator to provide the services to the client prior to ceasing an agreement. Finding another operator can be difficult depending on location and the needs of the client.
59. If the situation arose where the government was to remain with the approach of paying the additional funding into home care packages instead of to Operators, the length of lead up time and the communications of government with home care recipients on the change would be crucial.
60. The commencement of the lead up time would be when the Home Care Operators had sufficient information regarding the actual increase in funding to home care packages and the new pay rates for employees from 1 July 2023. Once this information was available then Operators can undertake pricing analyses, financial planning and communications with clients to seek agreement to the necessary changes in pricing. This lead up time should be no more than 3 months. This information would therefore be required to be in the hands of Home Care Operators by 1 April 2023.
61. The communications of government with home care package recipients regarding the increase in funding for their packages and the linkage of this to the 15% interim increase would be crucial. Home care recipients will need information from government to ensure that they can make informed decisions regarding the changes to prices under their home care agreements with Operators. The government would therefore need to commence its communications with home care recipients as soon as practicable but no later than 1 April 2023.

62. These above steps would not remove the financial risks for Operators relating to clients not agreeing to changes in pricing under their agreements but would mitigate the risk to a degree.
63. The Amending Act has introduced a new element to the modern awards objective (reflected in the amended s 3(a) Objects).
64. Section 134(1)(aa) has been introduced to s 134 through the Amending Act¹⁴.
65. Section 134(1)(aa) is in the following terms:

(aa) the need to improve access to secure work across the economy;
66. The amendment to s 3(a) is set out in paragraph 28 of these submissions.
67. Section 3(a) now includes the notion of promoting job security while s 134(1)(aa) requires the Commission in setting a fair and reasonable minimum safety net to have regard to the 'need to improve access to secure work across the economy'.
68. The notion of improving access to secure work is a complex issue.
69. "*Improving*" introduces a positive obligation similar to "*encourage*" in s 134(1)(b) albeit more focussed on outcomes rather than process.
70. Security of work can be brought about by different ways. At one end of the spectrum it can be based on 'rules' while at the other ensuring the economic performance of the businesses providing the work.
71. The Commission does not appear to need to venture into this depth of consideration in this matter as s 134(1)(aa) operates, in its terms, at a macro or aggregate level similarly to s 134(1)(h) as the Commission has already observed in its Decision¹⁵.

¹⁴ Item 347 of the Amending Act.

¹⁵ At [1072] of the Decision.

72. As the Commission has already concluded that this matter has limited aggregate implications for the economy it is difficult to see how this matter could have implications for secure work "across the economy" as distinct from a sectoral or employer by employer consideration.
73. As with s 134(1)(h), s 134(1)(aa) should be a neutral consideration.
74. The Commission's question was whether making the interim increases to modern award minimum wages applicable to direct care employees in these proceedings is necessary to achieve the modern awards objectives?
75. Ultimately to have a "*fair and relevant minimum safety net of terms and conditions*" a modern award will require properly set "*fair minimum wages*" within it.
76. Where such minimum wages are set on the basis of work value reasons and the Commission has then had regard to s 134(1), they would ordinarily meet this criteria.
77. The Commission has had regard to the matters in s 134(1) but will need to formally address those new limbs of s 134(1).
78. Subject to our submission on the modern awards objective, the Commission's question can be answered in the affirmative.
79. Obviously, if the wages were set on some other basis or were in excess of a fair "*minimum*" or implemented in a manner that materially adversely impacts business this may not be the case and s 138 would also condition this.

III. TIMING AND PHASING IN OF THE INTERIM INCREASE

80. The Joint Employers agree with this summary of the relevant principles set out at [976]–[990] of the Decision.
81. The relevant principles display what can be described as the ‘careful balance’ that the Commission needs to establish in the exercise of their discretion.
82. In the context of the Aged Care Sector this careful balance is conditioned, in particular, by the following:
 - (a) It should be uncontroversial that as the Sector is reliant on government funding to operate, the capacity of the Sector to ‘fund’ the interim increases (absent Commonwealth funding) is negligible.
 - (b) The interim increases for direct care workers will apply to the majority of employees in the Sector.
 - (c) The interim increases are sizable¹⁶.
 - (d) Elements of the Commonwealth’s funding are yet to be finalised (on-cost calculations, etc).
 - (e) The approach to funding for Home Care will require home care package recipients to consent to new pricing before the funding can flow to employers to fund the interim increases.

¹⁶ By way of comparison in *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)* [2021] FWCFB 6061 the increases granted were between 3.3% and 13.6% as was noted at [981] of the Decision.

Timing

83. Section 166(1)(a) of the FW Act creates 1 July 2023 as the default operative date for the interim increases to operate from.
84. The Commission has a discretion to depart from this where it is satisfied that it is appropriate to do so.¹⁷ It is commonplace for this discretion to be exercised in an appropriate case.
85. The Commonwealth's 16 December Submission sets out comprehensively how funding will be provided to allow the Sector to pay the interim increases.
86. Absent this funding, the Sector has little capacity to pay the interim increases. It is therefore fair and necessary for the operation of the interim increases to be aligned to the Commonwealth's funding commitment timetable.

Phasing-in

87. Phasing-in is an accepted approach to introducing increases to wages where appropriate to carefully balance the application of the modern awards objective.
88. In *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001¹⁸ (***Penalty Rates – Transitional case***) the Commission identified three categories of considerations relevant to deciding on the transitional arrangements for in that case a reduction in penalty rates:
 - (a) the statutory framework;
 - (b) the substantive decision itself as to the merits of the proposed variation; and
 - (c) fairness.

¹⁷ *Australian Workers' Union* [2022] FWCFB 4, [154], quoted at [980] of the Decision.

¹⁸ Cited at [980] of the Decision.

89. In regard to the statutory framework, the Commission in the *Penalty Rates Transitional case* noted¹⁹ that the setting of any transitional arrangements requires a particular focus on:
- (a) relative living standards and the needs of the low paid - s 134(1)(a);
 - (b) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden - s 134(1)(f); and
 - (c) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards - s 134(1)(g).
90. Aligning the operation of the interim increases to the Commonwealth's funding fairly and reasonably balances the tension within these considerations in the context of the present matter subject of the Decision.
91. It would be inappropriate to de-link operation and funding as this would materially disturb the careful balance the Commission should seek as it would materially weigh against s 134(1)(f) by materially and detrimentally impacting business in the Sector.
92. At [981] the Commission considered the observations of the Full Bench in *In Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch* [2021] FWCFB 6021. The main factors considered in that case in determining whether transitional arrangements were appropriate were:
- (a) how much time employers had to prepare;
 - (b) the extent of the increase; and
 - (c) whether there was reliable evidence from the employers as to what date was manageable.

¹⁹ At [143], cited in the AWU case at [157].

93. In the context of the submissions set out in paragraph 82 above, given the Commonwealth's funding commitment, and the central role of Commonwealth funding to the viable operation of the Sector, the Joint Employers submit that a phasing-in approach that reflects the Commonwealth's funding commitment would be appropriate and consistent with the summary of the relevant principles set out at [976]-[990] of the Decision. The phasing-in approach will disappoint aged care employers and employees. Given the central role of Commonwealth funding in the Sector, the Joint Employers cannot oppose that approach on the basis of ensuring the ongoing viability of the Sector.

IV. HEAD CHEFS/COOKS AND RAOS/LIFESTYLE OFFICERS

94. The November Statement also provided an opportunity to comment on the issue of Head Chefs/Cooks etc as follows:

[10]The Mention will canvass further programming of these matters and whether the interested parties have consulted in respect of increases in minimum wages for Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers.

95. As has been conveyed to the Commission previously, the Joint Employers consent to apply the direct care worker interim increase to these classes of employees on the basis that the increase is to be funded by the Commonwealth. They are a very small cohort of the employee base and in regard to the RAOs, are firmly aligned to direct care employees in how they work directly with consumers.

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