



## **INTRODUCTION AND SUMMARY**

### **Introduction**

1. This reply submission is made on behalf of 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. These submissions are in reply to the submissions filed by the various union parties on 20 January 2023.

### **Operative Date and Phasing**

3. The most material issue to reply on is clearly the timing and phasing of the interim increase of 15% applicable to direct aged care workers.
4. While expressed in different terms and in different language all of the union parties ask the Fair Work Commission to divert from the Commonwealth's proposed funding timetable and to, in effect, introduce the 15% interim wage increase to minimum wages immediately although various unions have individual formulations of this; some of which include prospective and then retrospective application.
5. Accordingly, the Commission is presented with a challenge that requires the exercise of careful judgement.

6. If the timing and phasing of the interim increase of 15% is aligned with the Commonwealth funding proposal the Commission can be comfortably satisfied in regard to section 134 of the Fair Work Act 2009.
7. If the Commission contemplates departing from this, requiring the industry to pay unfunded wage increases then a careful consideration of the balance of section 134 looms large.
8. As we will set out in these submissions, absent funding the outcome for many employers will be the imposition of further losses and deficits and the undermining of normal and prudent financial operations; introducing further erosion to already challenged financial stability.
9. The relevance of this of course is amplified when one considers the role of the industry in the community and the vulnerable group of people that it services, supports and cares for.
10. On what basis then should the Commission undertake this consideration?
11. A variety of factors coming to play in considering this issue and they include the:
  - 11.1. extent of over award payments paid whether at common law or through enterprise agreements;
  - 11.2. extent to which employers absorb increases to minimum wages in the relevant awards into these over award payments;
  - 11.3. diverse financial position of various operators; and

- 11.4. general financial state of the age care industry.
12. In regard to this consideration we rely on the evidence filed with these reply submissions from:
  - 12.1. Mr Grant Corderoy of StewartBrown;
  - 12.2. Johannes Brockhaus of Buckland;
  - 12.3. Michelle Jenkins of Community Vision Australia; and
  - 12.4. James Shaw of Royal Freemasons' Benevolent Institution.
13. We have also considered the various evidence filed to date in the proceedings and will comment on this.
14. It should be uncontroversial that the aged care industry is only sustainable on the basis of government funding. It should also be uncontroversial that the primary provider of this funding is the Commonwealth Government and to a lesser extent State and Territory governments.
15. This is not to suggest that operators in residential and home based aged care are not run as businesses in the normal sense but simply to acknowledge the distinction between a funded business and those ordinarily found in the private sector who are profit motivated rather than purpose motivated.

16. The starting point for consideration is that the aged care industry is not in a financially healthy position as is evidenced of Mr Grant Corderoy of StewartBrown. As he states:

“The aged care sector is experiencing significant financial and sustainability and viability concerns.”<sup>1</sup>

17. The StewartBrown *Aged Care Financial Performance Survey Industry Report* (September 2022) (**SBFP Report**) Annexure B to the Statement of Grant Corderoy develops this.

18. The SBFP Report states:

*The Survey for the 3 months ending September 2022 continues to highlight the declining financial sustainability of the industry, with residential aged care now remaining at a **critical financial sustainability position** for many providers.*

*The average operating results for residential aged care homes in all geographic sectors was an operating loss of \$21.29 per bed day (Sep-21 \$7.30 pbd loss) This represents a loss of \$7,092 per bed per annum which is extrapolated to a **residential industry loss in excess of \$345 million** for the three month period.*

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<sup>1</sup> Statement of Grant Corderoy 8 February 2023 paragraph 32.

*The alarming statistic is that 70% of aged care homes operated at a loss (56% at Sep-21) and 51% operated at a EBITDA (cash loss) (32% at Sep-21).<sup>2</sup>*

And

*Home Care financial performance has stagnated over the last four financial years with the average operating result for Sep-22 being \$3.56 per care recipient (client) per day. This is not an adequate return based on the investment required and business risk to provide these essential services to the elderly in a domestic home setting.<sup>3</sup>*

19. This in itself should raise concerns in regards to section 134(1)(f) and the setting of a fair and reasonable minimum safety net for employees and employers.
20. The SBFP Report also demonstrates the material proportionality of direct care labour costs to revenue; refer Table 1 page 9 SBFP Report.
21. Increasing direct care labour costs increases the major cost component of providing care generally.

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<sup>2</sup> Statement of Grant Corderoy 8 February 2023 Annexure B Aged Care Financial Performance Survey Industry Report (September 2022) p1.

<sup>3</sup> Ibid p 3.

22. This is placed in stark relief by Mr Corderoy who estimates the total industry cost of the 15% interim increase being paid but unfunded at:
- 22.1. \$639 million for the period 1 March 2023 to 1 July 2023; and
- 22.2. \$575 million for the 2024 financial year<sup>4</sup>.
23. Accordingly, the Commission's consideration needs to commence from an understanding that the impact on business of introducing the interim 15% increase to direct care employee wages without funding will materially impact operating costs generally in an already challenged financial context.
24. The question then that will be difficult to answer is how much of an increase for those on above award rates will actually be paid (above award rates) based on the amount of additional funding provided and how much of the 15% interim increase will be absorbed into enterprise agreement (section 206 being specifically relevant in this regard) or existing over award payments?
25. This said, the Commonwealth funding proposal, at least implicitly, operates on the basis that all direct aged care employees will be given the 15% increase on award rates and there may or may not be additional funding available for an increase above that based on the use of average labour costs in the calculations by the Commonwealth and the individual circumstances of operators such as workforce profile; there is nothing to suggest otherwise.

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<sup>4</sup> Statement of Grant Corderoy 8 February 2023 paragraph 34.

26. The actual amounts of additional funding to cover on-costs of the increase will of course impact on the outcome as well and is a significant concern of operators.

No definitive answer is available on the evidence before the Commission as to how this question should be answered but the evidence filed with these submissions demonstrates that all operators will pay the 15% increase on award rates from the additional funding but some are concerned that they may not be able to afford much of an increase for those on above award rates. While others will have a preference, if the funding is available, to pass on the whole 15% even though they may not be strictly legally required to do so. This will depend on their current financial position and the amount of additional funding actually provided by the Commonwealth.

27. There does not appear to be any evidence available to allow the Commission to determine with precision how many employees in the industry are covered by enterprise agreements, not covered by enterprise agreements but in receipt of over award payments or otherwise paid only on the minimum award rates. The industry is however seen as being award reliant.
28. The majority of the lay witnesses who gave evidence in the case were covered by enterprise agreements but this is unlikely to be surprising given that they were more likely than not union members and therefore employed in operations where the union is active.
29. We have set out in **Appendix A** to these submissions an examination of the evidence previously taken in this regard although it seems of modest assistance.



30. If we focus for present purposes on one of the primary 'multi' enterprise agreements used in the industry being the *NSWNMA and HSU NSW Enterprise Agreement 2017-2020 (ACSA Agreement)*, Ms Wade gave the evidence to the following effect in regard to the ACSA Agreement:

30.1. The enterprise agreements generally include above award minimum wages. The rates in the ACSA Agreement for nurses are anywhere between 1.9 and 56% above the minimum award rates.<sup>5</sup>

30.2. Outside of nurses rates, the rates set out in the ACSA Agreement are minimally above the relevant minimum award rates as the Government provides the majority of funding, and approved providers under the Act (which are the majority) are unable to afford wage increases within the current funding framework.<sup>6</sup>

30.3. Ms Wade made the following observation:

*"From experience in discussing the ACSA Agreement with our members, most employees covered by the ACSA Agreement are employed between CSE 1 and CSE 4 of the ACSA Agreement which is roughly between a 0.4% to 8% above the minimum award rates."*<sup>7</sup>

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<sup>5</sup> Statement of Anna-Maria Wade at [15].

<sup>6</sup> Statement of Anna-Maria Wade at [16].

<sup>7</sup> Statement of Anna-Maria Wade at [17].

30.4. Ms Wade estimated that:

*"...roughly 70% of ACSA members operate under an Enterprise Agreement".<sup>8</sup>*

31. This aligns with the lay evidence filed with these submissions:

31.1. Nurses are likely to be paid well above minimum award rates in an enterprise agreement such that many employers covered by those agreements could legally absorb the whole 15% increase.

31.2. Aged care workers are likely to be paid marginally above minimum award rates in an enterprise agreement thus requiring an employer (by virtue of section 206) to pass on most of the 15%.

32. It would be reasonable for the Commission to conclude that some employers in the industry will have a legal right to absorb some or potentially all of the 15% increase on award rates for nurses and some, but unlikely all of that increase, for care workers into enterprise agreement payments. This would be the case even though some employers may want to be able to pay more to these employees.

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<sup>8</sup> Statement of Anna-Maria Wade at [19].

33. It should also be taken from the state of the lay evidence filed with these submissions that:

33.1. Some operators will be financially compelled to absorb where they can [Community Vision Australia].

33.2. Some operators while facing increased deficits will try and pass on the whole 15% even though they may not be legally compelled to [Buckland].

33.3. Some operators may do that which is required now without funding and then pass on the full 15% when funding starts [ Royal Freemasons' Benevolent Institution].

34. What is uncontroversial from the state of the evidence however is that paying all or a portion of the 15% without funding will simply add losses to the operating position of the operator so much is clear from all of the evidence filed with these submissions.

35. For some operators like Community Vision Australia this will drive increased deficits and a further denuding of limited historical reserves.

36. For other operators such as Buckland these losses may be able to be covered by surpluses generated in business operations outside of residential aged care or home care but this does not detract from the fact that this will drive losses and impair the overall financial stability of such businesses.

37. Accordingly, it would be reasonable for the Commission to assume that businesses in the industry will potentially respond in a variety of ways should the 15% be introduced on a timetable without funding.
38. It is possible that some will respond by adopting absorption and reducing the losses they suffer.
39. It is possible that some will have no capacity to absorb and will bear the full brunt of the losses.
40. Incurring such losses through unfunded wage increases may tip some operators over the edge in terms of financial stability but it also should be acknowledged that some operators may have such diversified business holdings that while they are robbing 'Peter to pay Paul' they can cross subsidise the losses in their business.
41. The Joint Employer's 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.
42. Only this approach can ensure that employers do not face unfunded losses in their business and in so doing make the consideration of section 134(1)(f) to be neutral.
43. Anything other than this drives the consideration of section 134(1)(f) to be materially against the unions, sufficient to persuade the Commission against it.

44. In simple terms the Commission can drive the industry into further material financial distress or it can chose to not do this and introduce the 15% on a reasonable timetable aligned to Commonwealth Government funding.

### **Gender Related Amendments to the Fair Work Act**

45. All of the unions have laboured in their submissions over the gender related changes to the Fair Work Act 2009. We have already addressed these in our submissions in chief and we do not repeat them here but say the following.
46. The Commission needs to be cautious of amplifying the new gender related limb of section 134 (1ab) above the other limbs which seems to be the tenor of the unions' submissions, no limb has primacy and they all need to be evaluated and weighed.
47. The Commission also needs to be vigilant not to become overly focused on a contest concerning these limbs which is evidently at large in this stage of the proceedings but to be ever mindful that while regard is to be had to the limbs it must ultimately exercise broad discretion in establishing a fair and relevant minimum safety net for both employers and employees subject to the constraints of section 138.

### **Secure Work Across the Economy**

48. As we indicated in our submissions in chief, this case does not on its face appear to require the Commission to say too much about the introduction of the notion of secure work into section 134 (1 aa) and also the Objects to the Act.

49. This said, secure work in its simplest form can only be achieved in the context of financially stable business operations; this should be logically uncontroversial.
50. If the Commission makes a decision the consequences of which is to undermine the ordinary financial stability of business operations that will not improve access to secure work as it will inevitably make employment less stable.

**For the Joint Employers**



**Nigel Ward**

CEO + Director

Australian Business Lawyers & Advisors

9 February 2023

## Appendix A

1. A useful starting point is the “*report to the full bench*” (the report) prepared by Commissioner O’Neil (as she then was), which includes a list of all lay witnesses’ employment setting, role, title and/or classification, qualifications and competencies in Appendix A.<sup>9</sup> The following analysis is based on that data.

### A Personal Care Workers / Assistants In Nursing

- 1.1 The Commission had before it the evidence of **19 personal care workers / assistants** in nursing (**PCW/AIN**). The following observations may be made about award vs enterprise agreement coverage:
  - (a) 84% of the PCW/AIN were covered by an enterprise agreement (16 workers) (see **Table A1** below);
  - (b) 5% of the PCW/AIN confirmed the relevant modern award applied to their employment (1 worker) (see **Table A2** below);
  - (c) 11% of the PCW/AIM did not specify whether an enterprise agreement applied to their employment (2 workers) (see **Table A3** below).

**Table A1 - PCW/AIN - Enterprise Agreement**

#	Witness	Enterprise Agreement	Classification
1	Sherree Clarke	Opal Aged Care Qld Enterprise Agreement 2014	Assistant in Nursing - Qualified
2	Lyn Cowan	RSL Care Enterprise Agreement 2015	Care Service Stream - Level 3
3	Alison Curry	Warrigal and NSW Nurses and Midwives Association, Australian Nursing and Midwifery Federation NSW Branch, and Health Services	AIN thereafter

<sup>9</sup> Report to Full Bench (Commissioner O’Neill, 20 June 2022), Appendix A.

#	Witness	Enterprise Agreement	Classification
		Union NSW/ACT Branch Enterprise Agreement 2017	
4	Virginia Ellis (Homemaker)	Unspecified enterprise agreement	Level 4 Grade 1
5	Sally Fox	Huon Regional Care General Staff Enterprise Agreement 2019	Aged Care Employee - Level 3
6	Linda Hardman	Estia Health NSW Enterprise Agreement 2019	Nursing assistant (qualified)
7	Paul Jones	UPA Enterprise Agreement (NSW) 2017-2020	Grade 2 Level 1
8	Rose Nasemena	Unspecified enterprise agreement	WSG 8 Year 3
9	Helen Platt (Care Supervisor)	Anglicare NSW MNA and HSU Enterprise Agreement	Level 5
10	Dianne Power	Unspecified enterprise agreement	AIN Level 3
11	Antoinette Schmidt	HammondCare Residential Care and HammondCare at Home Enterprise Agreement	Aged Care Employee Level 3
12	Christine Spangler	Southern Cross Care (Broken Hill) Ltd, NSW NMA and the Broken Hill Town Employees' Union Enterprise Agreement 2017- 2020	AIN thereafter
13	Kristy Youd	Masonic Homes of Northern Tasmania General Staff Enterprise Agreement 2012	Aged Care Employee Level 4
14	Charlene Glass	Unspecified enterprise agreement	Carer: Level 4



#	Witness	Enterprise Agreement	Classification
15	Virginia Mashford	Unspecified enterprise agreement	-
16	Josephine Peacock	Unspecified enterprise agreement	-

**Table A2 - PCW/AIN - No Enterprise Agreement**

#	Witness	Award	Classification
17	Kerrie Boxsell	Aged Care Award	Grade 4 Aged Care Award for Team Leader Role, Grade 2 Level 1 for Care Staff Role

**Table A3 - PCW/AIN - Not Specified in Evidence**

#	Witness	Not Specified
18	Geronima Bowers	-
19	Judeth Clarke	-

1.2 The Commission had before it the evidence of 4 workers, which were categorised as “recreational officers” in the Report to the Full Bench (**RAOs**). The following observations may be made about award vs enterprise agreement coverage:

- (a) 50% of the RAOs were covered by an enterprise agreement (2 workers) (see **Table A4** below);
- (b) 50% of the RAOs did not specify whether an enterprise agreement applied to their employment (2 workers) (see **Table A5** below).

**Table A4 - RAOs - Enterprise Agreement**

#	Witness	Enterprise Agreement	Classification
1	Fiona Gauci	Uniting Aged Care Enterprise Agreement (NSW) 2017	Level 3 Administration Officer
2	Sanu Ghimire	Unspecified enterprise agreement	-

**Table A5 - RAOs - Not Specified in Evidence**

#	Witness	Not Specified
3	Jade Gilchrist	-
4	Michelle Harden	-

**B. Home Care Workers (excluding Team Leaders and Coordinators)**

1.3 The Commission had before it the evidence of **21 home care workers** (excluding team leaders and coordinators) (**HCW**). The following observations may be made about award vs enterprise agreement coverage:

- (a) 67% of the HCW were covered by an enterprise agreement (14 workers) (see **Table B1** below);
- (b) 14% of the HCW confirmed the SCHADS award applied to their employment (3 worker) (see **Table B2** below);
- (c) 19% of the HCW did not specify whether an enterprise agreement applied to their employment (4 workers) (see **Table B3** below).

**Table B1 - HCW - Enterprise Agreement**

#	Witness	Enterprise Agreement	Classification
1	Susan Digney	Family Based Care (North) Inc. Direct Care Worker Employee Collective Agreement 2009- 2012	Support Worker Level 2 Grade 2

2	Catherine Evans	Regis Aged Care Pty Ltd, ANMF & HWU Enterprise Agreement – Victoria 2017	Home Care Employee –Year 5 of exp.;
3	Catherine Goh	Brightwater Care Group Community Support Worker Collective Agreement 2009	Not specified
4	Lillian Grogan (Coach)	Australian Unity Home and Disability Services NSW Care Worker Enterprise Agreement 2019	Grade 2 employee, paid as Grade 4 employee when doing care worker coach work
5	Teresa Hetherington	Unspecified enterprise agreement	Personal Care Assistant, Grade 2
6	Susan Morton	Unspecified enterprise agreement	Grade 3 Advanced Care Worker
7	Lyndelle Parke	Australian Regional and Remote Community Services Enterprise Agreement 2019	Aged Care Employee Level 5 Year 3
8	Marea Phillips	South Eastern Community Care Community and Disability Support Workers Enterprise Agreement 2020	Community Support Worker Level 3.3
9	Michael Purdon	South Eastern Community Care Community and Disability Support Workers Enterprise Agreement 2020	Level 3 Grade 3 of Community Support Worker classification
10	Camilla Sedgman	RSL LifeCare, NSWNMA and HSU NSW Enterprise Agreement 2017-2020	Home Care Employee Grade 3
11	Veronique Vincent	Regis Aged Care Pty Ltd, ANMF & HWU Enterprise Agreement – Victoria 2017	Home Care Employee –Year 5 of exp,

12	Susanne Wagner	Community Based Support Enterprise Agreement 2018	Home Care Worker Level 3 Pay point 2
13	Paula Wheatley	Blue Care/Wesley Mission Brisbane Care and Support Employees Enterprise Agreement 2013	Personal Carer Pay point 3
14	Jennifer Wood	Uniting Aged Care Enterprise Agreement (NSW) 2017	Community Care Employee, Grade 2 Support Worker

**Table B2 - HCW - No Enterprise Agreement**

#	Witness	No Enterprise Agreement	Classification
15	Theresa Heenan	SCHADS	Home Care Worker Level 4 Pay point 1
16	Julie Kupke	SCHADS	Home Care Employee Level 2 Pay point 1
17	Bridget Payton	SCHADS	Home care employee – Level 3, Pay point 1

**Table B3 - HCW - Not Specified in Evidence**

#	Witness	Not specified
18	Sandra Hufnagel	-
19	Ngari Inglis	-
20	Maria Moffat	-
21	Susan Toner	-

- 1.4 Three further HCW were called, which consisted of a Coordinator and two Team Leaders. The quantity and specificity of the evidence does not allow for assistive analysis. The relevant data appears below in Tables B4 and B5.

**Table B4 - HCW (Coordinators and Team Leaders) - No Enterprise Agreement**

#	Witness	No Enterprise Agreement	Classification
1	Peter Doherty (Coordinator)	SCHADS	Home care employee, Level 5, Pay point 2

**Table B5 - HCW (Coordinators and Team Leaders) - Not Specified in Evidence**

#	Witness	Not specified
2	Karen Roe (Team Leader)	-
3	Lorri Seifert (Team Leader)	-

**C Enrolled Nurses**

1.5 The Commission had before it the evidence of **3 enrolled nurses (ENs)**. Whilst acknowledging the limited number of witnesses, the following observations may be made about award vs enterprise agreement coverage:

- (a) 66% of the ENs were covered by an enterprise agreement (2 workers) (see **Table C1** below); and
- (b) 33% of the ENs did not specify whether an enterprise agreement applied to their employment (1 workers) (see **Table C2** below)

**Table C1 - EN - Enterprise Agreement**

#	Witness	Enterprise Agreement	Classification
1	Wendy Knights	Princes Court Homes Inc (t/a Princes Court Homes Hostel), ANMF & HSU Enterprise Agreement 2017	Enrolled Nurse Pay point 8
2	Patricia McLean	Blue Care / Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013	EN Level 2.3

**Table C2 - EN - Not Specified in Evidence**

#	Witness	Not Specified
3	Suzanne Hewson	-

**D Registered Nurses**

- 1.6 The Commission had before it the evidence of **5 registered nurses (RNs)**. The following observations may be made about award vs enterprise agreement coverage:
- (a) 40% of the RNs were covered by an enterprise agreement (2 workers) (see **Table D1** below);
  - (b) 60% of the RNs did not specify whether an enterprise agreement applied to their employment (3 workers) (see **Table D2** below).

**Table D1 - RN - Enterprise Agreement**

#	Witness	Enterprise Agreement	Classification
1	Jocelyn Hofman	Catholic Healthcare Residential Aged Care Enterprise Agreement (New South Wales) 2018 – 2021	Registered Nurse
2	Irene McInerney	Unspecified enterprise agreement	Registered Nurse

**Table D2 - RN - Not Specified in Evidence**

#	Witness	Not specified
3	Lisa Bayram	
4	Maree Bernoth	
5	Pauline Breen (Community)	

**E Nurse Practitioners**

1.7 The Commission had before it the evidence of 2 nurse practitioners (**NPs**) The evidence did not specify whether either were covered by an enterprise agreement. The names of the two witnesses appear below in **Table E1**.

**Table E1 - NP - Not Specified in Evidence**

#	Witness	Not specified
1	Hazel Bucher	
2	Stephen Voogt	

## IN THE FAIR WORK COMMISSION

**Matter No:** AM2020/99, AM2021/63, AM2021/65: Applications to vary Modern Awards - Work Value - Aged Care Industry

### STATEMENT OF GRANT CORDEROY

I, Grant Corderoy of Level 2, Tower 1/495 Victoria Ave Chatswood in the state of New South Wales state as follows:

#### Background

1. I am currently a Senior Partner with StewartBrown, Chartered Accountants and am an accountant by trade.
2. I have a Bachelor of Commerce (Accounting) and Diploma of Journalism.
3. I commenced with StewartBrown in July 1977. During this period I have had several relevant secondments including:
  - (a) A six month secondment as a Management Consultant within UnitingCare NSWACT to manage the rationalisation and integration of each business segment, including aged care, children's services, property, and corporate.
  - (b) A lengthy secondment with a large private company as Chief Financial Officer - managing the expansion of having operating locations in each mainland State, New Zealand, Malaysia and Japan.
4. I have particular experience and involvement in the Aged Care Sector (**sector**) and my client portfolio includes numerous consulting projects for the Department of Health and Aged Care, Royal Commission into Aged Care Quality and Safety, and the Productivity Commission, with specific focus on financial sustainability at government, provider and consumer levels as well as policy development including extensive stakeholder consultations.
5. In my role I have an ongoing professional relationship with in excess of 300 aged care providers, the Department of Health and Aged Care, Australian Quality and Safety Commission, Productivity Commission, aged care peak bodies, consumers and sector panels.
6. My professional involvement within the sector includes audit and risk, financial modelling and analysis, governance reviews, systems reviews and implementations, financial statements preparation and analysis, Board and management workshops, facilitations and presentations, and numerous sector conference and forum presentations.
7. I have been a Board member of three aged care provider organisations, and member of Finance, Risk & Audit Committees for several provider organisations.
8. I appeared as witness in the Fair Work Commission Hearing - Matter No: AM2020/13 in June 2020.



9. On 27 January 2023 I was sent correspondence from the Aged & Community Care Providers Association asking me to provide my opinion in answer to certain questions (set out in **Annexure A** is that correspondence). The correspondence attached the Expert Evidence Practice Note which I have read and complied with and also the Commonwealth Submission of 16 December 2022 which I have read prior to making this statement.

#### **StewartBrown**

10. StewartBrown is a Chartered Accounting firm principally located in Chatswood, Sydney. The firm currently consists of 9 Partners and over 90 employees providing professional services including Audit, Consulting, Business Services, Taxation and Financial Planning.

StewartBrown provides these professional services nationally to a range of clients, however, we have a speciality expertise in aged care and community services, social services, independent schools, children's services and disability services.

11. With respect to aged care and community services, StewartBrown have more than 45 professional staff actively providing professional services to the sector nationally including:

- (a) Audit and assurance;
- (b) Preparation of general purpose financial statements;
- (c) Annual Prudential Compliance audits;
- (d) Government Community Grant Acquittals;
- (e) Governance reviews (including Board and Executive);
- (f) Finance systems and process reviews;
- (g) Financial modelling and forecast assignments;
- (h) Secondments;
- (i) Conference presentations and sector workshops; and
- (j) Briefings to Department of Health and the Aged Care Financing Authority

12. StewartBrown is not an advocate for any stakeholder in the sector and has professional relationships with the Department of Health and Aged Care, sector peak bodies (including ACCPA and COTA), provider organisations, aged care staff and aged care residents and clients.

13. The primary agenda of StewartBrown is that all financial policy and related public commentary should be evidenced based, objective and supported by accurate data.

#### **Aged Care Financial Performance Survey**

14. In 1995 I established the StewartBrown *Aged Care Financial Performance Survey (Survey)* and am still the lead manager in relation to the Survey.
15. The Survey is subscription based and designed for each participant organisation to compare and benchmark their operating performance at residential aged care home and home care program level through a number of financial and non-financial measures.
16. Each Survey participant submits detailed input sheets each quarter which include strict data definitions for processing. Staff costs, number of staff (FTE and casual) and hours employed are included in the Survey data captured and analysed.

17. The Survey data received undergoes an intensive cleansing and quality checking procedure, with each individual aged care home (residential) and program (home care) being cross checked to previous results by each revenue and expense line item, and to all similar sized and regionally located comparators, and then all material variances are subjected to explanatory confirmation from the respective participant before acceptance.
18. Once the data quality control measures have been completed, the data matrix is electronically run which produces the detailed financial results and comparisons at a granular level for each Survey participant.
19. The Survey participants use the extensive data output and comparisons as a major component of their respective strategic, operational and financial management and key performance measures.
20. The Survey participants also receives supplementary reports on their respective Residential and Home Care results - these contain more detailed granularity and analysis. Individual participant organisations also receive specific comparative data relevant to their location, size and the specific aged care homes within their organisation. They also have access to StewartBrown's interactive analysis website.
21. The Survey Sector Report is published four times yearly (each quarter) as a public document. The trend analyses contained in the respective Sector Reports are a subset of the data received from participants. It needs to be noted that the primary purpose of the Survey is for participant organisations to obtain a granular comparison for each residential care home or home care program for their internal analysis using a range of Key Performance Indicators.
22. The Survey Sector Report is distributed to each participant organisation electronically and also via secure access to the interactive Survey website. The response rate to the survey is above 44% of all residential aged care homes nationally and above 36% of all home care package programs.
23. Through the Survey, StewartBrown undertakes the largest financial performance benchmarking survey covering the aged and community care sector in Australia. The Survey obtains detailed operational, equity and staffing data on a quarterly basis for residential aged care facilities and home care packages.
24. The Survey data has been used and relied upon by the Department of Health and Aged Care, Royal Commission into Aged Care and Quality and Productivity Commission(s).
25. The most recent publication of the Sector Survey Report was the September 2022 survey **(September 2022 Survey) Annexure B** to this statement.
26. Respondents to the September 2022 Survey included some of the largest providers nationally, independent stand-alone providers, faith-based and community providers, and culturally specific providers. In addition, subscribers to the Survey reports include government bodies including the Department of Health and Aged Care (DoHAC) and Australian Aged Care Quality and Safety Commission, aged services sector peak bodies and other service providers to the sector.
27. The September 2022 Survey includes residential care and home care packages.

28. The Survey contains StewartBrown's analysis of the operating income and expenses of participants for the three month period ending 30 September 2022 and year-on-year comparisons to September 2018 through 2021, with references to the fiscal years (12 months) June 2022 and June 2021.
29. The September 2022 Survey included the detailed responses of:
- (k) 258 approved providers in total operating in either or both residential and home care sectors
  - (l) 1,182 aged care homes
  - (m) 76,770 home care packages
30. In respect of residential care, participants to the September 2022 Survey represent approximately 44.5% of non-government aged care homes within Australia.
31. The latest Survey for December 2022 is due for imminent public release in early March 2023 and will include a substantial increase in the number of aged care homes and home care packages participating. I can provide this to Fair Work Commission as soon as it is published.

#### **Specific Responses to Fair Work Commission Hearing**

32. The aged care sector is experiencing significant financial sustainability and viability concerns. In summary the current state of the sector is as follows:

##### Residential Aged Care

- o Average operating loss for three month period ended September 2022 was \$21.29 per bed day (\$7.30 per bed day loss Sept-21 quarter; \$14.87 per bed day loss June 2022 12 month period)
- o Aggregate losses for the five years 2018 to 2022 amounted to \$3.787 billion
- o Staff costs represent 71.8% of total revenue and 98.1% of government subsidies received (the remainder being resident fees)
- o 70% of aged care homes reported an operating loss (56% Sept-21 quarter; 67% June 2022 12 month period)

##### Home Care

- o Average operating surplus for three months ended September 2022 was \$3.56 per client (consumer) per day (\$4.90 surplus per client day Sept-21 quarter; \$3.98 surplus per client day June 2022 12 month period)
  - o Revenue utilisation (amount of funding actually utilised providing care services) was 83.7% (meaning the remaining 16.3% was effectively unused and will be returned to the government)
  - o Unspent funds (being the corollary of revenue utilisation) amounted to \$11,693 per client (in excess of \$2.4 billion nationally)
33. If the Commonwealth's timetable is adopted by the Fair Work Commission and Commonwealth funding (as defined in accordance with the Commonwealth of Australia submission) was aligned to implementation of the 15% wage increase there should be no economic impact on the aged care sector (it will not improve financial sustainability, however should not, in itself, cause further losses).

34. If the Commonwealth's timetable is not adopted and instead the increase commences in one instalment (being 15% for direct care workers) and earlier, for instance on 1 March 2023, this will have a significant economic impact on the aged care sector. This is due to the increase will be required to be funded by the provider for the interim periods (such as 15% to 1 July 2023 and 5% for the 12 months 1 July 2023 to 30 June 2024). To quantify, the impact will be in the order of \$639m (unfunded) for the period to 30 June 2023 and a further \$575m (unfunded) for the period to 30 June 2024.
35. The impact on residential aged care is direct - a full impact on the financial viability, as the increased staff costs will be unfunded.
36. The impact on home care is different to the extent that the price charged to the consumer (care recipient) will be required to be increased to meet the increased staff costs and this will introduce a possible time lag issue for home care that is not present for residential care even if funding is aligned to the increase.
37. It is difficult to comment on aged care operators with an enterprise agreement. How they respond will depend on the rates in their enterprise agreements and how much above the awards they are. It will likely be an operator by operator decision as to whether they absorb some or all of the 15% assuming they have room in the enterprise agreement rates to do this.
38. From my experience I believe that there will be substantial pressure on operators to pass the full 15% on which will be reinforced by their desire to attract and retain staff which currently is a major issue for the sector.
39. Similarly, the impact on aged care providers who do not have enterprise agreements but pay above the award rate will have the same circumstance as noted in paragraph 37 and 38 above.
40. I do not see the 15% and the funding of this presenting any real difference between the private (for-profit) providers and the not-for-profit. There are currently differences in terms of taxation and fringe benefits but none of these will change.



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**Grant Corderoy**

**8 February 2023**

27 January 2023

**PRIVATE AND CONFIDENTIAL**

Grant Corderoy  
Senior Partner  
Consulting and Aged & Community Services Division  
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By email: 

Dear Mr Corderoy,

**APPLICATIONS TO VARY MODERN AWARDS – WORK VALUE - AGED CARE INDUSTRY AM2020/99, AM2021/63, AM2021/65**

The Aged & Community Care Providers Association (**ACCPA**) is participating in the Work Value Case - Aged Care Industry proceedings conducted by the Fair Work Commission (the **Commission**).

**Background**

On 4 November 2022, the Commission published an interim decision ([2022] FWCFB 200) (the **Decision**) which granted an interim increase of 15% to the minimum award wages of direct aged care workers in the aged care industry under the following awards:

- Aged Care Award 2010
- Nurses Award 2020
- Social, Community, Home Care and Disability Services Industry Award 2010

Following the Decision, the Commission gave directions for the filing of submissions and evidence with respect to the timing and phasing in of the interim increase to modern award minimum wages applicable to direct aged care workers.

On 16 December 2022, the Commonwealth filed submissions confirming its commitment to funding the 15% wage increase proposed by the Commission prospectively in two phases with the following timing:

- an increase in funding corresponding with a 10 per cent increase in wages (including on-costs) from 1 July 2023; and
- a further increase in funding corresponding with the remaining 5 per cent increase in wages (including on-costs) from 1 July 2024.

This includes funding “on-costs” on the following basis:

- Initially, funding increases may be determined by using sector average labour costs by Program (including both wages and on-costs) and making the corresponding upwards adjustment to the subsidy or grant relevant to that program to account for the proposed interim increase. For example, higher shift allowances and overtime in residential aged care will be accounted for in the setting of the AN-ACC price in the residential aged care funding model.
- Into the future, the costs of delivering care both in residential aged care and in-home care will be further investigated through the IHACPA. IHACPA will provide advice to Government regarding the costs of care, which will inform future price setting arrangements.

This funding would apply to “*direct aged care workers*”; employees in the aged care sector in caring roles, including nurse practitioners, registered nurses, enrolled nurses, assistance in nursing, personal care workers and home care workers.

On 20 January 2023 the relevant Unions involved in the matter filed submissions which in summary (with some minor differences in language and form) asked the Fair Work Commission to not apply the Commonwealth’s timetable but rather to implement the increases earlier than the Commonwealth’s timetable; effectively as and when the Commission varies the relevant modern awards for this.

As to the matter of timing and phasing in of the interim increase, ACCPA (jointly with Australian Business Industrial) are directed by the Commission to file submissions and evidence in reply to the Unions’ positions in the proceedings by 5pm on Friday 9 February 2023.

### **Instructions**

We need you to provide an expert report that addresses the following questions:

1. What is the current commercial state of the Aged Care Sector (both residential and home care)?
2. If the Commonwealth’s timetable is adopted by the Fair Work Commission and Commonwealth funding was aligned to implementation of the 15% wage increase what will be the economic impact on the Aged Care Sector?
3. If the Commonwealth’s timetable is not adopted and instead the increase commences operation in one instalment and earlier; for instance on 1 March 2023, what will be the economic impact on the Aged Care Sector be?
4. Will there be any difference in impact between residential care and home care?
5. Will there be any difference in impact between Aged Care operators with an enterprise agreement compared to operators without one?

6. Will there be any difference in impact between Aged Care operators without an enterprise agreement but who pay over award payments compared to operators who do not?
7. Will any particular part of the Aged Care sector (private, not for profit, small, large) be impacted more than others and if so how and why?

Annexed to this letter and marked "A" is the Commonwealth Submission for you to refer to.

Annexed to this letter and marked "B" is a copy of the Federal Court's Practice Note regarding the use of Expert Witnesses in the Federal Court of Australia, together with a copy of the Harmonised Expert Witness Code of Conduct, which applies to any expert witness engaged to provide an expert report or to give opinion evidence in proceedings. Could you please ensure that you have read and understand the Practice Note and comply with the Practice Note in the provision of your expert report.

If you have any questions, please do not hesitate to contact me on [REDACTED] or email [REDACTED]

Yours sincerely,

Claire Bailey  
**Workplace Relations Manager**  
**Aged & Community Care Providers Association Ltd**

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

**WORK VALUE CASE – AGED CARE INDUSTRY**

**SUBMISSIONS OF THE COMMONWEALTH**

**A. INTRODUCTION AND SUMMARY**

**Introduction**

1. This submission is made on behalf of the Commonwealth of Australia 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.
2. Parts B – E of these submissions deal with the Commonwealth's position in relation to the matters the parties have been directed to address, as follows:
  - 2.1. Part B — the details of the Commonwealth's funding commitments in relation to the interim increase proposed in the Full Bench's decision on 4 November 2022 ([2022] FWCFB 200) (the **Decision**), and the implications of these commitments for the Commission's consideration of the modern awards objective in s 134(1)(f) of the *Fair Work Act 2009* (Cth) (**FW Act**).
  - 2.2. Part C — the Commonwealth's position on the timing and phasing-in of the proposed interim increases.
  - 2.3. Part D — scope of the proposed interim increase.
  - 2.4. Part E — the amendments made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Amending Act**) to the FW Act, and the implications of these amendments on the provisional views expressed in the Decision regarding former ss 134(1)(e) and 284(1)(d) in [1041]–[1063].
3. The Commonwealth otherwise accepts and does not wish to make any further submissions in relation to the provisional views of the Commission set out in:
  - 3.1. [1001]–[1072] of the Decision as to whether the proposed interim increases are necessary to achieve the modern awards objective having regard to the factors set out in s 134(1) other than subsection (f); and

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Lodged on behalf of the Commonwealth of Australia.

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- 3.2. [1073]–[1083] of the Decision as to whether the proposed interim increases are necessary to achieve the minimum wages objective having regard to the factors set out in s 284(1).

### **The Commonwealth's position in summary**

4. The Commonwealth supports the proposed interim increase and is committed to funding the full interim 15 per cent increase to minimum award wages for direct care workers, including on-costs incurred by aged care providers in all Commonwealth funded aged care (as outlined in [14]–[18], below).
5. The Commonwealth commits to providing this funding in two phases with the following timing:
  - 5.1. an increase in funding corresponding with a 10 per cent increase in wages (including on-costs) from 1 July 2023; and
  - 5.2. a further increase in funding corresponding with the remaining 5 per cent increase in wages (including on-costs) from 1 July 2024.
6. The Commonwealth supports timing and phasing-in arrangements that reflect the timing of these increases in funding.
7. The Commonwealth submits that, so far as they are relevant to this matter, the amendments to the FW Act by the Amending Act further support the Commission granting the proposed interim increase.

### **B. FUNDING COMMITMENT AND IMPLICATIONS FOR SECTION 134(1)(F)**

#### **Funding commitment of the Commonwealth**

8. The Commonwealth supports the Commission's proposal for a 15 per cent interim increase for direct care workers, as justified by work value reasons, and is committed to funding the interim increase in relation to Commonwealth funded aged care.
9. The Commonwealth is committed to funding the interim increase from 1 July 2023, phased in over a twelve-month period commencing 1 July 2023 with the funding necessary to support a 10 per cent increase in wages applied on 1 July 2023 and the funding necessary to support the remaining 5 per cent increase in wages on 1 July 2024.
10. This timing will allow the Commonwealth to implement the proposed interim increase appropriately through its various aged care funding mechanisms. Commencement from 1 July 2023 will also allow implementation of the interim increase to align with the annual indexation of aged care programs, scheduled funding changes to aged care program arrangements and the minimum wage uplift flowing from the annual wage review.

### ***Mechanisms for funding wage increases***

11. The mechanisms the Commonwealth will likely use to fund the proposed interim increase for direct care workers are the following aged care program arrangements (**Programs**):
  - 11.1. Residential aged care — the Australian National Aged Care Classification (**AN-ACC**) price will be determined on an annual basis from 1 July 2023, based on advice from the Independent Health and Aged Care Pricing Authority (**IHACPA**). IHACPA's advice will include advice in relation to the cost (including the cost of any increase in wages) of providing specified care and services to care recipients. As such, the future AN-ACC price can incorporate the pricing impact of the proposed interim increase from 1 July 2023 onwards.
  - 11.2. Home Care Packages (**HCP**) program — annual subsidy indexation on 1 July 2023 to also factor in the additional cost of wages incurred by providers to deliver wage increases to home care workers and nurses. Indexation from 1 July 2023 will allow the necessary subordinate legislation to be drafted and registered.
  - 11.3. Commonwealth Home Support Programme (**CHSP**) — development and negotiation of a large volume of grant agreements ahead of a commencement date of 1 July 2023.
  - 11.4. There are also a number of other small aged care and related programs funded by grant agreements or contractual arrangements that involve direct care workers that will need to be adjusted.
12. It is not feasible for the Commonwealth to implement a funding increase prior to 1 July 2023 because:
  - 12.1. the Commonwealth does not provide funding to directly fund wages and associated on-costs in the aged care sector;
  - 12.2. given that the proposed interim increase applies only to direct care workers, it is difficult to calculate and apply a standard indexation uplift to funding across the various aged care programs, which is the usual method of implementing wage increases in this sector; and
  - 12.3. it is necessary to ensure that increased funding is distributed accurately and that there are appropriate accountability mechanisms in relation to the expenditure of additional funding, which takes time given the diverse Program arrangements.
13. The Commonwealth supports continuing to improve wages and conditions for aged care workers so that they properly reflect the value of the work performed by those workers. However, this must be balanced against the need to ensure these funds are properly targeted, so that they contribute to improving the quality and safety of the aged care system for older Australians.

### ***Mechanism for determining on-costs***

14. The Commonwealth recognises that on-costs are a significant proportion of the total wage bill for aged care providers. Accordingly, the Commonwealth's funding commitment includes funding for on-costs.
15. The Joint Employers raised the following potential on-costs in their submissions in reply to the Commonwealth:
  - superannuation
  - payroll tax
  - workers' compensation
  - allowances and entitlements which are based on a percentage of the standard rate and may be subject to an increase, and
  - any possible new entitlements arising out of this matter.<sup>1</sup>
16. At least in respect of the proposed interim increase, the final dot point does not arise. The Commonwealth accepts that the other on-costs identified by the Joint Employers are likely to increase with the proposed interim increase.
17. The Commonwealth's proposed approach to funding on-costs is as follows:
  - 17.1. Initially, funding increases may be determined by using sector average labour costs by Program (including both wages and on-costs) and making the corresponding upwards adjustment to the subsidy or grant relevant to that program to account for the proposed interim increase. For example, higher shift allowances and overtime in residential aged care will be accounted for in the setting of the AN-ACC price in the residential aged care funding model.
  - 17.2. Into the future, the costs of delivering care both in residential aged care and in-home care will be further investigated through the IHACPA. IHACPA will provide advice to Government regarding the costs of care, which will inform future price setting arrangements.
18. This approach is appropriate because:
  - 18.1. as indicated above, the Commonwealth does not fund aged care wage costs directly, so it is not possible to calculate the precise level of Commonwealth funding to be provided to the sector according to a specified list of on-costs;
  - 18.2. historically, Commonwealth funding has not been calculated from the 'ground up', so there is no prescribed list of labour input costs that can be separated and adjusted for the purposes of Commonwealth funding;
  - 18.3. expenditure on wages is variable both within and across Programs reflecting the diversity of job roles, different business and employment models, the

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<sup>1</sup> Decision [906], quoting Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.13]–[3.14].

number of awards setting minimum pay and conditions and the higher wages paid by some employers under Enterprise Agreements. However, the main variability is across different Programs. For example:

- 18.3.1. on-costs associated with the *Aged Care Award 2010* and the *Nurses Award 2020* are higher than for the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award**) employees delivering in-home care, mainly because of higher shift allowances and overtime in residential aged care given the 24/7 nature of residential aged care service delivery;
- 18.3.2. in the HCP Program, the care recipient is able to spend their subsidy on a range of services, equipment and aids, and home modifications up to the level of their package. Expenditure on labour-related costs (wages and on-costs) is variable and is dependent to a certain extent on the preferences of the care recipient; and
- 18.3.3. for CHSP, a wide range of service types are delivered under grant-based funding, only a proportion of which are delivered by home care workers employed under the SCHADS Award Schedule E who would be eligible to receive the proposed interim increase; and
- 18.4. In these circumstances, using sector average labour costs by Program as the initial basis for determining the funding necessary to fund on-costs would be an equitable approach across providers that factors in existing expenditure on labour costs (including on-costs).

#### **Implications for s 134(1)(f) of the modern awards objective**

19. 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; and
20. As to productivity, the Commonwealth agrees with the provisional view expressed at [1065] of the Decision. An increase in wages should not be regarded as affecting productivity. In that respect, s 134(1)(f) is a neutral consideration.
21. As to regulatory burden, the proposed interim increase itself would have no increased regulatory burden. The Commonwealth expects that the accountability mechanisms referred to in [12.3] above would involve minimal additional regulatory burden. As such, the Commonwealth submits that regulatory burden is overall a neutral consideration.
22. As to the impact on business and employment costs, the Commonwealth recognises and agrees with the Commission that, given the Commonwealth's funding role in the sector, 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'.<sup>2</sup>

23. The Commonwealth submits that, given the funding commitment it sets out in these submissions, the Commission can be satisfied that granting an interim increase with timing and phasing in arrangements that are consistent with the timing of Commonwealth's funding commitments would have a non-material impact on business and employer costs. As such, on this premise, s 134(1)(f) would be a neutral consideration in whether such an increase was necessary to meet the modern awards objective.
24. If the Commission were to grant the proposed interim increase earlier or without the phase-in reflected in the Commonwealth's current funding commitment, this could have an impact on business. The Commonwealth recognises and accepts the observations from [911]–[916] of the Decision, including that there is no primacy to any of the s 134(1) considerations and so s134(1)(f) should not be given 'determinative weight'.<sup>3</sup>

### C. TIMING AND PHASING IN OF THE INTERIM INCREASE

25. The relevant principles are set out at [976]–[990] of the Decision. The Commonwealth agrees with this summary of the relevant principles.

#### Timing

26. Section 166(1)(a) of the FW Act creates a 'presumption' that the proposed interim increase would commence on 1 July 2023. The Commonwealth accepts that this is not a difficult presumption to displace, and the Commission need only be satisfied it is 'appropriate' to specify a different day of operation.<sup>4</sup>
27. Consistent with its funding commitments, the Commonwealth would support a commencement date of 1 July 2023 in respect of the first phase of the proposed interim increase. The Commonwealth does not submit that an earlier commencement date would be 'appropriate' having regard to its funding commitments and administrative arrangements.

#### Phasing-in

28. In *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001<sup>5</sup> (***Penalty Rates – Transitional Arrangements case***) the Commission identified<sup>6</sup> three categories of considerations relevant to deciding on the transitional arrangements for a decision to apply a reduction in penalty rates:

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<sup>2</sup> Decision, [904].

<sup>3</sup> 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].

<sup>4</sup> *Australian Workers' Union* [2022] FWCFB 4, [154], quoted at [980] of the Decision.

<sup>5</sup> Cited at [980] of the Decision.

<sup>6</sup> At [141].

- 28.1. the statutory framework;
  - 28.2. the *Penalty Rates decision*<sup>7</sup> (that is, the substantive decision as to the merits of the proposed variation of penalty rate provisions); and
  - 28.3. fairness.<sup>8</sup>
29. As regards the statutory framework, the Commission in the *Penalty Rates Transitional Arrangements case* noted<sup>9</sup> that the setting of any transitional arrangements requires a particular focus on:
- 29.1. relative living standards and the needs of the low paid (s 134(1)(a));
  - 29.2. 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
  - 29.3. 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)).
30. The Commission also considered the observations of the Commission in *In Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)* (at [981]). The main factors considered by the Commission in that case were in determining whether transitional arrangements were appropriate:
- 30.1. how much time employers had to prepare;
  - 30.2. the extent of the increase; and
  - 30.3. whether there was reliable evidence from the employers as to what date was manageable.
31. Given the Commonwealth's funding commitment, and the central role of Commonwealth funding to the sector, the Commonwealth submits that a phasing-in approach that reflects the Commonwealth's funding commitment would be appropriate and consistent with the principles established in the cases set out above. That is:
- 31.1. a 10 per cent increase to wages for direct care workers from 1 July 2023, and
  - 31.2. the remaining 5 per cent increase to wages for direct care workers from 1 July 2024.

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<sup>7</sup> *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001. See too [145] of the *Penalty Rates Transitional Arrangements decision*.

<sup>8</sup> Referring at [144] to ss 577(a) and 588 of the FW Act at [144] and noting at [148] that regard should be had to fairness from the perspective of both the employees and the employers.

<sup>9</sup> At [143], cited in the AWU case at [157].

32. Consistent with the submissions at [23]–[24] above, if the Commission adopts this phased-in approach, the impact on business and employer costs will be minimal. An approach which does not adopt this phasing-in may have impacts on business and employer costs which, if applicable, must be weighed and assessed against the benefits in providing an earlier uplift in wages.

#### **D. SCOPE OF THE PROPOSED INTERIM INCREASE**

##### **Definition of ‘direct care worker’**

33. In the interests of certainty, the Commonwealth submits that in implementing the proposed interim increase, there should be some further consideration given to clearly defining the scope of who is a ‘direct care’ worker.
34. The Decision defines ‘direct care worker’ as ‘employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs’. That is, the concept of a direct care worker is defined as a worker in a ‘caring role’ with a non-exhaustive list of specific roles included.
35. To provide certainty to employers and employees, and to support the accountability measures referred to at [12.3] above, the Commonwealth submits that final variations to the affected Awards will need to more precisely define which employees will receive the interim increase. This is particularly important in the home care sector under Schedule E of the SCHADS Award, where there is less of a clear delineation of caring and non-caring work than in the Aged Care Award.

#### **E. AMENDMENTS RELEVANT TO THE MODERN AWARDS OBJECTIVE AND MINIMUM WAGES OBJECTIVE REGARDING GENDER EQUALITY**

36. The relevant parts of the Amending Act (Part 4 – Objects of the Fair Work Act and Part 5 – Equal Remuneration) commenced on 7 December 2022, being the day after 6 December 2022 when the Amending Act received the Royal Assent.<sup>10</sup>

##### **Amendments to objects and objectives relating to gender equality**

###### ***Summary of amendments***

37. Part 4 of Schedule 1 to the Amending Act made the following amendments to the FW Act which are relevant to the Commission’s consideration of gender equality and gender-based undervaluation of wages in the context of considering the modern awards objective and the minimum wages objective. The Commonwealth agrees with the statement of Acting President Hatcher that these amendments apply to applications currently before the Commission, including these three applications.<sup>11</sup>

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<sup>10</sup> Amending Act, s 2(1), item 10.

<sup>11</sup> President’s Statement, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, 8 December 2022, [6] (<https://www.fwc.gov.au/documents/documents/media/releases/presidents-statement-more-jobs-better-pay-2022-12-08.pdf>).

38. Item 346 amended the objects of the FW Act, such that s 3(a) now reads (addition underlined):

**3 Object of this Act**

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (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; and

...

39. Items 347 and 348 repealed s 134(1)(e) of the modern awards objective and replaced it with new s 134(1)(ab), which reads:

- (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; and

40. Item 347 also introduced new s 134(1)(aa), which is addressed in [47]–[50] below.

41. Items 349 and 350 repealed s 284(1)(d) of the minimum wages objective, and replaced it with new s 284(1)(aa), which reads:

- (aa) 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; and

**Purpose of amendments**

42. The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) (Explanatory Memorandum)* explains the purpose of the amendments in Part 4 of the Amending Act as follows:

330. This Part would introduce job security and gender equality into the object of the FW Act. It would place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay.

331. In accordance with established principles of statutory interpretation, the FW Act is required to be interpreted in a way that would best achieve the object of the FW Act wherever possible (see section 15AA of the AI Act). The FWC is also required under existing paragraph 578(a) of the FW Act to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act. This includes, for example, the FWC performing functions or exercising powers in relation to dispute resolution, including arbitration, setting terms and conditions in modern awards and approving enterprise agreements.

43. The Explanatory Memorandum specifically 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)).

#### **Implications for provisional views on s 134(1)(e)**

44. At [1048] of the Decision, the Commission stated:

As discussed earlier, we accept that the aged care workforce is predominantly female and the expert evidence is that, as a general proposition, work in feminised industries including care work has historically been undervalued and the reason for that undervaluation is likely to be gender-based. We also accept the logic of the proposition in the expert evidence that gender based undervaluation of work is a driver of the gender pay gap and if all work was properly valued there would likely be a reduction in the gender pay gap. While it has not been necessary for the purposes of these proceedings for us to determine why the relevant minimum rates in the Awards have not been properly fixed we accept that varying the relevant awards to give effect to the interim increase we propose would be likely to have a beneficial effect on the gender pay gap and promote pay equity. The more contentious issue concerns the proper construction and application of ss.134(1)(e) and 284(1)(d).

45. The above amendments to the FW Act mean that the issue as to the proper construction and application of ss 134(1)(e) and 284(1)(d) raised in the above passage and then set out in [1049]–[1061] falls away. Unlike the phrase 'equal remuneration for work of equal or comparable value', the phrases 'gender equality', 'gender-based undervaluation of work' and 'gender pay gaps' are not defined in the FW Act (as amended) and take on their ordinary meaning. In particular, the breadth of those terms means it is unnecessary for the Commission to engage in the comparative exercise contemplated at [1057] of the Decision, or to limit the application of these objectives to situations where an award variation would equalise wages for men and women workers performing work of equal or comparable value as contemplated at [1060] of the Decision.
46. As such, the amendments made by the Amending Act provide a clear basis for the Commission to consider that its provisional views set out at [1048] of the Decision (and its findings as to gender-based undervaluation and the gender pay gap at [740]–[758] and [859]–[866]) support implementing the proposed interim increases. Specifically:

- 46.1. the Commission must take into account the object of the FW Act in amended s 3(a) to promote gender equality (s 578(a));
- 46.2. the provisional views expressed at [1048] and the findings referred to above would lead the Commission to consider that new s 134(1)(ab) is a positive factor in terms of whether the proposed interim increases are necessary to achieve the modern awards objective, because they would support achieving gender equality in the workplace, including by reducing gender-based undervaluation of work; and
- 46.3. those findings and provisional views would also lead the Commission to consider that new s 284(1)(aa) is a positive factor in terms of whether the proposed interim increases are necessary to achieve the minimum wages objective, because they would support achieving gender equality in the workplace, including by reducing gender-based undervaluation of work and addressing the gender pay gap.

### **New s 134(1)(aa) of the modern awards objective**

47. Item 347 of the Amending Act also introduced new s 134(1)(aa), which reads:
  - (aa) the need to improve access to secure work across the economy; and
48. The reference to 'secure work' in s 134(1)(aa) is directed at a similar purpose to the new reference to 'job security' in the objects, referred to at [38] above. 'Secure work' is not defined and takes its ordinary meaning. Indicators of secure work may include (but are not limited to) the degree of certainty an employee has about the duration of their employment, the predictability of their pay, and the circumstances in which their employment may end. It follows that this objective is most likely to be engaged in relation to award terms that relate to matters such as the type of employment, arrangements for when work is performed, and notice of termination and redundancy, rather than terms that relate only to hourly rates of pay.
49. The applications before the Commission do not seek to vary any award terms that are directly relevant to secure work (including in implementing the proposed interim increase). Further, the Government's commitment to fully fund the interim wage increase means that the additional wage costs resulting from the decision will not affect employer incentives around such conditions.
50. The Commonwealth therefore submits that this factor should be assessed as neutral in relation to the proposed interim wage increase.

### **Amendments to s 157**

51. Item 352 of the Amending Act inserted new s 157(2B) into the FW Act, which provides:
  - (2B) The FWC's consideration of work value reasons must:
    - (a) be free of assumptions based on gender; and
    - (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

52. The 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.

53. In circumstances where the Commission has not yet made a determination varying the relevant awards, it is necessary for the Commission to be satisfied that its consideration of work value reasons conforms with new s 157(2B). However, for the reasons below, the Commission can be satisfied that it has done so.

***Paragraph (a) – free of assumptions based on gender***

54. New s 157(2B)(a) imposes a negative standard or requirement on the Commission in terms of how it considers work value reasons within the existing meaning in s 157(2A). That is, in considering work value reasons, the Commission must not make assumptions based on gender.

55. In these proceedings, the Commission has before it extensive expert evidence as to gendered assumptions which have historically been applied in the assessment of the work value of work in the aged care sector. As set out further below, the Commission has given close consideration to that evidence. Further, in conducting its assessment of work value, the Commission has relied on and applied the expert evidence of Associate Professor Junor which exposes 'invisible' skills that may have been given inadequate weight in previous work value assessments including because of gender-based assumptions. This demonstrates that the Commission's consideration of work value reasons in this proceeding to date has adhered to the requirements of new s 157(2B)(a).

56. Of course, s 157(2B)(a) imposes an ongoing obligation which will continue to apply to the Commission's consideration of work value reasons for the purposes of Stage 3 of these proceedings.

***Paragraph (b) – consideration of historical undervaluation due to gender-based assumptions***

57. Modern award minimum wages may be varied only if the Commission is satisfied that the variation is justified by work value reasons (s 157(2)), which, as was accepted in the Decision, are exhaustively defined in s 157(2A) (at [148]). Section 157(2B)(b) operates by requiring the Commission, in considering the work value reasons specified in subsection (2A) (for example, the level of skill or responsibility involved in doing the work), to consider whether gender-based assumptions have been made historically in relation to those matters which have resulted in the work being undervalued.

58. As [347] of the Explanatory Memorandum indicates, the principal mischief that new s 157(2B)(b) is intended to address is the Commission using minimum rates that were improperly fixed because of gender-based assumptions as a foundation or datum point for applying later changes in work value.<sup>12</sup> If minimum rates that have been set based on historical assumptions about gender are used as a reference point for future wage rises, gender-based undervaluation will be perpetuated, even if later assessments of changes in work value do not themselves make such assumptions. Section 157(2B)(b) requires the Commission considers whether this is a factor in each case.
59. New s 157(2B)(b) does not require that the Commission make a positive finding about historical undervaluation. Rather, the Commission must actively turn its mind to the question of historical undervaluation.
60. For the reasons below, the Commonwealth submits that the Commission's existing consideration of historical undervaluation due to gender-based assumptions in these proceedings is sufficient to satisfy s 157(2B)(b).

*The Commission has accepted that rates were not properly fixed*

61. In considering the role of a fixed datum point, the Commission stated that (at [175] of the Decision):

While not mandatory, where work value has previously been properly taken into account it is likely the Commission would adopt an appropriate datum point from which to measure work value change, as a means of avoiding double counting.

62. However, the Commission also observed that (at [172] of the Decision):

A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.

63. In the Decision, the Commission proceeded (noting broad agreement from the parties supporting this approach) on the basis that existing rates had not been properly fixed (at [353]). This means there is no risk of past undervaluations being carried forward into the minimum rates that the Commission will finally determine at Stage 3 of these proceedings. This will have the effect of addressing the issue of any historical undervaluation because of assumptions based on gender, which is the mischief to which new s 157(2B)(b) is directed.

*The Commission has considered, accepted and applied expert evidence on gendered undervaluation*

64. The Commission proceeded on the basis (consistent with the parties' submissions) that it was not required to form a view as to why the rates in the relevant awards have not been properly fixed, including by making a finding as to whether the minimum rates are affected by gender undervaluation (at [355]). However, it is apparent that the

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<sup>12</sup> As discussed in *Re 4 yearly review of modern awards* (2018) 284 IR 121 at [148] and [156], the adoption of this approach by the Commission's predecessor tribunals significantly limited the capacity to undertake a full work value assessment of awards covering female-dominated areas of work.

Commission gave consideration to whether work in the aged care sector had been undervalued because of gender-based assumptions.

65. *First*, the expert evidence before the Commission addressed historical gender-based undervaluation applicable to this case, including the Charlesworth Report at [42] and the Charlesworth Supplementary Report at [61], the Eagar Report at page 13, and the Meagher Report at page 27. The issue was addressed in submissions. The Decision comprehensively summarises this evidence and argument.

66. *Second*, the Commission accepted key propositions from the expert evidence as to there being historical undervaluation of care work for gendered reasons (at [356]; see also [1048]):

That being said, we accept the expert evidence that as a general proposition work in feminised industries, including care work, has been historically undervalued and that the reason for that undervaluation is likely to be gender based. We also accept that the evidence pertaining to gender undervaluation provides a useful context for the assessment of the work value and skills utilised in feminised industries, including in the aged care industry. The proper assessment of the skills utilised in aged care work is considered in detail in Chapter 7.

67. *Third*, after giving close consideration to expert evidence on gender undervaluation in the aged care sector, the Commission accepted key propositions on gender-based undervaluation (at [758]). This included accepting that there were 'barriers and limitations to the proper assessment of work value in female dominated industries and occupations', and that the 'approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations'.

68. *Fourth*, the Commission drew on expert evidence to ensure that its assessment of work value was free of assumptions based on gender. In particular, the Commission accepted the evidence of Associate Professor Junor that the Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly characterised as skills, and should be brought to account in the assessment of work value (at [896]).

### *Conclusion*

69. These are clear indications that the Commission has turned its mind to the question of historical undervaluation because of gender-based assumptions as a key consideration in this matter. That is sufficient to discharge the obligation in s 157(2B)(b), especially given the Commission's finding that wages were never properly fixed. It is not a requirement of new s 157(2B)(b) for the Commission to reach a concluded view on the issue.

Date: 16 December 2022

Paul Barker  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Respondent

These submissions were settled by Yaseen Shariff SC and Dan Fuller, counsel for the Commonwealth of Australia.





## EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

### General Practice Note

#### 1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see Annexure A) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see Annexure B), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
  - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
  - (c) the *Evidence Act 1995* (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
  - (d) Part 23 of the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”); and
  - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

#### 2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and
  - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence



being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

### **3. INTERACTION WITH EXPERT WITNESSES**

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness<sup>1</sup> should, at the earliest opportunity, be provided with:
  - (a) a copy of this practice note, including the Code (see Annexure A); and
  - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

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<sup>1</sup> Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

#### **4. ROLE AND DUTIES OF THE EXPERT WITNESS**

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

##### ***Harmonised Expert Witness Code of Conduct***

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

#### **5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL**

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
- (a) acknowledge in the report that:
    - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
    - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
  - (b) identify in the report the questions that the expert was asked to address;
  - (c) sign the report and attach or exhibit to it copies of:
    - (i) documents that record any instructions given to the expert; and

- (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

## **6. CASE MANAGEMENT CONSIDERATIONS**

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

## **7. CONFERENCE OF EXPERTS AND JOINT-REPORT**

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

- (a) who should prepare any joint-report;
- (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
- (c) the agenda for the conference of experts; and
- (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

#### ***Conference of Experts***

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
- (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
- (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

#### ***Joint-report***

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

## **8. CONCURRENT EXPERT EVIDENCE**

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

## **9. FURTHER PRACTICE INFORMATION AND RESOURCES**

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP  
Chief Justice  
25 October 2016

## **HARMONISED EXPERT WITNESS CODE OF CONDUCT<sup>2</sup>**

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### **APPLICATION OF CODE**

1. This Code of Conduct applies to any expert witness engaged or appointed:
  - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
  - (b) to give opinion evidence in proceedings or proposed proceedings.

### **GENERAL DUTIES TO THE COURT**

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

### **CONTENT OF REPORT**

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
  - (a) the name and address of the expert;
  - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
  - (c) the qualifications of the expert to prepare the report;
  - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
  - (e) the reasons for and any literature or other materials utilised in support of such opinion;
  - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
  - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
  - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
  - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

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<sup>2</sup> Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

#### **SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION**

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

#### **DUTY TO COMPLY WITH THE COURT'S DIRECTIONS**

- 6. If directed to do so by the Court, an expert witness shall:
  - (a) confer with any other expert witness;
  - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
  - (c) abide in a timely way by any direction of the Court.

#### **CONFERENCE OF EXPERTS**

- 7. Each expert witness shall:
  - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
  - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.



## ANNEXURE B

# CONCURRENT EXPERT EVIDENCE GUIDELINES

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### APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

### OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique<sup>3</sup> will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

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<sup>3</sup> Also known as the "hot tub" or as "expert panels".

## **CASE MANAGEMENT**

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
  - (a) the agenda;
  - (b) the order and manner in which questions will be asked; and
  - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

## **CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES**

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

## **PROCEDURE AT HEARING**

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
  - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
  - (c) the experts will take the oath or affirmation together, as appropriate;
  - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
  - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
  - (f) the judge will guide the process by which evidence is given, including, where appropriate:
    - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
    - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
    - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
    - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
    - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.
17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.



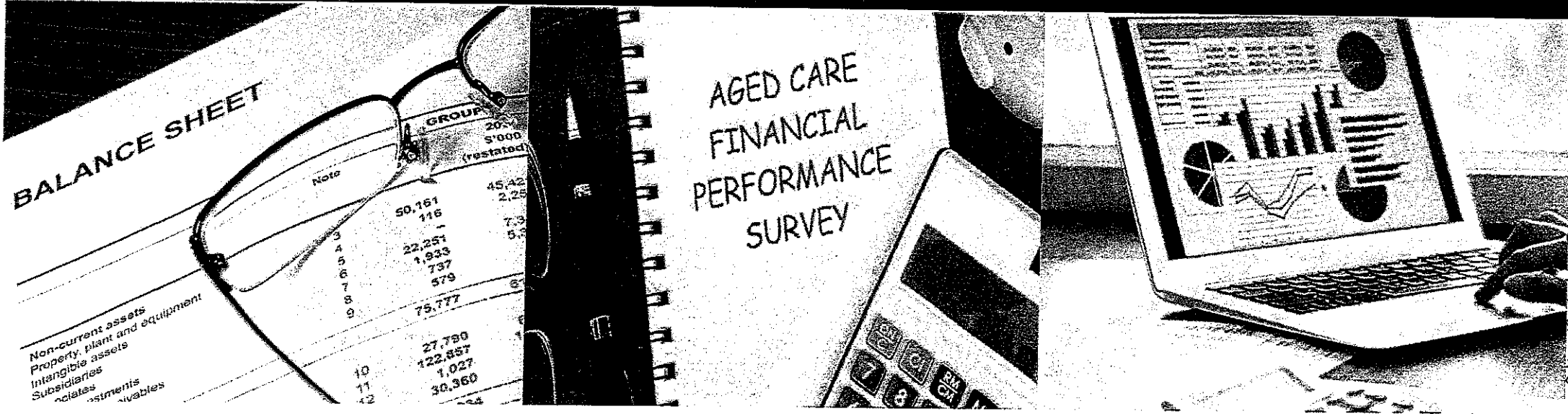
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**StewartBrown**

Integrity + Quality + Clarity

## Aged Care Financial Performance Survey Report



The StewartBrown September 2022 *Aged Care Financial Performance Survey* incorporates detailed financial and supporting data from **1,182 aged care homes (95,126 beds/places)** and **76,770 home care packages across Australia**. The quarterly survey is the largest benchmark in the aged care sector and provides invaluable insight into the trends and drivers of financial performance at the sector level and at the aged care home or programme level.

3 months ended 30 September 2022

ANNEXURE B TO THE STATEMENT OF GRANT CORDEROY

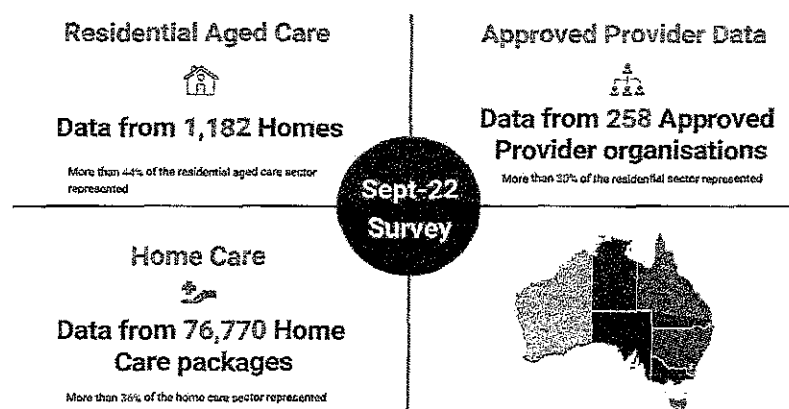
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# 1. EXECUTIVE SUMMARY

## Abstract

The *Aged Care Financial Performance Survey (Survey) September 2022 (Sep-22) Sector Report* provides an overview of the financial performance of the aged care sector in Australia. It is based on the results of the StewartBrown Survey for the 3 months ended 30 September 2022 which includes the below metrics.



Refer Glossary, which provides a graphical depiction of the Data Collection, Data Cleansing and Survey Metrics processing.

## Commentary

The aged care sector, including residential aged care and home care packages, continues to have a significantly declining financial performance. Whilst much necessary focus has been directed toward important legislative and regulatory reforms, this has not transcended into improving the financial sustainability of the sector.

Staffing capacity is at a severe shortage which impacts care service delivery at all levels of aged care, and with the interim Fair Work Commission ruling promising to assist in the retention of staff this still falls well short of what is required.

The government has shown strong commitment to implementing the reforms recommended by the Royal Commission and has already demonstrated a positive and multilateral approach with all stakeholders.

However more funding reforms are urgently required which must focus on a greater level of consumer contribution for everyday living and accommodation services in particular.

**The funding reform agenda needs to clearly articulate each specific area to be addressed. Additional financial reforms need to be strongly considered including:**

- Funding to increase staff remuneration, on-costs and benefits
- Subsidy funding, including indexation, to directly correlate to direct costs of care (particularly staff)
- Regulated consumer contribution for Home Care (and CHSP) based on ability to pay
- Deregulation of residential Basic Daily Fee
- Structural enhancement of residential Accommodation Pricing model
- Increased capital grants for rebuilding and refurbishment
- Alternate Home Care funding model

The Survey for the 3 months ending September 2022 continues to highlight the declining financial sustainability of the sector, with residential aged care now remaining at a **critical financial sustainability position** for many providers.

The average operating results for residential aged care homes in all geographic sectors was an operating loss of \$21.29 per bed day (*Sep-21 \$7.30 pbd loss*) This represents a loss of \$7,092 per bed per annum which is extrapolated to a **residential sector loss in excess of \$345 million** for the three month period.

The alarming statistic is that 70% of aged care homes operated at a loss (56% at Sep-21) and 51% operated at a EBITDA (cash loss) (32% at Sep-21).

The introduction of the AN-ACC subsidy model from 1 October 2022 may have a transition financial benefit, due to the subsidy including funding for additional direct care staffing minutes with the mandated minutes not being obligatory until 1 October 2023. However much of this benefit is eroded due to the AN-ACC starting price being insufficient at commencement (due to the effect of increased award staff costs and higher inflation, which were not known when the funding costing was formulated at the time).



However, staffing shortages have been a major contributing factor, with much increased levels of overtime and agency staff being required to ensure that resident care needs are being properly met. Agency staffing alone represented a cost of \$13.42 per bed day, an increase of \$7.48 per bed day when compared to the Sep-21 period.

Occupancy remains a major concern and the combination of negative factors are likely to have eroded essential investment from new and existing providers.

Home Care also faces significant operating issues. As with residential aged care, staffing remains the most crucial concern, and this coupled with the current complicated regulatory environment has seen the financial performance declining with the current operating result being a surplus of \$3.56 per client per day (*Sep-21 \$4.90 pcpd*), a decline in revenue utilisation to 83.7% of available package funding and an increase in unspent funds to now average \$11,693 for every care recipient (*unspent funds are now in excess of an aggregate \$2.4 billion*).

The underlying issue is that as the reforms are being implemented, there is a lag period of some years before they will positively impact financial performance. This is where the pressure point is likely to occur and short-term remedial assistance may be required.

**It is the opinion of StewartBrown that after more than 5 successive years of significant aggregate operating losses in the residential aged care sector, structural funding reforms (including increased and appropriate care recipient co-contribution) are essential. However, to avoid closure of homes and reduced service delivery, especially in regional locations, a funding sustainability package also needs to be considered in the short term to ensure current viability and allow for the necessary funding reforms to be properly implemented.**

## StewartBrown Survey

### Survey Outline

The StewartBrown *Aged Care Financial Performance Survey* (Survey) commenced in 1995 and has grown exponentially since that date. The use of the term “Survey” is probably a misnomer, as unlike many public surveys which have a limited data set, the StewartBrown Survey is subscription based, quarterly and very granular in respect of data covered and depth.

The Survey is primarily for the benefit of aged care providers in reviewing their financial performance and considerations of strategic direction on an individual aged care home (facility) basis and home care package program basis. Providers compare their performance on a number of metrics with facilities (in this instance) through a range of data attributes, including resident mix and acuity, staffing levels (cost and hours/minutes), geographic region, age of building, size of building, number of places (beds), accommodation pricing and administration. Home care has a similar range of metrics.

The Survey participants utilise an interactive website with high level dashboards, business intelligence tools and the ability to drill down on all data fields as required.

A secondary benefit is that the aggregate of the data provides a significant level of trend data and detailed analysis as included in our Survey reports and now through independent analysis undertaken by the University of Technology (UTS Ageing Research Collaborative) which provides an additional level of academic rigour.

Each participant completes detailed data input sheets for each quarter. Once received, the data undergoes a substantial cleansing and checking process (refer Glossary) which identifies all material variances, by comparison to previous quarters for each facility and comparison to equivalent benchmark facilities. In this context, all variances identified through this automated cleansing process are followed up with the respective provider for comment and further amendment if required.

### Survey Results Matrix

As noted above, the primary purpose of the Survey is for participating providers to benchmark individual aged care facility and home care programs against similar de-identified comparators using a range of metrics.

To ensure accurate and relevant benchmark comparison, all outlier aged care facilities and home care programs are excluded from the Survey results. Examples of outliers include:

- Facilities/programs under sanction
- Facilities with significant infectious disease outbreaks (such as covid-19)
- Facilities undergoing major refurbishment
- Newly built facilities still in the ramping up stage
- Recently acquired facilities/programs undergoing structural operation changes

- Facilities/programs closed during the financial year (and reporting period)
- Facilities with occupancy less than 80%
- Revenue and expense lines that are out of range with supporting explanation

For the purpose of the Survey analysis, all facilities/programs included are referred to as being **mature**.

### Indirect Care (Everyday Living)

Indirect care includes hotel services (catering/cleaning/laundry), utilities and an administration cost allocation. The major revenue components comprise the Basic Daily Fee (BDF), BDF Supplement and additional/extra services charged in some facilities (where applicable).

A characteristic of these services is that the BDF (calculated at 85% of the single pension) is the same for all residents irrespective of financial means and acuity.

The costs of providing these services has been greater than the revenue where no additional service fee is levied, and currently the sector average is \$7.49 loss per resident per day, which is after the \$10 per resident per day additional BDF subsidy supplement provided by the Government from 1 July 2021.

### Accommodation

The accommodation results represents the major component of the poor financial performance and the sector averaged a loss of \$13.90 per resident per day for Sep-22. Depreciation represented \$20.78 per bed day, and whilst it is a non-cash component (and excluded from EBITDA calculations) it is a critical expense that needs to be covered given the cost associated with maintaining, refurbishing and eventual rebuilding of an aged care facility.

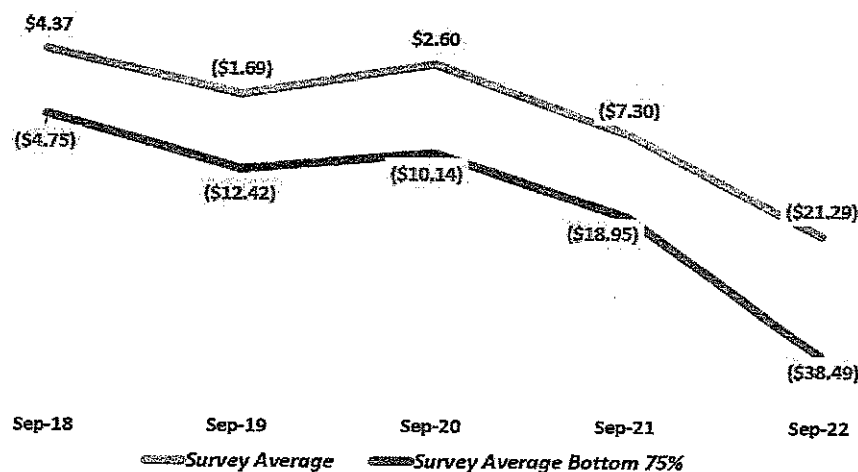
The majority of providers depreciate buildings over 40 years (2.5% pa) which may not be representative of the effective life of a facility to provide accommodation for aged care services. It is more likely to be in the 25 to 30 year range, and particularly driven by the changing nature of aged care and consumer choice as to what future accommodation settings will be required and favoured.

The building cost for a new aged care facility averages over \$310,000 per room nationally, and the average written down value (after accumulated depreciation) of existing facilities is in excess of \$180,000 and the depreciation expense needs to be covered to ensure the adequate refurbishment and ultimate replacement of the building.

### Financial Performance of Bottom 75% of Facilities

Possibly the greatest concern is in respect of the financial performance of the bottom 75% of facilities. This should not be interpreted as any reflection on the standard of care delivered, but the dilemma that the sector faces. *Figure 1* highlights this gap of \$17.20 pbd from the average result.

Figure 1: Operating results comparison of Bottom 75% of homes (\$ per bed day)



### Home Care Revenue Utilisation

Home Care financial performance has stagnated over the last four financial years with the average operating result for Sep-22 being \$3.56 per care recipient (client) per day. This is not an adequate return based on the investment required and business risk to provide these essential services to the elderly in a domestic home setting.

Revenue utilisation, being the actual services provided as a percentage of the funding received, continues to remain less than 90% (83.7% for Sep-22). There are a number of valid reasons for such a low utilisation, one being the current funding model, however increased utilisation is required to fully cover the fixed costs and therefore improve financial performance.

The resultant effect of the low utilisation is that unspent funds (being funding not being used by care recipients) has increased year on year to amount to an average of \$11,693 per consumer (over \$2.4 billion nationally in aggregate). It is estimated that 96% of these unspent funds are never utilised and subsequently returned to Treasury (or not consumed in the first place due to the changes in the subsidy payments arrangements with unspent funds now being held by Services Australia until such time as being required if at all).

### Home Care Revenue

The actual amount charged for providing home care services has steadily decreased to average \$66.39 per client per day for Sep-22 (\$70.26 for Sep-21). This may be as a result of competition and consumer choice, however it is more likely a reflection of concerns by providers in lifting their pricing, as due to staffing constraints which has restricted the range of service delivery.

More community education is required to explain the actual costs associated with providing home care services, with the attention focused on administration and care management fees diverting this understanding.

### Financial Reform Considerations

A number of potential reforms to the financing of aged care have been considered. Unfortunately, the lack of a consistent strategy and agreement from all sector stakeholders has inhibited some of the significant reform that is required.

The Department has been very active in considering, implementing where required and supporting regulatory changes but the sector, as a whole, needs to embrace reform and provide solutions and not just focus on funding issues.

**Ultimately, this will come down to requiring a greater level of consumer co-contribution in funding aged care.** Clearly, where the consumer does not have the financial means to further contribute this must not in any respect disadvantage them. A safety net must be enshrined within aged care, as with other areas of health care and social services.

A brief overview of some financial reforms to be considered is as follows.

#### Staff Remuneration and Benefits

The biggest challenge facing aged care is staffing, with considerable shortages in staff numbers being felt in all regions of Australia. The ability to attract and retain staff has reached a critical stage.

The recent Fair Work Commission minimum wage increase of 5.2% (effectively 4.6% for aged care workers) from 1 July 2022 is a start. The recent “work value case” interim ruling of 15% increase by the Fair Work Commission (for Direct Care staff only) should provide further required pay rate increases for aged care staff.

Whether these increases are sufficient on their own to attract additional staff is questionable, and other incentives and benefits may be required.

Several possible considerations could include:-

- Increase the Fringe Benefits Tax exemption for aged care employees to a cap of \$40,000 (current cap of \$30,000 has been in place since 1 April 2001)
- Expand the exemption criteria to include all aged care workers, not just those employed by a public benevolent institution
- Allow travel to work cost to be tax deductible for aged care workers (many of whom travel quite a distance to their place of employment)
- Provide a payroll tax supplement where applicable

A characteristic of the FBT exemption is that this amount must be consumed (as a fringe benefit) and not saved, and accordingly will have a lower economic cost and impact than a straight wage increase.

#### Subsidy Funding

A major and appropriate reform is for the Independent Hospital and Aged Care Pricing Authority (IHACPA) to be responsible for the review of the various cost components in providing aged care services for residential and community care. IHACPA will provide recommendations to the Government as to the appropriate subsidy required to fund these costs which will provide greater transparency.

#### AN-ACC Subsidy

From 1 October 2022, residential aged care subsidy for the provision of direct care services has changed from the Aged Care Funding Instrument (ACFI) to the Australian National Aged Care Model (AN-ACC).

AN-ACC has been designed to more accurately reflect the funding required for each resident to align with their acuity and care needs, and is welcomed by the sector.

The AN-ACC subsidy has been expanded to include funding for providing additional direct care minutes (Registered Nurses/Enrolled Nurses/Personal Care Workers) to be in line with the mandated levels as recommended by the Royal Commission. In this sense, it has morphed into a hybrid funding model.

As with any new funding model in such a complex and diverse area as aged care there will need to be refinements over time. In this regard, the role of IHACPA is paramount to ensure that the funding matches the input costs, and that inflation and wage increases are appropriately covered, unlike the recent experience of COPE not being adequate in this regard.

### **Regulated Consumer Contribution for Home Care**

Home care providers (HCP and CHSP) are entitled to receive a consumer contribution of up to 17.5% of the single aged pension amount. Due to the less than optimal revenue utilisation in home care packages (refer earlier commentary) there has been little incentive for providers to seek a consumer contribution as it merely adds to the unspent funds and a portion is ultimately returned to the care recipient when they leave the home care program.

This has distorted the overall funding, and, importantly, has created a climate whereby consumers do not regard co-contribution as being a necessary component of aged care.

*Recommendation 12* of the “Legislated Review of Aged Care 2017” (Tune Review) included requiring providers to charge the basic daily fee (consumer contribution) for home care packages.

*Recommendation 16* recommended that mandatory consumer contributions be levied for CHSP services.

Implementation of these recommendations together with a new funding model designed to ensure that approved funding for each care recipient is appropriately utilised (services provided) should significantly improve the home care financial performance, and importantly, enable care recipients to receive a more inclusive care service delivery.

### **Amendments to the Means-Tested Care Fee Criteria**

*Recommendation 13* of the Tune Review stated “include the full value of the owner’s home in the means test for residential care when there is no protected person in that home”.

*Recommendation 15* sought the abolishment of the annual and lifetime caps on income-tested fees in home care and means-tested care fees in residential care.

These are fundamental to ensuring that aged care funding is appropriately also being contributed to by the consumer.

In residential aged care, the means-tested care fee represents only 3.8% of the direct care subsidy. If this was lifted to (say) 9% and the means-tested care fee added to the funding envelope (rather than being deducted from the subsidy paid by the government) this would add in excess of \$1.25 billion pa in the overall direct care funding envelope based on the Sep-22 ACFI.

### **Derégulation of the Basic Daily Fee**

The Basic Daily Fee is levied to reimburse for the costs associated with everyday living services. The costs are currently greater than the revenue received.

The Tune Review *Recommendation 14* effectively sought to deregulate the BDF by proposing that providers be allowed to charge a higher basic daily fee to non-low means residents up to a \$100 per day cap before requiring pricing commissioner approval.

This proposal would eliminate the current unwieldy additional services and extra services regime and provide consumers with a greater choice and clarity.

### **Structural Reform of the Accommodation Pricing Model**

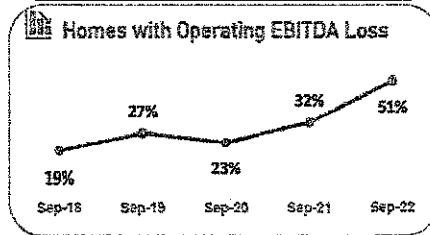
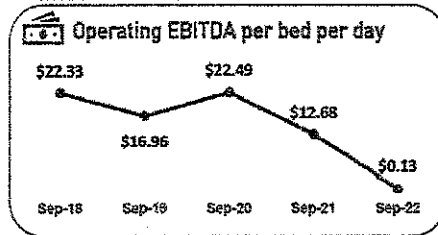
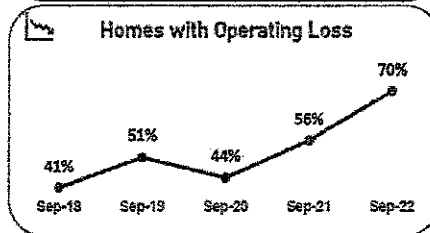
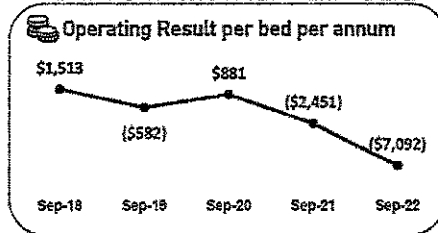
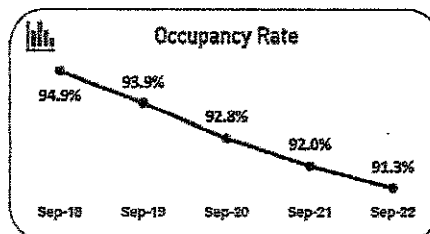
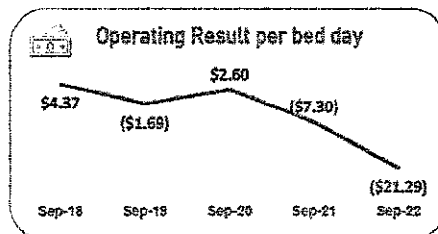
This represents possibly the least understood aspect of residential aged care funding. The current RAD/DAP model infused with a prescriptive MPIR is cumbersome and confusing. It is also inequitable for consumers and providers as paying a RAD where possible is far less cost than paying a daily fee (DAP).

StewartBrown has advocated for changing the model to be more focussed on a “rental” payment for accommodation whereby the rent amount is determined by the actual upfront contribution paid. The underlying principle is that a rental portion is paid irrespective of whether a full contribution (currently a RAD) is paid.

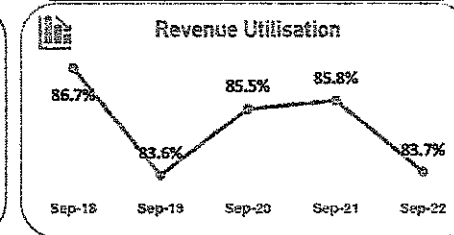
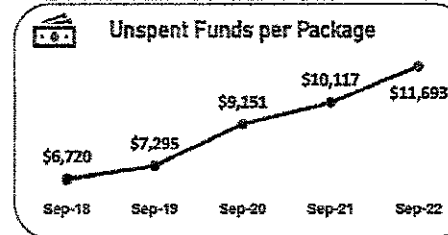
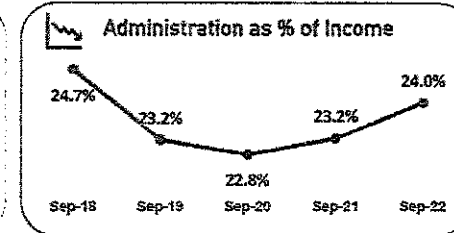
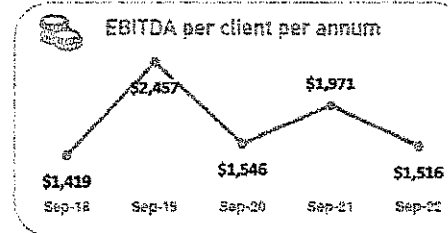
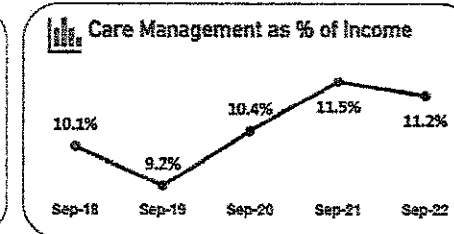
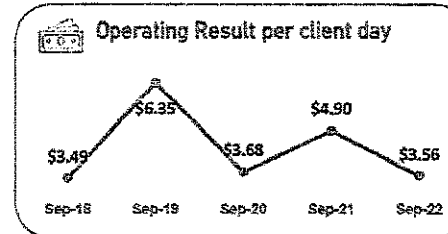
As the name suggests, a Refundable Accommodation Deposit has no rental component included, and accordingly when paying a RAD the loss of alternate revenue from the RAD (such as interest) is the only actual cost for the accommodation in an aged care home. If the RAD amount still resides in the residential home, it is likely that the value of the home increase will be greater than the amount of lost interest income.

## Sep-22 (3 months) Results Snapshot

### Residential Aged Care



### Home Care



## Sep-22 (3 months) Financial Performance Analysis

### Residential Aged Care Results

Revenue	<ul style="list-style-type: none"> <li>• Average ACFI and supplements was \$196.99 pbd an increase of 2.08% from Sep-21 (\$192.99 pbd)</li> <li>• Indirect care (everyday living) revenue <i>excluding the BDF supplement</i> was \$57.73 pbd an increase of 4.3% from Sep-21 (\$55.37 pbd)</li> <li>• Indirect care (everyday living) revenue <i>including the BDF supplement</i> was \$67.53pbd</li> <li>• Accommodation revenue was \$33.33 pbd a small increase from Sep-21 (\$32.52 pbd)</li> </ul>
Expenses	<ul style="list-style-type: none"> <li>• Direct care labour costs (RN/EN/PCA) averaged \$149.24 pbd an increase of 12.1% from Sep-21 (\$133.14 pbd)</li> <li>• Direct care agency costs averaged \$13.42 per bed day an increase of \$7.58 per bed day from Sep-21 (\$5.84 pbd) <i>highlighting the extreme permanent staffing shortages</i></li> <li>• Other direct care labour costs (Care Management/Allied Health/Lifestyle) averaged \$25.18 pbd a decrease of 2.9% from Sep-21 (\$25.92 pbd)</li> <li>• Other direct care costs averaged \$6.01 pbd a decrease from Sep-21 (\$12.48 pbd) <i>(due to less covid-19 impact in the comparable quarters)</i></li> <li>• Indirect care (everyday living) costs was \$75.02 pbd (including administration) an increase of 9.5% (Sep-21 \$68.54 pbd)</li> <li>• Catering expenditure averaged \$36.31 pbd an increase of 9.6% (Sep-21 \$33.15 pbd) <i>(as a result of the targeted BDF supplement)</i></li> <li>• Administration costs was \$44.46 pbd an increase of 12.0% (Sep-21 \$39.68 pbd) <i>(due to increase quality, reporting and compliance requirements)</i></li> <li>• Accommodation expenditure (including administration) averaged \$47.24 pbd (depreciation \$20.78 pbd) compared to Sep-21 \$42.92 pbd (depreciation \$19.31 pbd)</li> </ul>
Operating Result	<ul style="list-style-type: none"> <li>• Direct care result declined by \$6.65 pbd to a surplus of \$0.11 pbd from Sep-21 (\$6.76 pbd)</li> <li>• Indirect care result declined to record a deficit of \$7.49 pbd (including administration) (Sep-21 \$3.66 pbd deficit)</li> <li>• Accommodation result was a deficit of \$13.90 pbd (Sep-21 \$10.40 pbd deficit)</li> <li>• Operating result <i>(including BDF supplement of \$10 pbd)</i> was a <b>deficit of \$21.29 pbd</b> (Sep-21 operating deficit \$7.30 pbd)</li> <li>• Operating EBITDA averaged \$44 pbpa (Sep-21 EBITDA \$4,257 pbpa)</li> </ul>
Additional Trends	<ul style="list-style-type: none"> <li>• Direct care minutes (RN/EN/PCA) was <b>186.48 minutes per resident per day</b> (Sep-21 180.39 minutes)</li> <li>• Occupancy for mature homes <b>declined to 91.3%</b> (Sep-21 92.0%) <i>(occupancy based on actual available beds)</i></li> <li>• Occupancy for all homes decreased to 90.4% (Sep21 90.7%) <i>(occupancy based on approved places)</i></li> <li>• Supported resident ratio decreased by 1.2% to 45.0% (Sep-21 46.2%)</li> <li>• Average full RAD received for Sep-22 period was \$466,103 (Sep-21 \$444,921)</li> <li>• Proportion of full RADs received was 17.4%, full DAPs was 64.2% and Combinations (RAD/DAP) was 18.4%</li> </ul>

## Home Care Package (HCP) Results

Revenue	<ul style="list-style-type: none"> <li>Revenue was \$66.39 per client per day a decrease of 5.5% from Sep-21 (\$70.26 pcpd)</li> <li>Care management revenue as a proportion of total revenue was 19.5% (Sep-21 18.7%)</li> <li>Package management revenue as a proportion of total revenue was 11.4% (Sep-21 10.1%)</li> <li>Revenue utilisation <b>decreased by 2.1% to 83.7%</b> of funding received for Sep-22 (Sep-21 85.8%)</li> </ul>
Expenses	<ul style="list-style-type: none"> <li>Direct service costs decreased by \$1.56 pcpd and represents 58.6% of total revenue (Sep-21 57.6% on higher revenue per client per day)</li> <li>Case management cost as % of revenue has decreased to 11.2% of revenue (Sep-21 11.5% of revenue)</li> <li>Administration and support costs represent 24.0% of revenue (Sep-21 23.2%)</li> </ul>
Unspent Funds	<ul style="list-style-type: none"> <li>The amount of unspent funds per client (care recipient) has continued to rise and now averages <b>\$11,693 per client</b> (Sep-21 \$10,117 per client)</li> <li>In aggregate across the sector, this represents <b>in excess of \$2.4 billion</b> of funds that have not been utilised.</li> </ul>
Operating Result	<ul style="list-style-type: none"> <li>Operating results have declined from \$4.90 per client per day for Sep-21 to \$3.56 pcpd for Sep-22</li> <li>The profitability margin has declined from 7.0% for Sep-21 to 5.4% for Sep-22</li> <li>Profitability decline is being driven by a \$3.87 decrease in total revenue per client per day in parallel with decrease in revenue utilisation</li> </ul>
Other Trends	<ul style="list-style-type: none"> <li>Average staff hours per week was <b>4.88 hours</b> (Sep-21 5.62 hours)</li> <li>The number of packages in the survey has increased 30.6% (15,297 packages) from Sep-21 to Sep-22</li> </ul>

## 2. FINANCIAL RESULTS - KEY METRICS

### Residential Aged Care

Table 1: Summary Income & Expenditure Comparison (\$ per bed day)

	Survey		Survey FY22 1,202 Homes
	Sep-22 1,088 Homes	Sep-21 1,107 Homes	
<b>DIRECT CARE</b>			
Revenue	\$196.99	\$192.99	\$194.77
Expenditure			
Direct care labour costs	149.24	133.14	139.17
Other direct care labour costs	25.18	25.92	26.43
Other direct care costs	6.01	12.48	12.16
Administration	16.45	14.68	15.16
	\$196.88	\$186.23	\$192.92
<b>DIRECT CARE RESULT (A)</b>	<b>\$0.11</b>	<b>\$6.76</b>	<b>\$1.85</b>
<b>INDIRECT CARE</b>			
Revenue	\$67.53	\$64.88	\$66.33
Expenditure			
Catering	36.31	33.15	34.51
Cleaning	10.20	9.37	9.88
Laundry	4.23	4.21	4.31
Other hotel services expense	0.12	0.09	0.08
Payroll tax	0.08	0.12	0.13
Overhead allocation (workcover & education)	0.88	0.79	0.80
Utilities	8.26	7.49	7.29
Administration	14.94	13.33	13.77
	\$75.02	\$68.54	\$70.78
<b>INDIRECT CARE RESULT (B)</b>	<b>(\$7.49)</b>	<b>(\$3.66)</b>	<b>(\$4.45)</b>
<b>CARE RESULT (C) (A + B)</b>	<b>(\$7.38)</b>	<b>\$3.10</b>	<b>(\$2.60)</b>
<b>ACCOMMODATION</b>			
Revenue			
Residents	13.87	13.16	13.03
Government	19.46	19.36	19.82
	\$33.33	\$32.52	\$32.84
Expenditure			
Depreciation	20.78	19.31	19.54
Property maintenance	11.31	10.08	11.08
Property rental	0.64	0.67	1.00
Other	1.43	1.19	1.24
Administration	13.07	11.67	12.05
	\$47.24	\$42.92	\$44.91
<b>ACCOMMODATION RESULT (D)</b>	<b>(\$13.90)</b>	<b>(\$10.40)</b>	<b>(\$12.06)</b>
<b>OPERATING RESULT (\$ per bed day) (C + D)</b>	<b>(\$21.29)</b>	<b>(\$7.30)</b>	<b>(\$14.67)</b>
<b>OPERATING RESULT (\$ per bed per annum)</b>	<b>(\$7,092)</b>	<b>(\$2,451)</b>	<b>(\$4,871)</b>
<b>EBITDA (\$ per bed per annum)</b>	<b>\$44</b>	<b>\$4,257</b>	<b>\$1,949</b>

Figure 2: Residential Operating Result Snapshot (\$ per bed day)

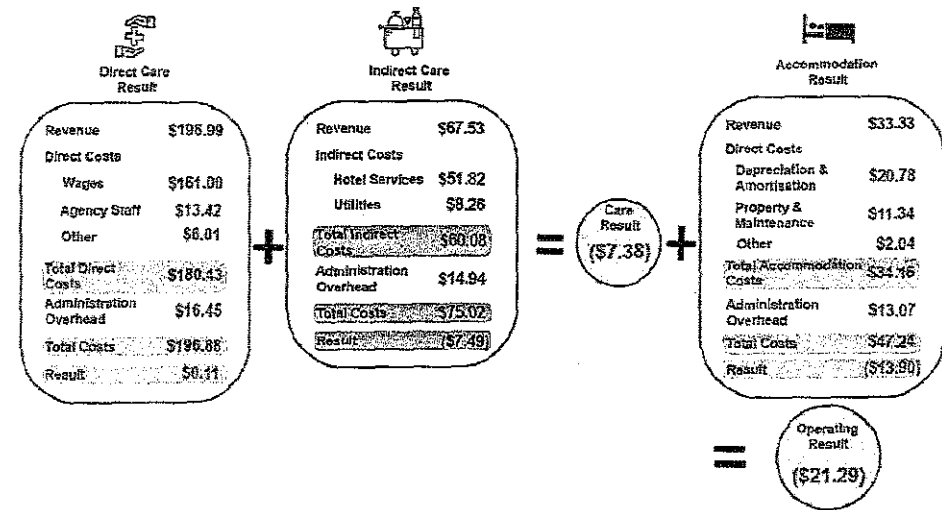


Table 2: Summary KPI Results Comparison

Summary KPI Results	Sep-22 1,088 Homes	Sep-21 1,107 Homes	Difference (YoY)	FY22 1,202 Homes
Operating Result (\$pbd)	(\$21.29)	(\$7.30)	↓ (\$13.99)	(\$14.67)
Operating Result (\$pbpa)	(\$7,092)	(\$2,451)	↓ (\$4,641)	(\$4,871)
EBITDA (\$pbpa)	\$44	\$4,257	↓ (\$4,213)	\$1,949
Average Occupancy (all homes)	90.4%	90.7%	↓ (0.3%)	89.7%
Average Occupancy (mature homes)	91.3%	92.0%	↓ (0.7%)	91.0%
Average direct care revenue (\$pbd)	\$196.99	\$192.99	↓ \$4.01	\$194.77
Total direct care minutes per resident per day	186.48	180.39	↓ 6.09	176.91
Direct care services costs as a % of direct care revenue	91.6%	88.9%	↑ 2.7%	91.3%
Supported Ratio %	45.0%	46.2%	↓ (1.2%)	45.3%
Average Full RAD/Bond held	\$428,405	\$416,676	↑ \$11,729	\$425,852
Average Full RAD taken during period	\$466,103	\$444,921	↑ \$21,182	\$455,006



**Trend Analysis**

Figure 3: Residential Operating Results by Region (\$ per bed day)

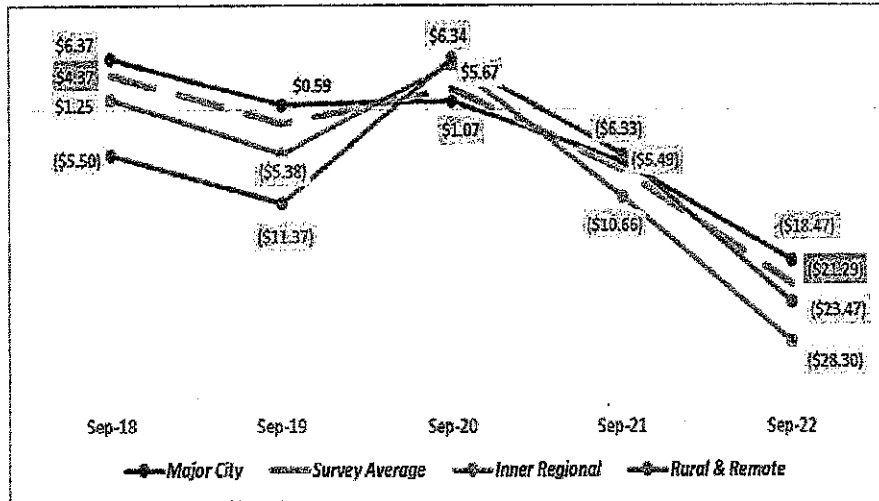


Figure 4: Residential Operating Results by Region (\$ per bed per annum)

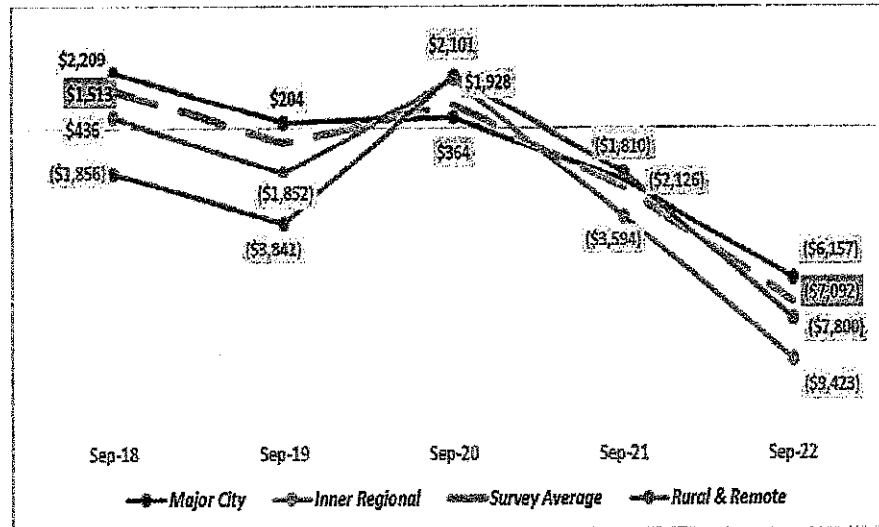
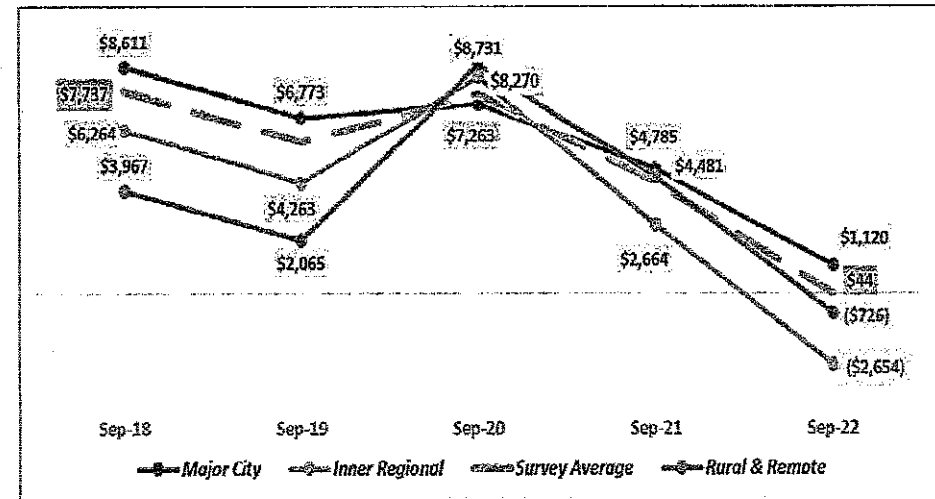
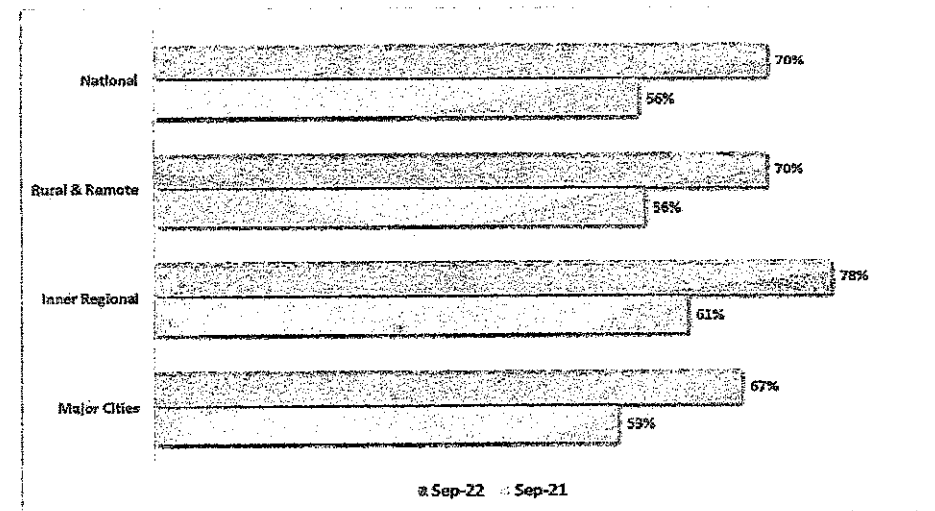


Figure 5: Residential EBITDA Results by Region (\$ per bed per annum)



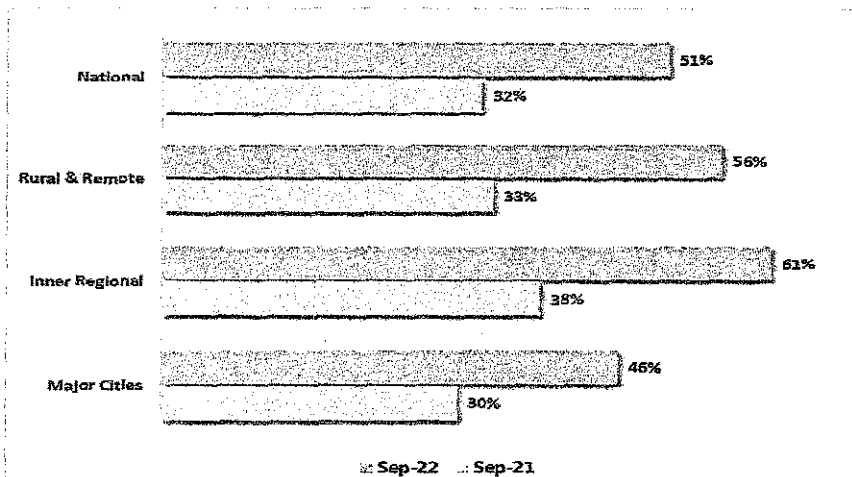
**Number of Aged Care Homes making an Operating Loss**

Figure 6: Aged care homes making an operating loss by remoteness



### Number of Aged Care Homes making an EBITDA loss

Figure 7: Aged care homes making an EBITDA loss by remoteness



### Operating Result Metrics

Figure 8: Operating Result by ACFI band and Occupancy percentage (\$ pbd)

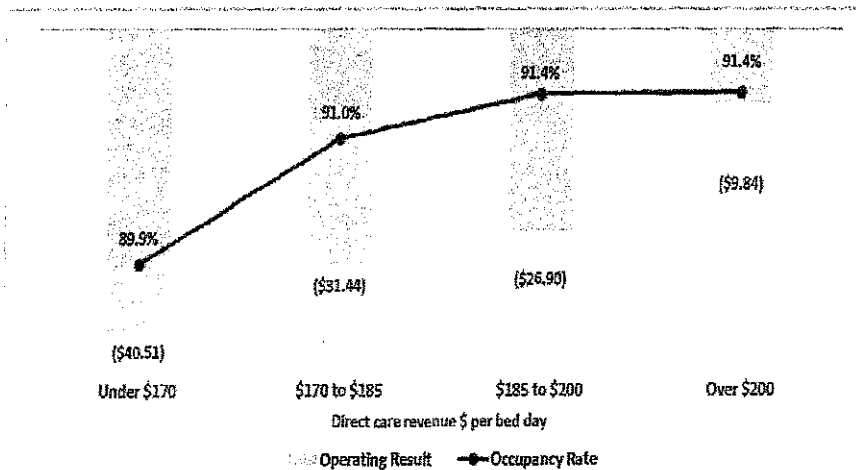


Figure 9: Operating Result comparison by State/Territory (\$ per bed day)

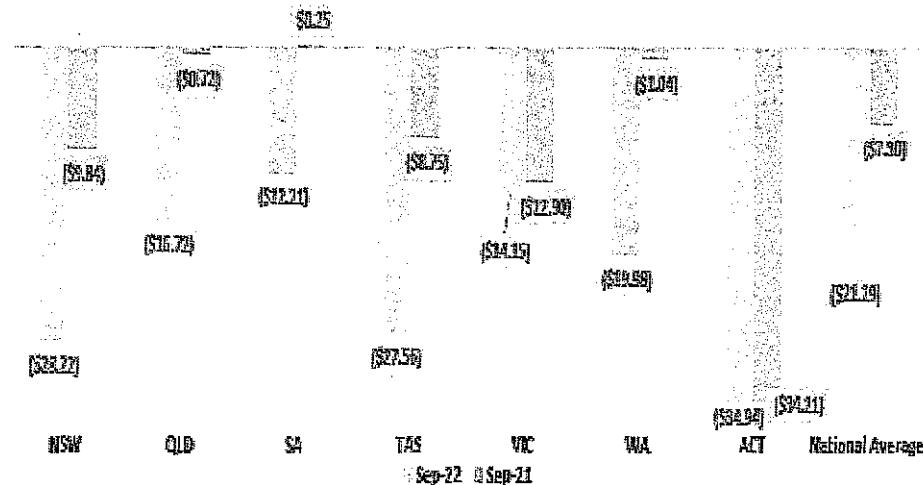
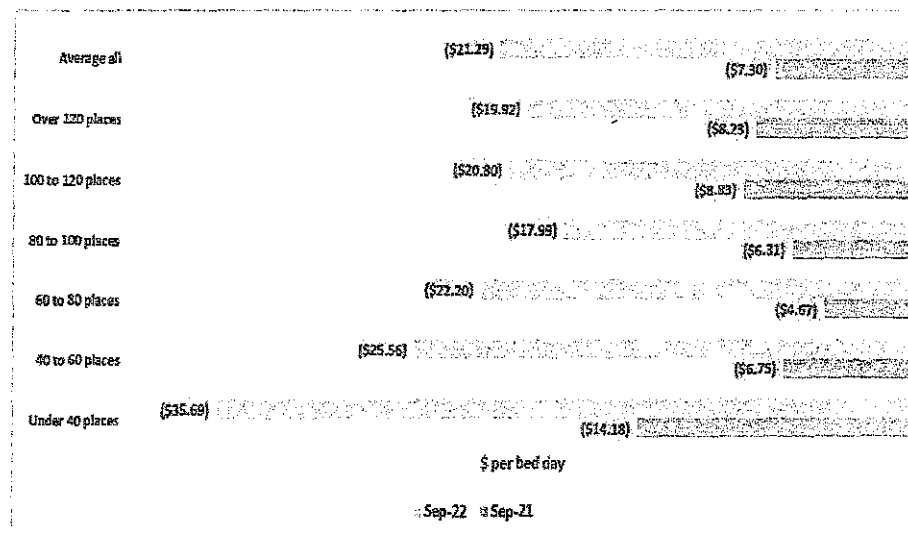


Figure 10: Operating Result comparison by size of aged care home (\$ per bed day)

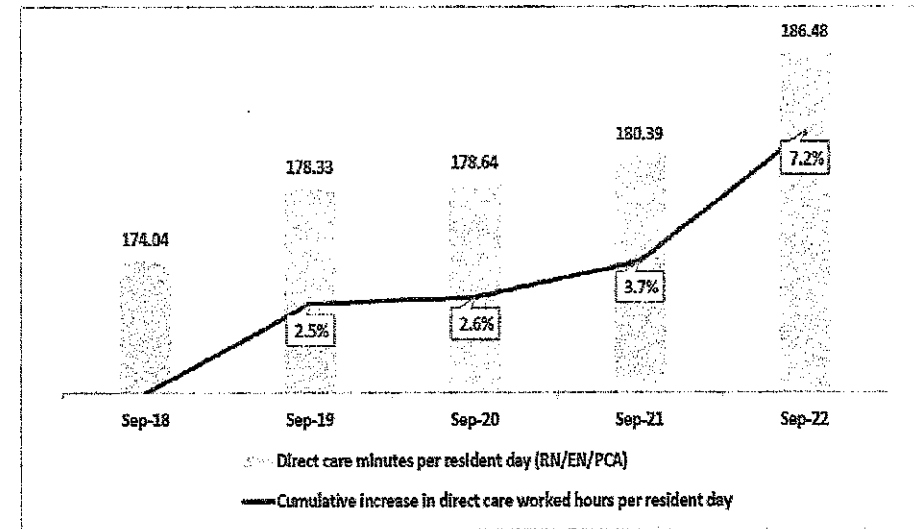


### Results by Geographic Location

Table 3: Summary KPI Results by geographic location

Summary Results by Region	Sep-22	Sep-22	Sep-22
	Major Cities 694 Homes	Inner Regional 283 Homes	Rural & Remote 111 Homes
Operating Result (\$pbd)	(\$18.47)	(\$28.30)	(\$23.47)
Operating Result (\$pbpa)	(\$6,157)	(\$9,423)	(\$7,800)
EBITDA (\$pbpa)	\$1,120	(\$2,654)	(\$726)
Average Occupancy (mature homes)	91.3%	91.2%	91.1%
Average direct care revenue (\$pbd)	\$198.63	\$193.00	\$195.46
Direct care minutes per resident per day	187.66	184.06	184.11
Direct care services costs as a % of direct care revenue	91.0%	93.3%	91.1%
Supported ratio %	44.2%	44.8%	51.4%
Average Full RAD/Bond held	\$462,999	\$345,922	\$325,699
Average Full RAD taken during period	\$498,790	\$373,670	\$358,769

Figure 11: Direct Care staff (RN/EN/PCA) trend (minutes per resident per day)



### Direct Care Staffing Minutes (per resident per day)

Table 4: Direct Care staffing metrics

Staffing Category	Survey Average		Survey Average FY22
	Sep-22	Sep-21	
Registered nurses	30.45	27.43	27.11
Enrolled & licensed nurses	12.52	17.04	13.16
Other unlicensed nurses & personal care staff	143.06	134.05	135.85
Imputed agency direct care minutes	0.45	1.88	0.79
<b>Total Direct Care Minutes</b>	<b>186.48</b>	<b>180.39</b>	<b>176.91</b>
Care management	5.50	7.58	7.52
Allied health	6.36	6.45	5.07
Diversional/Lifestyle/Activities	6.35	6.63	7.20
Imputed agency non-direct care minutes	0.20	n.a.	n.a.
<b>Total Care Minutes</b>	<b>204.89</b>	<b>201.06</b>	<b>196.70</b>

Figure 12: Direct Care Staff Minutes by Region (minutes per resident per day)

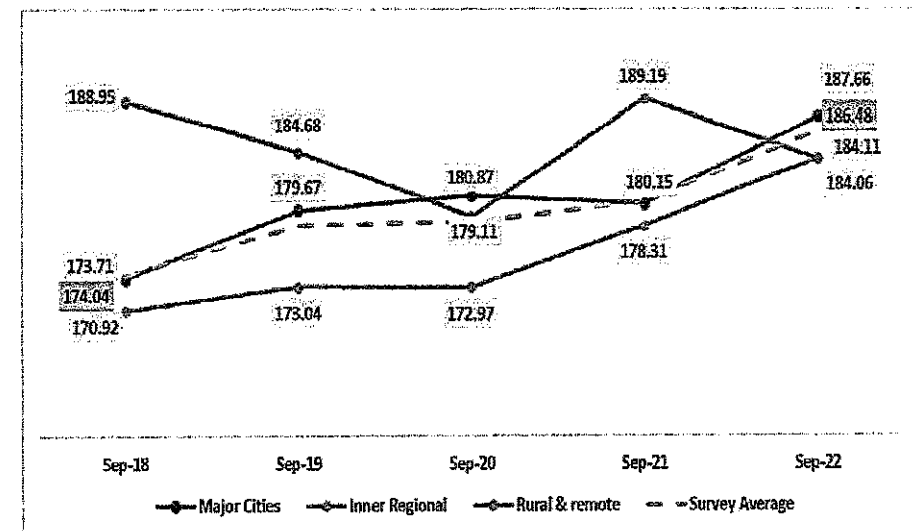
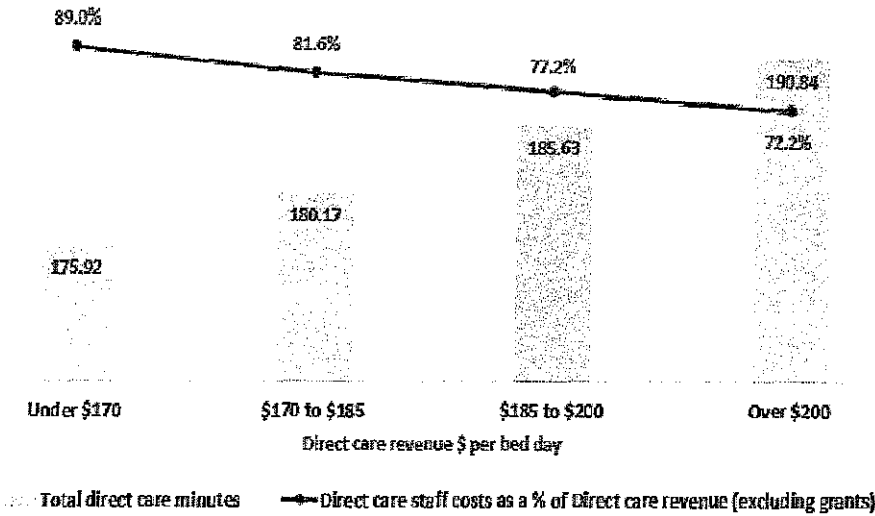


Figure 13: Direct Care Minutes by average ACFI subsidy bands



**Indirect Care (Everyday Living)**

Table 5: Indirect Care (everyday living) revenue and expenses (\$ pbd)

	Sep-22 1,088 Homes	Sep-21 1,107 Homes	YoY Movement	FY22 1,202 Homes
Basic daily fee supplement - government	\$9.79	\$9.51	↑	\$9.94
Basic daily fee - resident	\$54.78	\$52.71	↑	\$53.57
Other resident income	\$2.96	\$2.66	↑	\$2.81
<b>Indirect care revenue</b>	<b>\$67.53</b>	<b>\$64.88</b>	<b>↑</b>	<b>\$66.33</b>
Hotel services	\$51.82	\$47.72	↑	\$49.72
Utilities	\$8.26	\$7.49	↑	\$7.29
<b>Indirect care expenses</b>	<b>\$60.08</b>	<b>\$55.21</b>	<b>↑</b>	<b>\$57.01</b>
<b>Indirect care result (before Administration)</b>	<b>\$7.45</b>	<b>\$9.67</b>	<b>↓</b>	<b>\$9.32</b>
Administration	\$14.94	\$13.33	↑	\$13.77
<b>Indirect Care Result</b>	<b>(\$7.49)</b>	<b>(\$3.66)</b>	<b>↓</b>	<b>(\$4.45)</b>

**Accommodation Analysis**

Table 6: Accommodation revenue and expenses (\$ pbd)

	Sep-22 1,088 Homes	Sep-21 1,107 Homes	YoY Movement	FY22 1,202 Homes
<b>Accommodation revenue</b>	<b>\$33.33</b>	<b>\$32.52</b>	<b>↑</b>	<b>\$32.84</b>
<b>Accommodation expenses</b>				
Depreciation	\$20.78	\$19.31	↑	\$19.54
Refurbishment	\$0.28	\$0.19	↑	\$0.22
Property maintenance	\$11.31	\$10.08	↑	\$11.08
Property rental	\$0.64	\$0.67	↓	\$1.00
Other accommodation costs	\$1.15	\$1.01	↑	\$1.02
Administration	\$13.07	\$11.67	↑	\$12.05
<b>Accommodation expenses</b>	<b>\$47.24</b>	<b>\$42.92</b>	<b>↑</b>	<b>\$44.91</b>
<b>Accommodation Result (\$ per bed day)</b>	<b>(\$13.90)</b>	<b>(\$10.40)</b>	<b>↓</b>	<b>(\$12.06)</b>
<b>Accommodation Result (\$ per bed per annum)</b>	<b>(\$4,632)</b>	<b>(\$3,491)</b>	<b>↓</b>	<b>(\$4,006)</b>
<i>Imputed DAP (based on RAD holdings x 70%) (\$pbpa)</i>	<i>\$5,720</i>	<i>\$4,580</i>	<i>↑</i>	<i>\$4,641</i>
<b>Accommodation Result with imputed DAP (\$pbpa)</b>	<b>\$1,087</b>	<b>\$1,088</b>	<b>↓</b>	<b>\$635</b>
<b>Depreciation charge \$ per bed per annum</b>	<b>\$6,923</b>	<b>\$6,483</b>	<b>↑</b>	<b>\$6,487</b>

**Accommodation Pricing**

Figure 14: Median Accommodation Price as % of Medium House Price

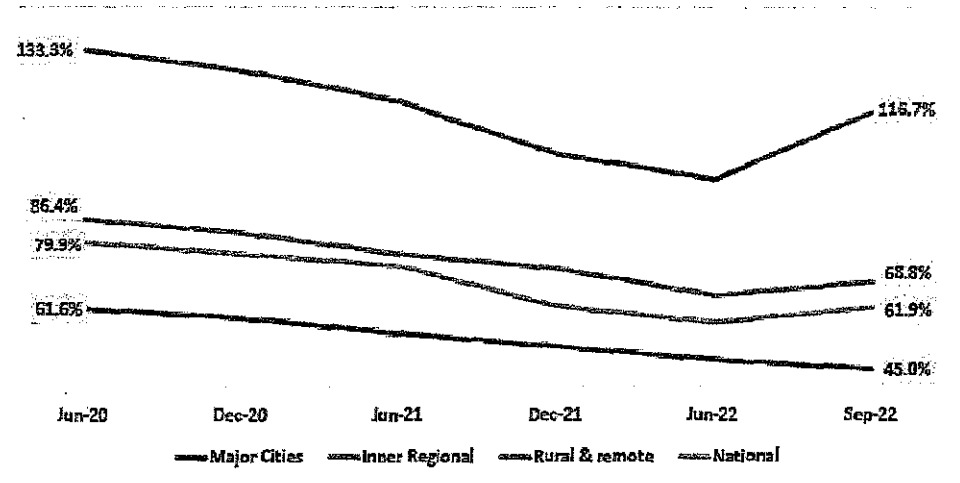


Figure 15: Average full RAD received by State/Territory

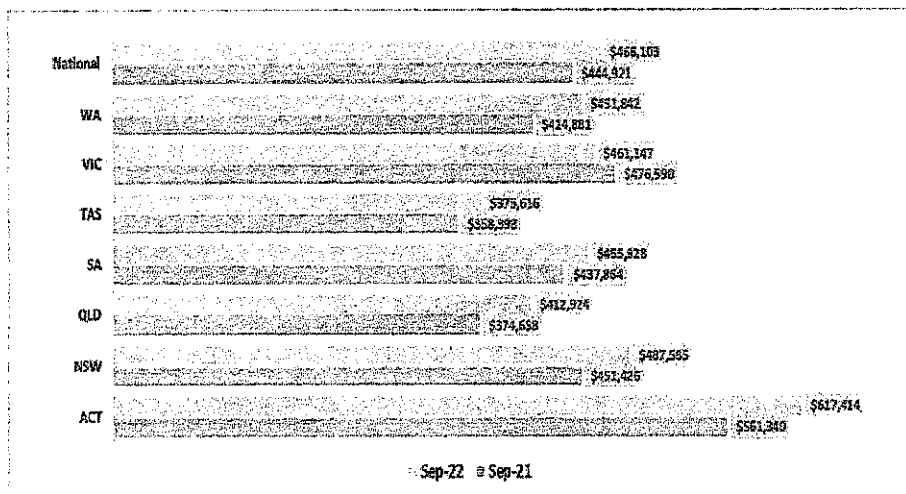
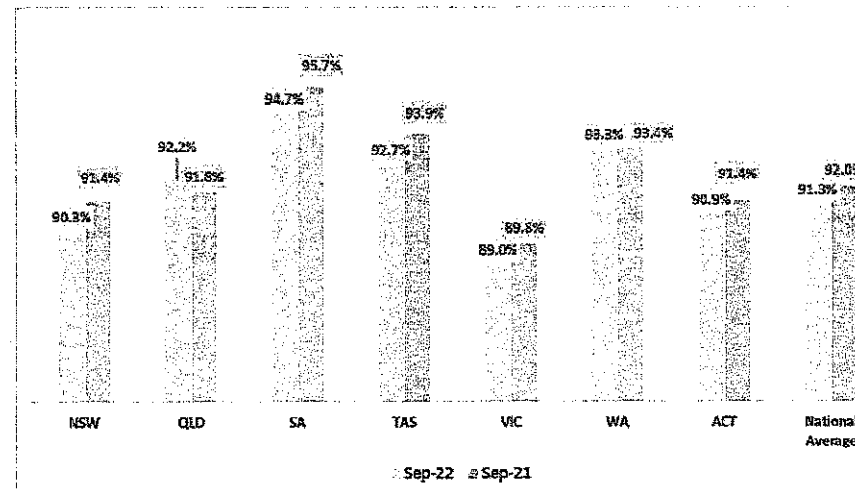
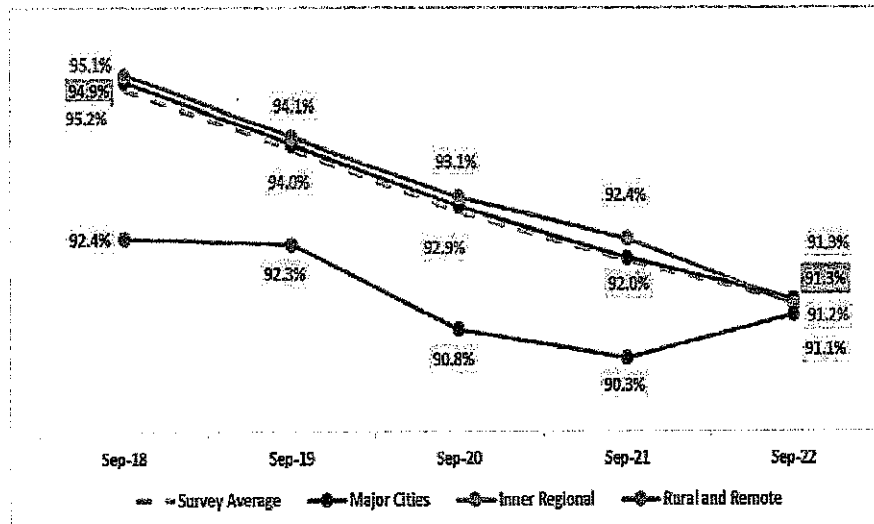


Figure 17: Residential Occupancy by State/Territory (mature homes)



Occupancy

Figure 16: Residential Occupancy by region (mature homes)



Administration Costs

Table 7: Administration costs (\$ pbd)

	Sep-22 1,088 Homes	Sep-21 1,107 Homes	YoY Movement	FY22 1,202 Homes
Administration (corporate) recharges	\$27.53	\$25.01	▲	\$25.29
Labour costs - administration (facility)	\$8.98	\$7.54	▲	\$7.79
Other administration costs	\$6.11	\$5.48	▲	\$6.19
Workers compensation	\$0.21	\$0.19	▲	\$0.17
Payroll tax - administration staff	\$0.03	\$0.04	▼	\$0.04
Fringe Benefits Tax	\$0.02	\$0.01	▲	\$0.02
Quality & education - labour costs	\$0.06	\$0.04	▲	\$0.05
Quality and education - other	\$0.03	\$0.02	▲	\$0.02
Insurances	\$1.51	\$1.36	▲	\$1.41
<b>Total Administration Costs</b>	<b>\$44.46</b>	<b>\$39.68</b>	<b>▲</b>	<b>\$40.98</b>

Allocation of Administration Costs

- Direct Care: 37% (\$16.45 per bed day)
- Indirect Care: 33.6% (\$14.94 per bed day)
- Accommodation: 29.4% (\$13.07 per bed day)

### Home Care

Figure 18: Home Care key metrics summary

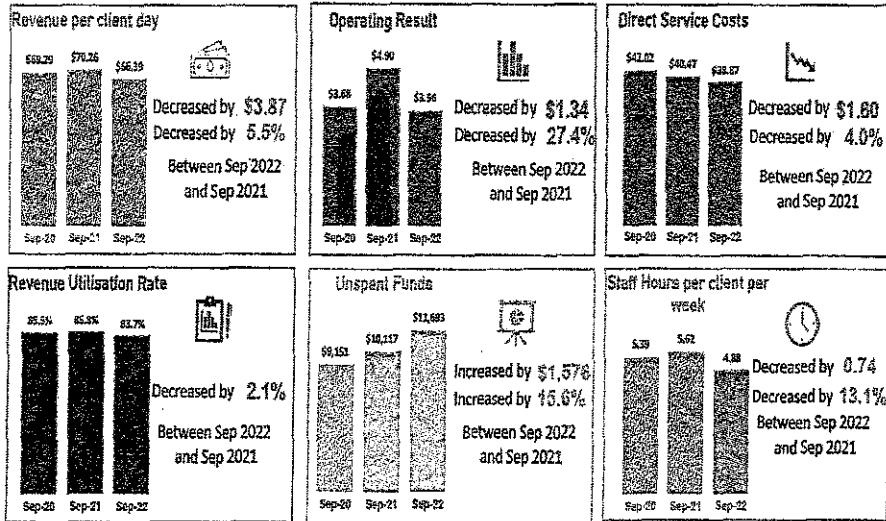


Table 8: Summary Home Care KPI Results Comparison

	Sep-22 65,275 Packages	Sep-21 49,978 Packages	Difference (YoY)	FY22 60,630 Packages
Total revenue \$ per client per day	\$66.39	\$70.26	↓ (\$3.87)	\$68.98
Operating result per client per day	\$3.56	\$4.90	↓ (\$1.34)	\$3.98
EBITDA per client per annum	\$1,516	\$1,971	↓ (\$455)	\$1,632
Average total Internal Staff hours per client per week	4.88	5.62	↓ (0.74)	5.28
Median growth rate	2.3%	3.1%	↓ (0.9%)	14.3%
Revenue utilisation rate for the period	83.7%	85.8%	↓ (2.1%)	85.0%
Average unspent funds per client	\$11,693	\$10,117	↑ \$1,576	\$10,736
Cost of direct care & brokered services as % of total revenue	58.6%	57.6%	↑ 1.0%	58.6%
Care management & coordination costs as % of total revenue	11.2%	11.5%	↓ (0.3%)	11.8%
Administration & support costs as % of total revenue	24.0%	23.2%	↑ 0.8%	23.1%
Profit Margin	5.4%	7.0%	↓ (1.6%)	5.8%

Figure 19: Operating Result by revenue band (\$ per client per day)

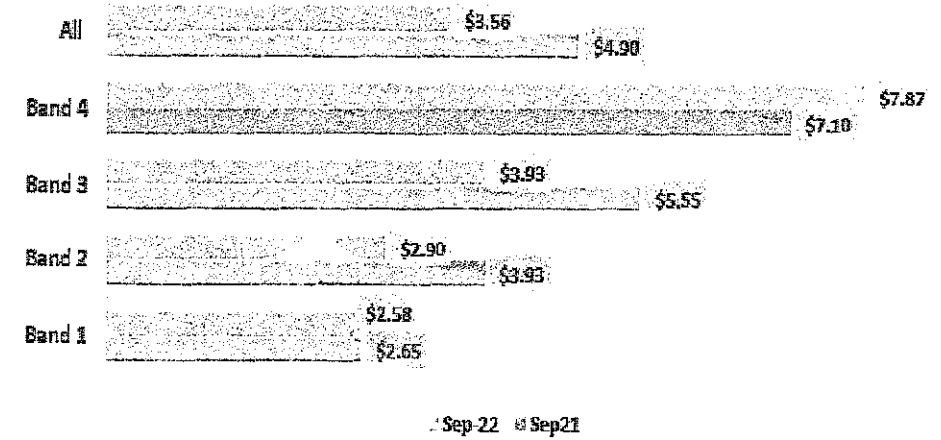


Figure 20: EBITDA Result by revenue band (\$ per client per annum)

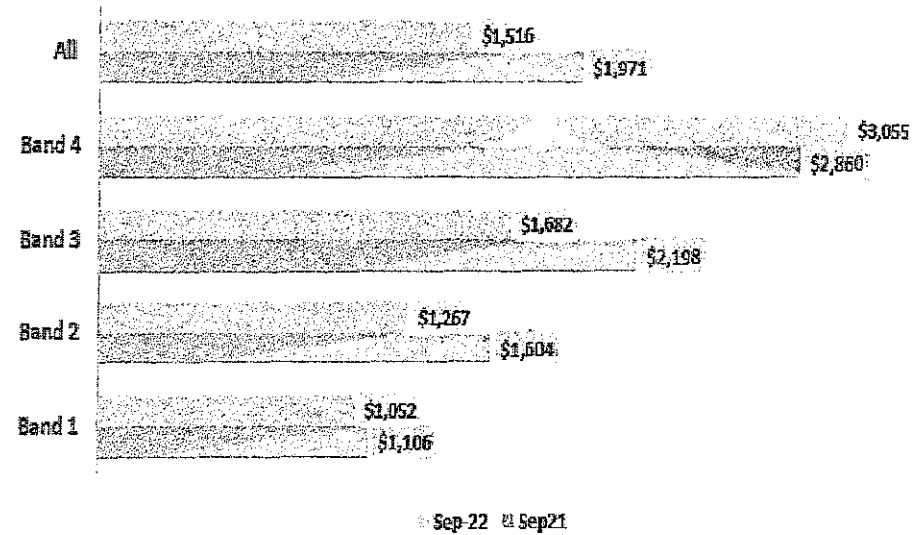


Figure 21: Operating Result by revenue split (\$ per client per day)

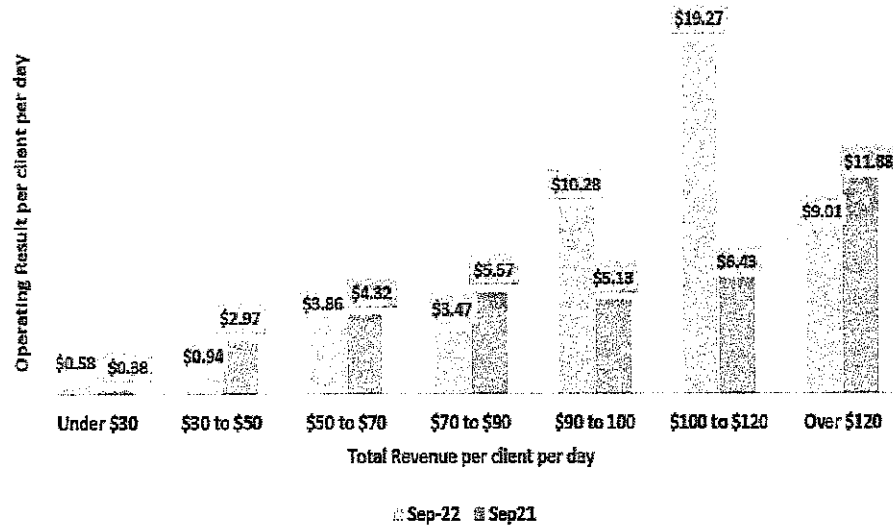


Figure 23: Operating Result and Revenue Utilisation revenue band

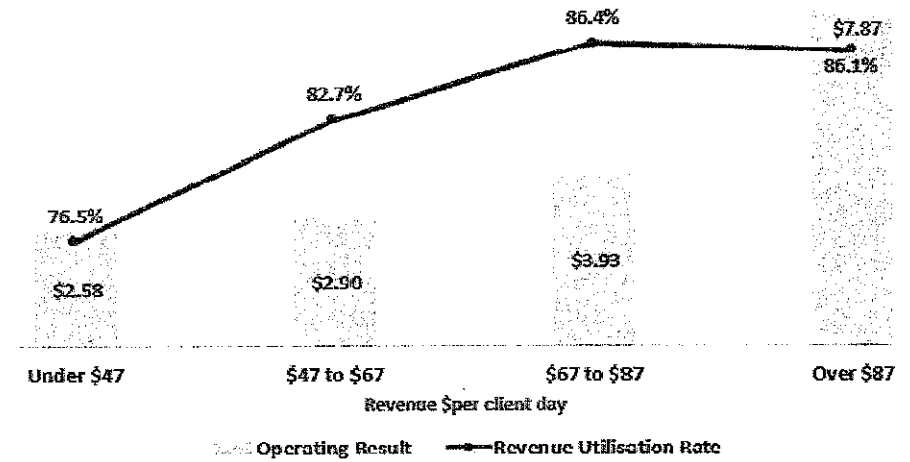
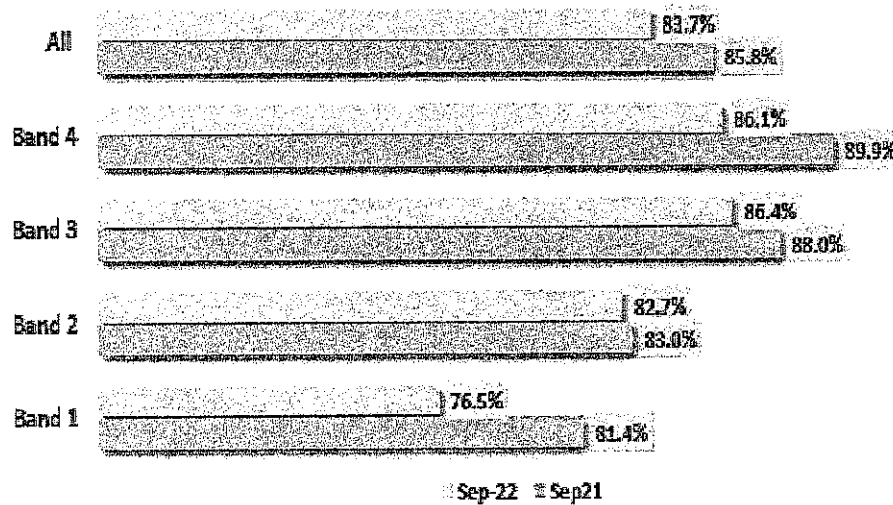


Figure 22: Revenue Utilisation percentage by revenue band



Unspent Funds

Figure 24: Unspent Funds trend analysis (\$ per client)

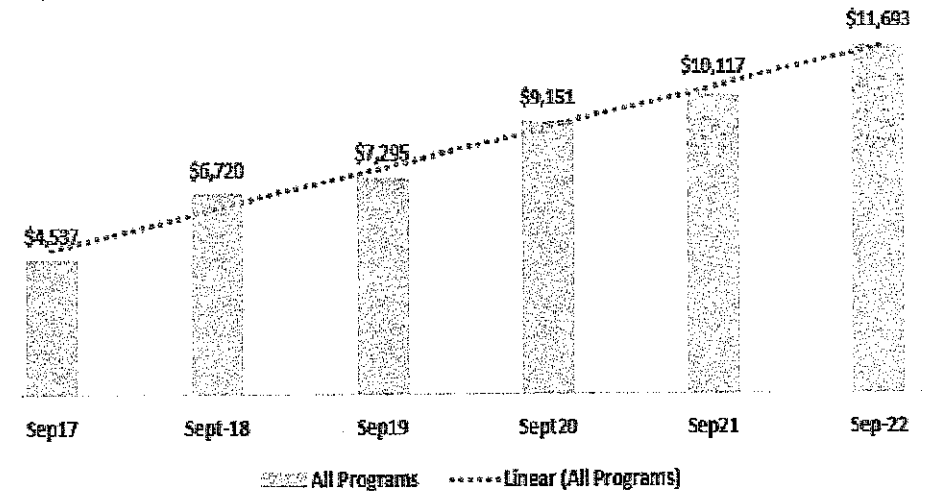


Figure 25: Average Unspent Funds by revenue band (\$ per client)

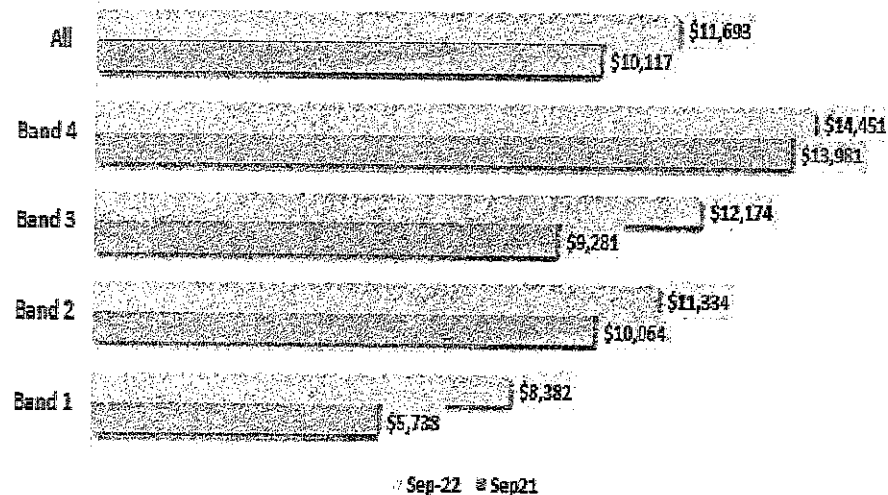
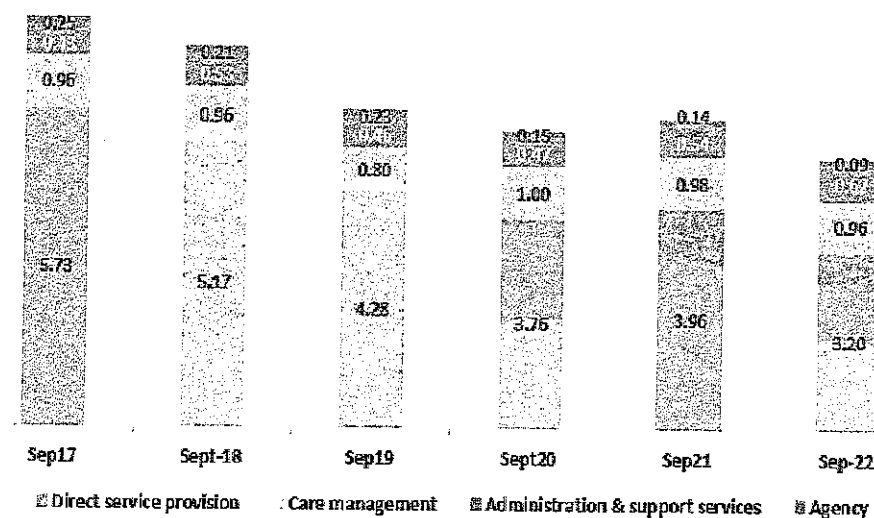


Figure 26: Staff Hours per care recipient week trend analysis



**Staff Hours/Minutes Worked per Care Recipient**

Table 9: Staff Hours worked per care recipient per week

Internal staff hours worked per client week	Sep-22	Sep-21		Difference
Direct service provision	3.20	3.96	↓	(0.76)
Agency	0.09	0.14	↓	(0.04)
Care management & coordination	0.96	0.98	↓	(0.02)
Administration & support services	0.62	0.54	↑	0.08
<b>Total Staff Hours</b>	<b>4.88</b>	<b>5.62</b>	↓	<b>(0.74)</b>

Figure 27: Internal and Brokered Services staff costs comparison

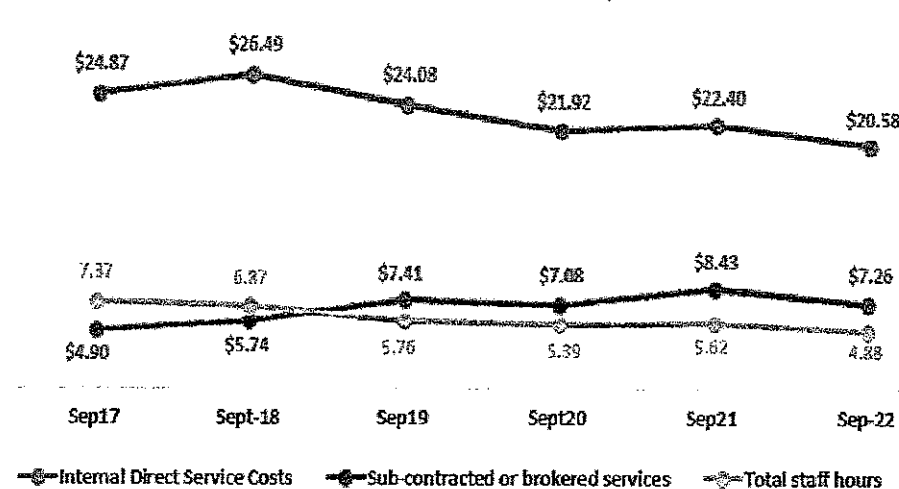
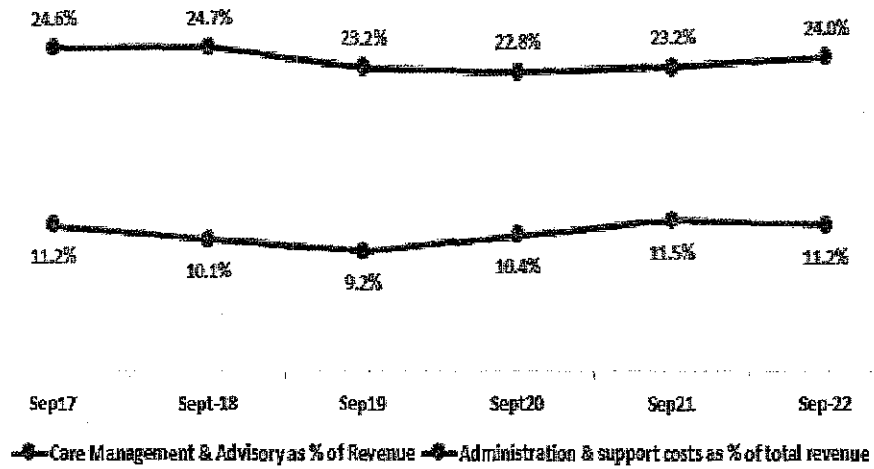


Table 10: Staff Minutes worked per care recipient per week

Internal staff minutes worked per client week	Sep-22	Sep-21		Difference
Direct service provision	192.1	237.6	↓	(45.6)
Agency	5.7	8.1	↓	(2.4)
Care management & coordination	57.7	59.1	↓	(1.4)
Administration & support services	37.2	32.2	↑	5.1
<b>Total Staff Minutes</b>	<b>292.7</b>	<b>337.0</b>	↓	<b>(44.3)</b>



Figure 28: Case Management and Administration cost as % of revenue



Package Growth

Figure 29: Number of People in a Home Care Package

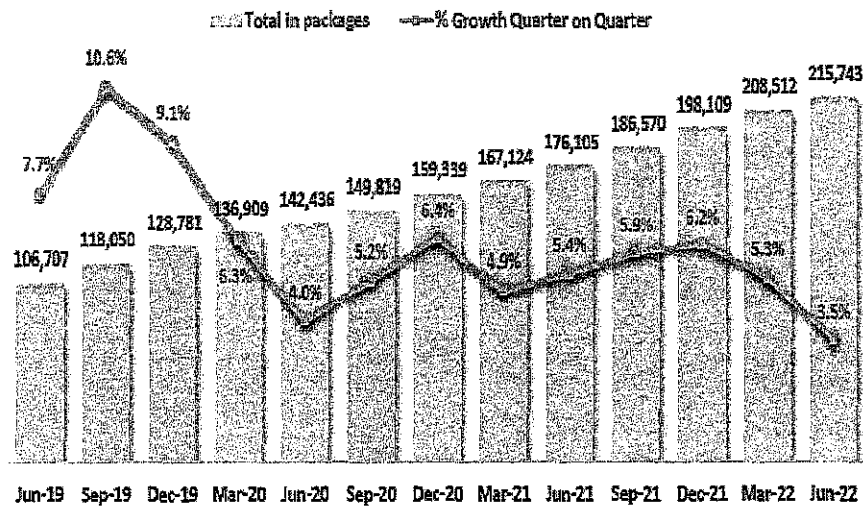


Figure 30: Demand for Home Care Packages

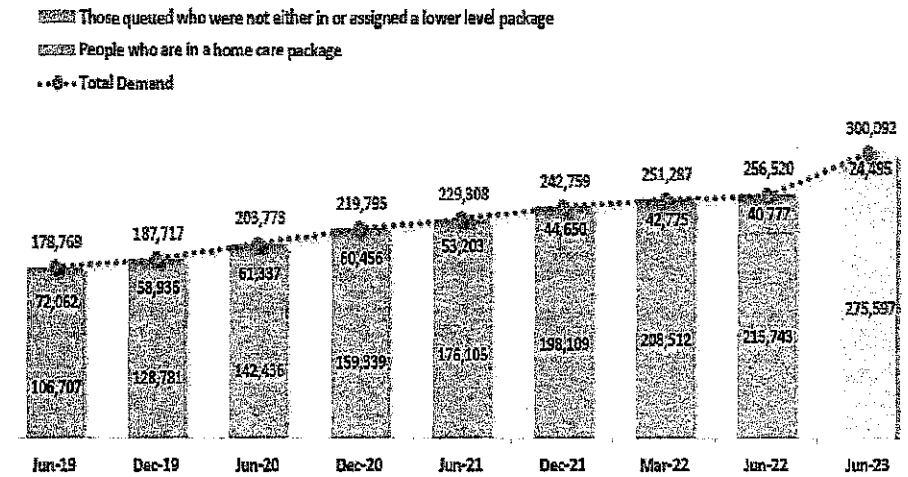
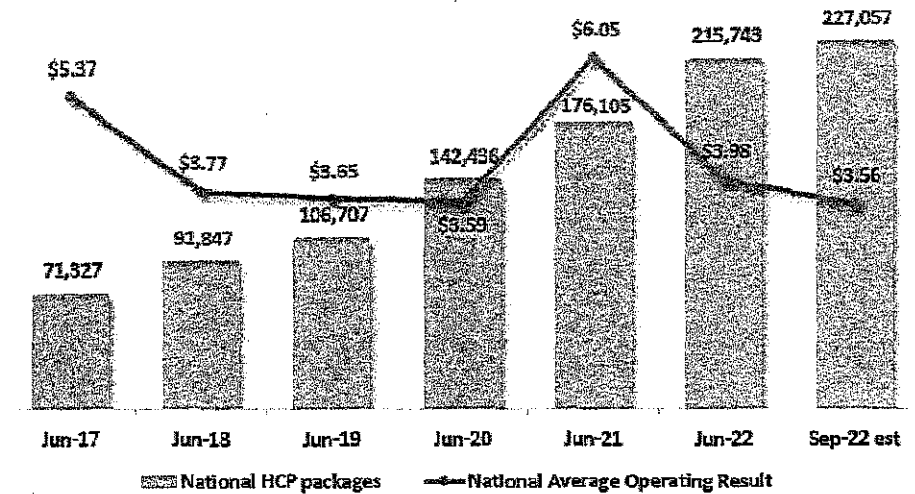


Figure 31: Number of People in a Package compared to Operating Result (\$ pcpd)



### 3. GLOSSARY

#### **Accommodation Result**

Accommodation Result is the net result of accommodation revenue (DAPs/DACs/Accommodation supplements) and expenses related to capital items such as depreciation, property rental and refurbishment costs.

#### **ACFA**

Aged Care Financing Authority - the (former) statutory authority which provides independent advice to the government on funding and financing issues, informed by consultation with consumers, and the aged care and finance sectors.

#### **ACFI Revenue**

Aged Care Funding Instrument (ACFI) revenue includes the subsidy received from the Commonwealth and the means-tested care fee component levied to the resident. ACFI revenue includes the additional care supplement subsidies and some specific grant (not capital) funding.

#### **Direct Care (ACFI) Result**

The Direct Care (ACFI) Result represents the net result from revenue and expenses directly associated with care. It includes ACFI and Supplements (including means-tested care fee) revenue less total care expenditure, and this includes an allocation of workers compensation and quality and education costs.

#### **ACH (Facility) Result**

This refers to the Operating Result may also be referred to as the net result or the NPBT Result.

#### **ACH EBITDA**

The same as Facility EBITDA. The starting point for this calculation is the Aged Care Home (Facility) Result which is the combination of the Care and Accommodation results. It excludes all "provider revenue and expenditure" including fundraising revenue, revaluations, donations, capital grants and sundry revenue. It also excludes those items excluded from the EBITDA calculation above.

This measure is more consistent across the aged care homes (facilities) because it excludes all those items which are generally allocated at the aged care home (facility) level on an inconsistent and arbitrary basis depending on the policies of the individual provider.

#### **Administration Costs**

Administration Costs includes the direct costs related to administration and support services and excludes the allocation of workers compensation and quality and education costs to Direct Care (ACFI) and Indirect Care (everyday living).

#### **Aged Care Home**

Individual discrete premises that an approved provider uses for residential aged care. "Aged Care Home" is the term approved at the Department of Health; in some contexts, "facility" is used, with an identical meaning.

#### **Averages**

For residential care all *averages* are calculated using the total of the raw data submitted for any one-line item and then dividing that total by the total occupied bed days for the aged care homes in the group. For example, the average for contract catering across all homes would be the total amount submitted for that line item divided by the total occupied bed days for all aged care homes in the Survey.

For home care all *averages* are calculated using the total of the raw data submitted for any one-line item and then dividing that total by the total client days for the programs in the group. For example, the average for sub-contracted and brokerage costs across all programs would be the total amount submitted for that line item divided by the total client days for all programs in the Survey.

#### **Average by line item**

This measure is *averaged* across only those aged care homes that provide data for that line item. All other measures are *averaged* across all the homes in the particular group. The *average* by line item is particularly useful for line items such as contract catering, cleaning and laundry, property rental, extra service revenue and administration fees as these items are not included by everyone.

**Bed Day**

The number of days that a residential care place is occupied in the Survey period. Usually represents the days for which a Direct Care subsidy or equivalent respite subsidy has been received.

**Benchmark**

We consider the benchmark to be the average of the *First 25%* in the group of programs being examined. For example, if we are examining the results for aged care homes (facilities) / programs in Band 4, then the benchmark would be the average of the *First 25%* of the aged care homes (facilities) / programs in Band 4.

**Benchmark Bands***Residential Care*

Based on Average Direct Care + Supplements (including respite) (\$ per bed day):

Band 1 - Over \$200

Band 2 - Between \$185 and \$200

Band 3 - Between \$170 and \$185

Band 4 - Under \$170

*Home Care*

Based on Total Revenue (Direct Care + Brokered + Case Management + Administration) (\$ per client day):

Band 1 - Under \$47

Band 2 - Between \$47 and \$67

Band 3 - Between \$67 and \$87

Band 4 - Over \$87

**Care Result**

This is the element of the aged care home (facility) result that includes the Direct Care expenses and Indirect Care (everyday living) costs and administration and support costs. It is calculated as Direct Care Result *plus* Indirect Care Result *minus* Administration Costs.

**Dollars per bed day**

This is the common measure used to compare items across aged care homes (facilities). The denominator used in this measure is the number of occupied bed days for any home (facility) or group of homes (facilities).

**Dollars per client day**

This is the common measure used to compare items across programs. The denominator used in this measure is the number of client days for any programs or group of programs.

**EBITDA**

This measure represents earnings before interest (including investment revenue), taxation, depreciation and amortisation. The calculation excludes interest (and investment) revenue as well as interest expense on borrowings.

The main reason for this is to achieve some consistency in the calculation. Different organisations allocate interest and investment revenue differently at the “aged care home (facility) level”. To ensure that the measure is consistent across all organisations we exclude these revenue and expense items.

**EBITDA per bed per annum**

Calculation of the overall aged care home (facility) EBITDA for the financial year to date divided by the number of operational beds in the aged care home (facility).

**NPBT**

Net Profit Before Tax. For the context of the Survey reports, NPBT is referred to as Operating Result or net result or, in the aged care home (facility) analysis, as the ACH Result (Aged Care Home, or Facility) Result.

**Facility**

An aged care home is sometimes called a “facility” for convenience. The Facility Result is the result for each aged care home being considered. Often called Aged Care Home and abbreviated to ACH.

**Indirect Care (Everyday Living) Result**

Revenue from Basic Daily Fee plus Extra or Optional Service fees less Hotel Services (catering, cleaning, laundry) and Utilities (includes allocation of workers compensation premium and quality and education costs to hotel services staff).

### Home Care Packages (HCP)

Home Care results (NPBT) are distributed for the Survey period from highest to lowest by \$ per client per day (\$pcd). This is then divided into quartiles - the *First 25%* is the first quartile, second 25%, third 25%, fourth 25% and the average of each quartile is reported. The *First 25%* represents the quartile of programs with the highest NPBT result.

### Residential Care

The Residential Care results are distributed for the Survey period from highest to lowest by Care Result. This is then divided into quartiles - the *First 25%* (the first quartile), second 25%, third 25%, fourth 25% and the average of each quartile is reported. The *First 25%* represents the quartile of homes with the highest Care Result.

### Location - City

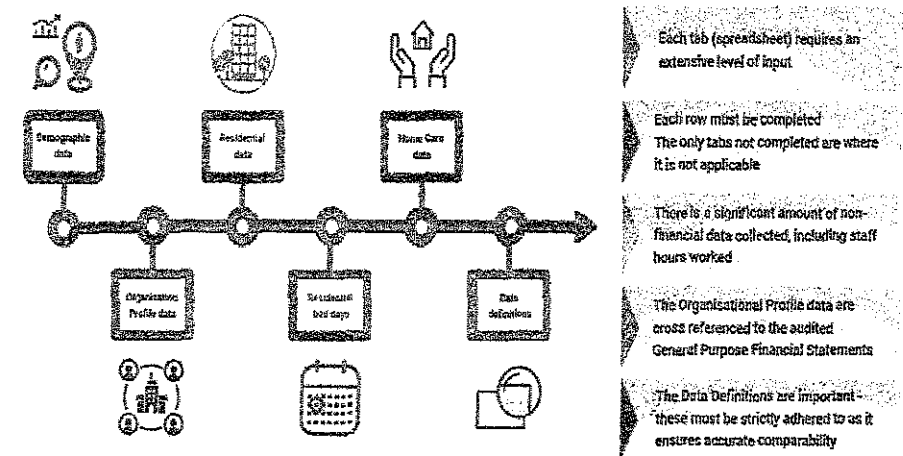
Aged care homes have been designated as being city based according to the designation by the Department of Health in their listing of aged care services. Those that were designated as being a "Major City of Australia" have been designated City.

### Location - Regional

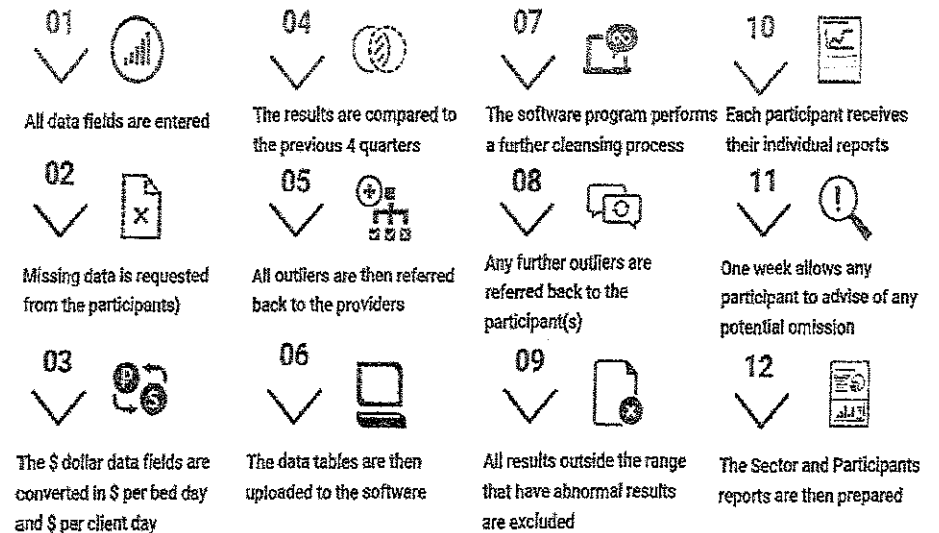
Aged care homes have been designated as being regionally based according to the designation by the Department of Health in their listing of aged care services. Those that were designated as being an "Inner Regional", "Outer Regional" or "Remote" have been designated as Regional.

**Survey** is the abbreviation used in relation to the *Aged Care Financial Performance Survey*.

### Data Collection Process



### Data Cleansing Process



## StewartBrown Contact Details

For further analysis of the information contained in the Survey report please contact our specialist analyst team

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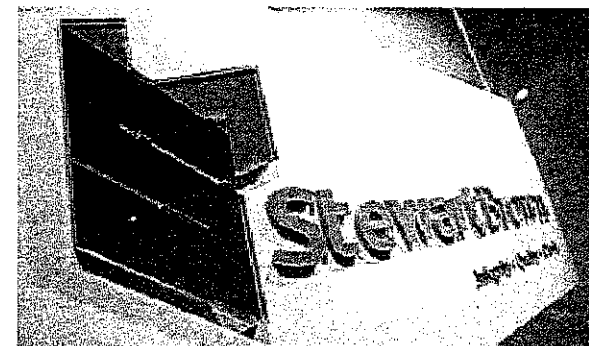
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## IN THE FAIR WORK COMMISSION

**Matter(s):** AM2020/99; AM2021/63 & AM2021/65

**Re Applications by:** Health Services Union (HSU) and Australian Nursing and Midwifery Federation (ANMF)

### STATEMENT OF JOHANNES BROCKHAUS

I, Johannes Brockhaus of [REDACTED] in the state of New South Wales state as follows:

#### Background

1. This statement is made from my own knowledge and belief, unless otherwise stated. Where statements are not made from my own knowledge, they are made to the best of my knowledge, information and belief and I have set out the sources of my knowledge, information and belief.
2. I am currently employed as the CEO of Buckland Aged Care Services (**Buckland**). I have held this position since 2020. Prior to this, I was the General Manager of Buckland's Residential Aged Care Facility and held that position since 2019.
3. Before coming to Buckland, I was the Home Care Manager for a provider in the Northern Territory and worked for roughly 5 years as a registered nurse in remote indigenous communities.
4. I am registered nurse and undertook my training and qualification in 2006 in Germany. I worked as a registered nurse and care manager in Aged Care in Germany.

5. In 2009 I immigrated to Australia, due my qualification not being automatically recognised, I worked as a personal care worker/assistant in nursing whilst I was studying at the University of South Australia in order to have my bachelor recognised.
6. After my qualification was recognised, I worked as a registered nurse in aged care.

### **Buckland**

7. Buckland is a not-for-profit provider of aged care services to the Blue Mountains community.
8. It was established in 1936 as a hospital for women who needed specialist medical care. Buckland later transitioned into a 26-bed aged care facility and has continued to grow over time.
9. We now have:
  - (a) a 144-bed aged care residential fit for purpose-built facility;
  - (b) retirement villages comprising 166 units;
  - (c) homecare available to both our retirement villages and the broader blue mountains community; and
  - (d) private services to the community.
10. The private services that we offer are free aged care services for those who are not eligible for government funded services. This can include residential care or home care services. Through this, we also help the individuals enter the aged care system, either with Buckland or with another provider.
11. Through our home care and private services, we currently help around 60 elderly persons.
12. Our retirement villages operate on the basis of independent living.
13. I am aware that the Fair Work Commission has granted a 15% wage increase to direct care employees which for Buckland I understand to include assistants in nursing (personal carers), enrolled nurses and registered nurses.

14. I am also aware that the Commonwealth has proposed to fund this increase in two instalments of:

(a) 10% from 1 July 2023; and

(b) 5% from 1 July 2024.

### **Financial Position**

15. I have focussed on our residential aged care facility as our home care activity is small (five employees) and our retirement villages being independent living do not employ direct care workers. Looking at our residential aged care profit and loss statement Buckland has usually been able to operate generating some modest surplus. Our residential financial position is and has been as follows:

<b>Financial Year</b>	<b>Revenue</b>	<b>Costs</b>	<b>Surplus/Deficit</b>
<b>FY23 YTD</b>	7,437,998	8,099,571	-661,573
<b>FY22</b>	14,387,326	14,172,221	215,105
<b>FY21</b>	14,246,523	13,921,429	325,094
<b>FY20</b>	13,612,515	13,255,098	357,417
<b>FY19</b>	13,038,538	12,367,437	671,101

16. For the current financial year, our residential aged care is trading with a material operational deficit.

17. The size of deficit for the current financial year is a little unusual. We are currently in a major refurbishment. So, we are refurbishing 60 rooms and as part of the refurbishment and twelve of those rooms are permanently vacant. While the refurbishment itself is a capital issue, the cash flow challenge is the fact that we do not have as many rooms being occupied as we normally do.



18. Historically, we have always been around break even and more often than not trading at a small surplus in the order of \$300,000.
19. My current projection is that FY 24 will likely normalise, and I am optimistic and having carefully considered the current environment and having taken some left and right turns in terms of strategies that in FY 24 the aim is to at least reduce the deficit to less than \$50,000.

### **Direct Care Employees**

20. Based on our most recent fortnightly pay run for our residential aged care Buckland employed<sup>1</sup> s approximately:
  - (a) 20 Registered Nurses (**RN**);
  - (b) 10 Enrolled Nurses (**EN**); and
  - (c) 80 Assistants in nursing (**Carers**).
21. In addition, Buckland employs diversional therapists, chaplains, general support staff (catering, kitchen, cleaning, laundry), a maintenance team, administrative employees and a management team.
22. Buckland operates under the *Buckland Aged Care Services, NSWNMA, AANMF NSW Branch and HSU New South Wales Branch Enterprise Agreement 2017* (the **Enterprise Agreement**).

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<sup>1</sup> Buckland has more direct care employees on its books but some are not currently on the pay run as they are on various unpaid leave such as parental leave or leave without pay. This number also does not include the small number of employees in home care.

23. The Enterprise Agreement provides minimum rates of pay above the relevant Award. Broadly speaking the position is as follows:

Role	Margin Above Award
Cert III Carer	2%
Enrolled Nurse	6%
Registered Nurse	22%

24. While I understand that I can absorb part of the 15% into these over award margins I am thinking that we will probably not do that as I will want to try and reward our employees with the whole amount.
25. The wages cost for the employees referred to in paragraph 23 is currently per annum:
- (a) \$6,037,497 of direct cost; and
  - (b) an additional \$1,037,242 for on costs.
26. This gives for this group of employees a cost of \$7.074,740 million per annum or \$589,561 a month.

**Impact of the 15% Increase Without Funding**

27. Accordingly, the monthly cost of applying the 15% to the Buckland employees referred to in paragraph 23 will be approximately \$88,434.
28. Absent government funding we will effectively be doubling our projected deficit.

29. For instance, if the 15% commenced on 1 March 2023 and the government funding remained on the current proposed schedule, we would carry deficits for unfunded wages costs of:
- (a) \$353,737 for FY 23 (an extra 15% for four month); and
  - (b) \$353,737 for FY 24 (cost of unfunded 5% throughout the FY 24 year).
30. This does not deal with how we manage the annual wage review in July this year which may be a further unfunded cost impost.
31. Based on my experience I am not convinced the 15% will have much impact on labour retention and attraction. Aged care is increasingly seen as an unattractive industry and all of the recent publicity the industry has received has done little improve the perception of the industry.
32. The reality is we are not in a position to make any savings to carry this unfunded cost. We already run very fine and any further cost savings that I might even consider or might have a possibility of considering would all negatively impact on the quality of care that we deliver. So, there is no further savings to be made, absolutely not and perhaps in our case we are overspending on certain elements of the provision of care when it comes to nutrition or whatever it may be, we try to do the best with the Commonwealth funding we receive.
33. From my experience we are probably luckier than many operators having been around for so long and having a more diversified business but the simple fact is that if the 15% increase comes into operation without government funding it will simply increase or residential aged care operating deficit.

34. We may be more fortunate than many in the industry as being a diversified business we can likely subsidise this loss this year from our retirement village revenue which will be in surplus for FY 23 but this simply reduces the overall financial stability of Buckland. The alternative would be to cut services in residential care which is something I am not prepared to do in the interest of our residents.



Date: 09/02/2023

## IN THE FAIR WORK COMMISSION

**Matter(s):** AM2020/99; AM2021/63 & AM2021/65

**Re Applications by:** Health Services Union (HSU) and Australian Nursing and Midwifery Federation (ANMF)

### STATEMENT OF JAMES ALEXANDER LACHLAN MCLEAN SHAW

I, James Alexander Lachlan McLean Shaw of Suite 2, Level 12, 2 Park St, Sydney, NSW 2000 in the state of New South Wales state as follows:

#### Background

1. This statement is made from my own knowledge and belief, unless otherwise stated.  
Where statements are not made from my own knowledge, they are made to the best of my knowledge, information and belief and I have set out the sources of my knowledge, information and belief.
2. I am currently employed as the Deputy CEO and Chief Financial Officer of Royal Freemasons' Benevolent Institution (**RFBI**). I have held this position since June 2022 and the CFO position since 2013.
3. Before that I held the position of Management Accountant.
4. I have worked with RFBI since 2005.

## **RFBI**

5. RFBI is a not-for-profit provider of aged care services.
6. RFBI operates 22 residential aged care facilities and provides homecare service at certain locations in regional New South Wales in addition we operate 20 retirement villages (which operate on the basis of independent living).
7. Through our residential facilities we currently care for up to 1,300 aged residents.
8. Through our home care services, we currently support around 430 aged clients.
9. I am aware that the Fair Work Commission has granted a 15% wage increase to direct care employees which for RFBI I understand to include personal carers, enrolled nurses and registered nurses.
10. I am also aware that the Commonwealth has proposed to fund this increase in two instalments of:
  - (a) 10% from 1 July 2023; and
  - (b) 5% from 1 July 2024.

## **Financial Position**

11. RFBI has historically generated reasonable operating surpluses. Our revenue base is currently \$150 million per year. Until 2019, typical annual operating surpluses were in the order of \$1 million to \$3 million.

12. Our recent financial performance is set out in the table below:

<b>DEC YTD - 2022-23</b>	<b>RFBI Group</b>	<b>Residential Care</b>	<b>Retirement Living</b>	<b>Home Care</b>	<b>HO</b>
Total Revenue	64,274,730	55,869,106	3,321,521	3,258,195	1,825,907
Total Expense	69,760,479	61,711,810	3,253,011	2,949,516	1,846,142
Net (Reported) Result	- 5,485,749	- 5,842,703	68,511	308,679	- 20,235
Head Office Allocation	-	- 3,053,576	- 386,305	- 6,801	3,446,682
Operating Result	- 5,485,749	- 2,789,127	454,816	315,480	- 3,466,917

<b>2021-22</b>	<b>RFBI Group</b>	<b>Residential Care</b>	<b>Retirement Living</b>	<b>Home Care</b>	<b>HO</b>
Total Revenue	149,648,570	129,132,652	7,172,805	7,831,835	5,511,278
Total Expense	172,049,382	152,652,988	6,556,631	7,251,603	5,588,160
Net (Reported) Result	- 22,400,812	- 23,520,336	616,174	580,232	- 76,882
Head Office Allocation	- 0	- 4,971,808	- 888,720	- 100,852	5,961,380
Operating Result	- 22,400,812	- 18,548,528	1,504,894	681,083	- 6,038,262

<b>2020-21</b>	<b>RFBI Group</b>	<b>Residential Care</b>	<b>Retirement Living</b>	<b>Home Care</b>	<b>HO</b>
Total Revenue	160,270,160	132,581,629	6,231,676	8,044,701	13,412,154
Total Expense	158,892,990	132,448,807	6,333,386	6,744,158	13,366,639
Net (Reported) Result	1,377,170	132,822	- 101,710	1,300,543	45,515
Head Office Allocation	-	- 4,976,866	- 913,536	- 519,533	6,409,935
Operating Result	1,377,170	5,109,688	811,826	1,820,076	- 6,364,420

<b>2019-20</b>	<b>RFBI Group</b>	<b>Residential Care</b>	<b>Retirement Living</b>	<b>Home Care</b>	<b>HO</b>
Total Revenue	146,497,675	124,501,647	7,048,615	7,936,623	7,010,790
Total Expense	154,754,715	130,339,541	7,473,065	6,065,065	10,877,044
Net (Reported) Result	- 8,257,040	- 5,837,894	- 424,450	1,871,558	- 3,866,254
Head Office Allocation	-	- 6,219,275	- 897,060	- 580,322	7,696,657
Operating Result	- 8,257,040	381,381	472,610	2,451,880	- 11,562,911

<b>2018-19</b>	<b>RFBI Group</b>	<b>Residential Care</b>	<b>Retirement Living</b>	<b>Home Care</b>	<b>HO</b>
Total Revenue	137,454,385	115,324,772	6,347,238	6,060,037	9,722,338
Total Expense	136,978,230	111,883,619	6,548,544	4,993,146	13,552,921
Net (Reported) Result	476,154	3,441,153	- 201,306	1,066,891	- 3,830,584
Head Office Allocation	-	- 2,544,790	- 879,460	- 169,251	3,593,501
Operating Result	476,154	5,985,943	678,154	1,236,142	- 7,424,085

<b>2017-18</b>	<b>RFBI Group</b>	<b>Residential Care</b>	<b>Retirement Living</b>	<b>Home Care</b>	<b>HO</b>
Total Revenue	124,592,061	105,699,173	7,377,909	4,675,990	6,838,989
Total Expense	121,823,617	101,329,505	8,825,689	3,894,492	7,773,931
Net (Reported) Result	2,768,444	4,369,668	- 1,447,780	781,498	- 934,942
Head Office Allocation	-	- 1,198,042	- 1,227,682	- 56,995	2,482,719
Operating Result	2,768,444	5,567,710	- 220,098	838,493	- 3,417,661

13. In simple terms, our retirement village portfolio and our homecare services offset our residential aged care facility performance.

14. Since 2019 our performance has been heavily impacted by the Covid-19 Pandemic and more recently, general inflationary pressures.

15. We are currently trading with an operational deficit.

## Direct Care Employees

16. Across the RFBI residential and home care operations RFBI employs the following direct care staff:

Location	HEMOCARE	RESIDENTIAL
Care at Home Officer	54	
Carer		923
Enrolled Nurse		8
Registered Nurse		174
Trainee Carer		18
<b>Total</b>	<b>54</b>	<b>1123</b>

17. RFBI operates under the Royal Freemasons' Benevolent Institution Enterprise Agreement 2018 (the **Enterprise Agreement**).
18. Set out in **Annexure A**, is a comparison I have had our HR and finance team prepare comparing the Enterprise Agreement to the relevant modern award rates.
19. I am informed by our HR department that the most populated classification for RFBI is Level 1B in which we have 776 employees. I am further informed that this level sits some 3.07% to 8.27% above the relevant award rate although the bulk of these employees are in the 3.07% category being personal care workers with a Cert III.
- As Annexure A demonstrates, all of our nursing staff (enrolled nurses and registered nurses) are paid well above the award; somewhere between 26.65% to 62.53% above.
20. I understand that we must always pay at least the minimum award rate even though we have the Enterprise Agreement.
21. Having discuss the matter with our CEO Frank Price, I understand that RFBI will pass on the full 15% when RFBI receives the Government funding. In the event funding is not available, RFBI will only increase its rates to what is required legally.



## Impact of the 15% Increase Without Funding

22. Set out in Annexure B are the current labour costs for our direct care staff. Annexure B also sets out the additional costs if we were to pass on the full 15% to staff working in direct care roles.
23. Based on our current wages bill this would amount to an additional \$10.6 million with on costs.
24. Accordingly, the monthly cost of applying the 15% to the RFBI employees referred to in paragraph 16 will be \$884,084.
25. If the 15% commenced on 1 March 2023 and the government funding remained on the current proposed schedule, we would carry a deficit for unfunded wages costs of:
  - (a) \$3.5M for FY 23 (an extra 15% for four months); and
  - (b) \$4.1M for FY 24 (cost of unfunded 5% throughout the FY 24 year and including an estimated 3% annual wage increase applicable from 1 July 2023).
26. If RFBI was to absorb some of these increases into its over award Enterprise Agreement wage rates, the impact on the operational deficit would be less.

Even if we did this until funding kicked-in we would have a material deficit for our personal care workers. By way of example, if we assumed that all our personal care workers were on our Level 1B this would still require a 11.93% increase (being 15% less the current over award of 3.07%) against 76% of our direct care labour costs which is still the bulk of the cost (and loss) associated with applying the 15% on an unfunded basis.
27. Further un-funded wage increases simply compounds an overall problem of underfunding labour dating back several years; for instance, since the 2013 financial year on my calculations CPI has increased by 19.2%, our enterprise agreement increases have been 24% and our annual funding indexation has been 9.5%.

28. Even if RFBI does absorb some of the 15% into its existing over award Enterprise Agreement wage rate and only increases wages where it is required to or where funding kicks-in, the added cost, if unfunded simply drives RFBI's trading position further into deficit and impacts the ongoing sustainability of the business.



Date: 9/2/2023

## Annexure A

Nurses Award v EA 2022				
Nurse Classifications	07/01/2022	RFBI Enterprise Agreement Classification	07/01/2022	EA v Award 1/07/22
	Hourly		Hourly	
<b>Enrolled Nurse</b>				
Pay point 1	\$25.22	Level 4 Pay Point A	\$31.94	26.65%
Pay point 2	\$25.55	Level 4 Pay Point B	\$33.45	30.92%
Pay point 3	\$25.89	Level 4 Pay Point B	\$33.45	29.20%
Pay point 4	\$26.27	Level 4 Pay Point B	\$33.45	27.33%
Pay point 5	\$26.53	n/a		
<b>REGISTERED NURSE</b>				
<b>RN - Level 1</b>				
Pay point 1	\$26.98	Level 5 Pay Point A	\$37.49	38.95%
Pay point 2	\$27.53	Level 5 Pay Point B	\$39.68	44.13%
Pay point 3	\$28.21	Level 6 Pay Point A	\$42.59	50.97%
Pay point 4	\$28.96	Level 6 Pay Point B	\$47.07	62.53%
Pay point 5	\$29.85	Level 6 Pay Point B	\$47.07	57.69%
Pay point 6	\$30.71	n/a		
Pay point 7	\$31.60	n/a		
Pay point 8 & Thereafter	\$32.42	n/a		
<b>RN - Level 2</b>				
Pay point 1	\$33.28	Level 7 Pay Point A	\$51.32	54.21%
Pay point 2	\$33.81	n/a		
Pay point 3	\$34.40	n/a		
Pay point 4 and thereafter	\$34.96	n/a		
<b>RN - Level 3</b>				
Pay point 1	\$36.09	n/a		
Pay point 2	\$36.75	Level 7 Pay Point A	\$51.32	39.65%
Pay point 3	\$37.38	Level 7 Pay Point B	\$55.86	49.44%
Pay point 4 and thereafter	\$38.06	n/a		
<b>RN - Level 4</b>				
Grade 1	\$41.19	Level 8 Pay Point A	\$62.22	51.06%
Grade 2	\$44.14	Level 8 Pay Point B	\$67.23	52.31%
Grade 3	\$46.71	Level 8 Pay Point B	\$67.23	43.93%
<b>RN - Level 5</b>				
Grade 1	\$41.56	n/a		
Grade 2	\$43.77	n/a		
Grade 3	\$46.71	n/a		
Grade 4	\$49.63	n/a		
Grade 5	\$54.73	n/a		
Grade 6	\$59.89	n/a		
<b>Nurse Practitioner</b>				
1st year	\$41.53	Level 8 Pay Point A	\$62.22	49.82%
2nd year	\$42.76	Level 8 Pay Point B	\$67.23	57.23%

Aged Care Award v EA 2022 (Direct Care)				
Aged Care Award Classifications	07/01/2022	RFBI Enterprise Agreement Classifications	07/01/2022	EA Award 1/07/22
	Hourly		Hourly	
Level 1	\$22.67	New Entrant	\$23.38	3.13%
Level 2	\$23.57	Level 1 Pay Point A	\$24.40	3.52%
	\$23.57	Level 1 Pay Point B	\$25.52	8.27%
Level 3	\$24.47	Level 1 Pay Point B	\$25.52	4.29%
Level 4	\$24.76	Level 1 Pay Point B	\$25.52	3.07%
Level 5	\$25.60	Level 3 Pay Point A	\$28.55	11.52%
	\$25.60	Level 3 Pay Point B	\$30.51	19.18%
Level 6	\$26.98	Level 4 Pay Point A	\$31.94	18.38%
	\$26.98	Level 4 Pay Point B	\$33.45	23.98%
Level 7	\$27.46	n/a	n/a	

SCHDS Award v EA 2022				
Home Care Employee Classification	07/01/2022	RFBI Enterprise Agreement Classification	07/01/2022	EA Award 1/07/22
	Hourly		Hourly	
Level 1				
Pay point 1	\$22.94	New Entrant	\$23.38	1.92%
Level 2				
Pay point 1	\$24.26	Level 1 Pay Point A	\$24.40	0.58%
Pay point 1	\$24.26	Level 1 Pay Point B	\$25.52	5.19%
Pay point 2	\$24.43	Level 1 Pay Point B	\$25.52	4.46%
Level 3				
Pay point 1	\$24.76	Level 2 Pay Point A	\$26.56	7.27%
Pay point 1	\$24.76	Level 2 Pay Point B	\$27.14	9.61%
Pay point 2	\$25.52	Level 2 Pay Point B	\$27.14	6.35%
Level 4				
Pay Point 1	\$27.01	Level 3 Pay Point A	\$28.55	5.70%
Pay point 1	\$27.01	Level 3 Pay Point B	\$30.51	12.96%
Pay point 2	\$27.55	Level 3 Pay Point B	\$30.51	10.74%
Level 5				
Pay point 1	\$28.96	Level 4 Pay Point A	\$31.94	10.29%
Pay point 1	\$28.96	Level 4 Pay Point B	\$33.45	15.50%
Pay point 2	\$30.11	Level 4 Pay Point B	\$33.45	11.09%

## Annexure B

### Labour Costs - Additional Costs (High Level)

	YTD	Est FY 2022/23 Labour Costs		Wage Care Impact	Est. FY 2023/24 Labour Costs Pre Wage Case		Wage Care Impact	Est. FY 2023/24 Labour Costs W. Wage Case	Est. FY 2023/24 Labour Costs Pre Wage Case		Wage Care Impact	Total Wage Case Impact if Split over 2 years
Labour - Registered Nurse	6,343,686	12,687,372	15%	1,903,106	13,067,993	10%	1,306,799	14,374,792	14,806,036	5%	740,302	2,047,101
Labour - Enrolled Nurse	184,114	368,228	15%	55,234	379,275	10%	37,927	417,202	429,718	5%	21,486	59,413
Labour - Other Nursing	20,674,813	41,349,626	15%	6,202,444	42,590,115	10%	4,259,011	46,849,126	48,254,600	5%	2,412,730	6,671,741
Total Permanent Labour	<u>27,202,613</u>	<u>54,405,226</u>		<u>8,160,784</u>	<u>56,037,383</u>		<u>5,603,738</u>	<u>61,641,121</u>	<u>63,490,355</u>		<u>3,174,518</u>	<u>8,778,256</u>
			Oncosts	30%		Oncosts	30%			Oncosts	30%	
				<u>2,448,235</u>			<u>1,681,121</u>				<u>952,355</u>	
			<b>Gross Cost</b>	<u>10,609,019</u>		<b>Gross Cost</b>	<u>7,284,860</u>		<b>Gross Cost</b>	<u>4,126,873</u>		

#### Part 27. Witness Statement

If the 15% commenced on 1 March 2023 and the government funding remained on the current proposed schedule, we would carry a deficit for unfunded wages costs of:

- (a) \$2,720,261 for FY 23 (an extra 15% for four months); and 4 3,536,340 (based on total 15% increase in FY 2022/23)
- (b) \$2,720,261 for FY 24 (cost of unfunded 5% throughout the FY 24 year). 4,126,873 (based on total Labour Cost including 10% Wage Care and FY 2023/24 3% EBA increase)

**IN THE FAIR WORK COMMISSION**

**Matter(s):** AM2020/99; AM2021/63 & AM2021/65

**Re Applications by:** Health Services Union (HSU) and Australian Nursing and Midwifery Federation (ANMF)

**STATEMENT OF MICHELLE JENKINS**

I, Michelle Jenkins of [insert] in the state of Western Australia state as follows:

**Background**

1. This statement is made from my own knowledge and belief, unless otherwise stated.  
Where statements are not made from my own knowledge, they are made to the best of my knowledge, information and belief and I have set out the sources of my knowledge, information and belief.
2. I am currently employed as the Chief Executive Officer of Community Vision Australia Limited (**CVA**). I have held this position for six and a half years.
3. I have worked in the aged care sector since 2012.
4. Prior to this, I worked in the finance sector as head of commercial banking for Westpac in Western Australia and before this 'State Leader' for St George Bank in Western Australia.

**CVA**

5. CVA is a not-for-profit provider of home care services based in Western Australia primarily focussed on Northern Perth.

6. CVA has a mix of business activity and has worked to build and hold a diversified business portfolio. In doing this CVA operates:
- (a) Home care for the aged;
  - (b) Home care for persons with a disability;
  - (c) Home care for defence force veterans;
  - (d) 'Consulting' business called FORTIS (which we operate on a largely separate basis);
  - (e) Family day care (childcare) through a network of contracted educators;
  - (f) Contracted services associated with 'hoarding and squalor'; and
  - (g) As a partner in culturally appropriate care for Western Australia under a Commonwealth contract.
7. Based on revenue, the home care for aged persons represents about 50% of the CVA business.
8. I am aware that the Fair Work Commission has granted a 15% wage increase to direct care employees.
9. I am also aware that the Commonwealth has proposed to fund this increase in two instalments of:
- (a) 10% from 1 July 2023; and
  - (b) 5% from 1 July 2024.

#### **CVA Employees**

10. CVA employs approximately 180 employees. Of these employees some three are registered nurses (RNs), some 120 are undertaking personal care work (which may include social and domestic support work) (Personal Care Workers) and some 20-30 are undertaking social and domestic support work only (Care Workers).

11. The Personal Care Workers hold a Cert III in aged care or disability care and the Care Workers will usually be in a traineeship for such a Cert III.
12. The Personal Care Workers and Care Workers are not segmented between the different forms of home care we provide.
13. Accordingly, they will be rostered to clients as required and all will be exposed to aged care clients in a given day/week/month. On a given day such employees could work:
  - (a) only with aged care clients;
  - (b) only with disability clients;
  - (c) with a combination of aged care and disability clients; or
  - (d) any of the combinations in (a) to (c) and also with veterans who could be aged and/or with a disability.
14. These employees may also assist with our 'hoarding and squalor' operations.
15. Given how we operate our workforce as an integrated pool we do not practically differentiate in how we pay employees so they are all paid on the same basis under our enterprise agreement; at CVA you do not get paid one rate for supporting the aged at home and a different rate for supporting a person with a disability at home.
16. Because of this we will need to apply the 15% decision to all our care workers irrespective of what type of client they are supporting that hour.
17. I am not aware whether this has been considered in how the Commonwealth are proposing to fund the 15%.
18. Our care worker attrition rate is currently around 10% which from my experience is low for the industry.



## **CVA Finances**

19. Few of CVAs home care clients are funded through the NDIS and many have remained on packages through the Commonwealth Home Support Programme (**CHSP**).
20. CVA currently operates with an annual revenue of approximately \$14 million and is currently forecast to operate at a loss this financial year.
21. Prior to the Pandemic CVA was on a major growth path and experienced growth in the order of 20% year on year. Increasingly home care is becoming a scale and volume business where sufficient scale and client volume is necessary to remain viable.
22. CVA growth is currently 4% year on year.
23. We have had a history of modest profitability. The Pandemic hit us very hard and a lot of the extra expenses and things that we incurred during Covid, we were not able to climb back from. During previous years CVA was able to operate and generate a modest surplus. While not large typical surpluses were in the order of up to \$200,000.
24. The CVA reserves are currently \$2.18 million down from a high of \$4.34 million in FY 20.
25. A variety of factors have required CVA to eat into its reserves in recent years. This included:
  - (a) meeting increased costs of providing services during the Pandemic that were not covered by funding;
  - (b) meeting the current inflationary pressures in the economy generally (such as workers compensation which has increased by 40% and now runs at around \$8,000 a month);
  - (c) covering our working capital rather than holding a commercial overdraft (collecting aging and bad debts has sadly become a key focus for us); and
  - (d) reinvesting in business ICT related infrastructure to improve business efficiency.

26. In addition to this we now use our reserve to cover our working capital as the Commonwealth now pay us in arrears which was not previously the case.
27. This means that our reserves are used to drive our working capital rather than be invested to grow.
28. While a well-run business, CVA started to experience losses year on year in the 2020-2021 financial year.
29. Given the projection for this financial year CVA will be experience three loss making years in a row.
30. CVAs financial performance this financial year and over recent years is as follows:

	FY23 YTD December	FY23 Projection	FY22	FY21	FY20	FY19
Revenue	\$ 7,033,774	\$ 14,067,548	\$ 12,263,280	\$ 11,751,731	\$ 11,984,250	\$ 9,974,823
Net Profit	-\$284,292	-\$568,584	-\$556,529	-\$206,419	\$83,581	\$193,654

### Wages

31. CVA operates under the *Community Vision Australia Disability And Aged Care Agreement 2019* (the **Enterprise Agreement**).
32. The Enterprise Agreement provides hourly rates of pay above the relevant Award at a rate of approximately 1.6% above the Award.
33. I understand that I can absorb part of the 15% into these modest Enterprise Agreement over award payments and we will likely do this for commercial reasons.
34. The wages cost for the employees referred to in paragraph 10 inclusive of on costs for the current financial year is \$3,235,679 YTD December and projected for the full financial year to be \$6,471,358. This gives a monthly wages bill for the relevant employees of \$539,279 a month.

### **Impact of the 15% Increase Without Funding**

35. If we did not absorb any of the 15% increase into our existing over award Enterprise Agreement payments, then the cost of covering the addition would be 80,891 a month.
36. If the 15% increase commenced on 1 March 2023 but the government funding stayed as they propose (10% on 1 July 2023 and 5% on 1 July 2024) we would need to fund \$323,567 of extra wage costs to 1 July 2023 and then a further \$323,567 for FY 24.
37. If we absorb 1.6% of the 15% wage increase that would leave us with 13.6% to fund (absent government funding) which would present a better but still deficit driving position.
38. For instance, if the 13.4% commenced on 1 March 2023 and the government funding remained on the current proposed schedule, we would carry a deficit for unfunded wages costs of:
  - (a) \$289,053 for FY 23 (an extra 13.4% for four month); and
  - (b) \$220,026 for FY 24 (cost of unfunded 3.4% throughout the FY 24 year).
39. This will be affected by the annual wage review in July 2023 which may be a further partially unfunded cost impact.
40. If the 15% comes into operation without aligned government funding it simply means that CVA will experience an even greater deficit for the current financial year. The deficit size of an unfunded increase is material as it will increase our likely FY 23 deficit by a little over 50% and increase the pressure on our business to return to a surplus position in FY 24.
41. This will severely impair our financial position and drive us further into deficit requiring us to materially deplete our cash reserves to a historic low.
42. Potentially this will create a position which will cause the organisation to be in a position where it is unable to meet its liabilities within a short period of time.

43. The current new funding environment effective from January 2023 has already created a potential further loss of \$18,000 from being unable to claim for cancelled services but where the organisation has had to pay worker wages.



Date: 9/2/2023