

IN THE FAIR WORK COMMISSION

Applicants: **HEALTH SERVICES UNION OF AUSTRALIA and others**

Matter: **APPLICATIONS TO VARY THE AGED CARE AWARD AND THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES AWARD**

Matter No: **AM2020/99; AM2021/65**

SUBMISSIONS OF THE HEALTH SERVICES UNION AND OTHER APPLICANTS IN REPLY TO COMMONWEALTH AND EMPLOYER SUBMISSION

INTRODUCTION

1. This submission is in response to:
 - (a) The Commonwealth's Response to Wage Adjustment Issues dated 31 October 2023 (**Commonwealth**);
 - (b) The Joint Employers' Submission on Wage Adjustment Issues dated 1 November 2023 (**Joint Employers**).

REPLY TO COMMONWEALTH SUBMISSION

2. The Commonwealth Submission deals only with the submissions of the Health Services Union and other applicants (as well as the submissions of the ANMF and the UWU) concerning the issue of understaffing. The Commonwealth indicates (at [3]) that it does not wish to be heard with respect to any particular outcome on that issue, but raises some matters it is said may assist the Commission in considering the submissions advanced.
3. The Commonwealth acknowledges (at [6]) that the Full Bench expressly indicated that it did not take into account 'issues arising from understaffing' in arriving at the interim increase it determined was justified by work value reasons. However, the Commonwealth suggests, correctly, that the Full Bench did take into account increased workload, work intensity and the complexity of aged care work generally in

determining the interim increase.¹ However, these observations must be seen in the context of the decision as a whole.

4. Firstly, the Full Bench acknowledged that evidence painted a picture of chronic understaffing across the aged care sector which has contributed to increasing workloads and work intensity.² However, the Full Bench was satisfied that the complexity and intensity of work in aged care had increased significantly for other reasons that were neither transitory nor likely to be entirely mitigated by increased staffing levels.³ Secondly, to the extent that increased workload, intensity and complexity of work arising from reasons other than understaffing contributed to the interim increase awarded by the Commission, the interim increase did not exhaust the increase justified by work value reasons arising from that factor (together with the other matters accepted by the Full Bench), but rather the interim increase is 'comfortably below' the level of the increase likely to be justified on a final basis.
5. The Commonwealth described (at [7]) a number of measures that have been implemented to achieve increased staffing and skills. It submits (at [9]) that there are early indications that those measures, along with the interim wage increases awarded by the Commission are having an impact on staffing levels. Whilst it is hoped that those initiatives are having a positive impact, the Commission would not be satisfied that they are, or will be, sufficient to deal with the entrenched problems with the aged care workforce. Indeed, the Commonwealth's figures make it clear that considerably more must be done.
6. At [9.1], the Commonwealth identifies that the previously estimated shortfall of direct care workers in residential aged care for 2023-2024 decreased from 26,670 direct care workers to 17,437. Nothing about the latter *estimated* shortfall points to a resolution of the skills shortage in the area. Structural and demographic factors (including an ageing and increasingly frail population with increasing demand for aged care of a more intensive nature), along with a longstanding and entrenched undervaluation and underappreciation of care work contribute to the shortfall of skills. The problem is not

¹ *Aged Care Award 2010* [2022] FWCFB 200 at [973].

² *Aged Care Award 2010* [2022] FWCFB 200 at [216].

³ *Aged Care Award 2010* [2022] FWCFB 200 at [220].

a static one. As the Commonwealth acknowledged in its earlier submissions, modelling suggested that the aged care workforce would be required to grow by 6.6% *each year for five years* to support quality of care and growing demand.⁴ There is little basis to have confidence that the above estimated narrowing of the skills and staffing gap will be realised in the short term, or that the initial trend will continue and outpace growing demand. Indeed, the estimate tends to confirm that the skills shortfall remains substantial.

7. Of course, the trend within aged care is toward such care being provided in the home and for residential aged care to be used only for the more frail and acute aged persons. It is significant that the Commonwealth has not pointed to any data about the workforce in the home care sector. Given the dramatic expansion in the provision of home care as a result of the desire of aged persons to remain in their home and deliberate government policy to encourage that outcome, the requirement for labour in that sector is only likely to increase as well.
8. The Commonwealth refers (at [9.2]) to data concerning enrolments since January 2023 in free TAFE courses. The figure of 51,000 enrolments in the care sector includes enrolments in health care, aged care and disability care and is not directed specifically at aged care.⁵ No information is provided as to the number of enrolments which are likely to assist in addressing shortages in the aged care workforce. Furthermore, in the absence of comparative data from the corresponding periods in previous years, the Commission is unable to reach any concluded view that such enrolments will be effective in dealing with the problem of understaffing or even keeping pace with the requirements of an expanding sector.
9. Although many of the initiatives to which the Commonwealth refers in its Submission are welcome developments, they do not negate the imperative to increase wages across the sector to:
 - (a) properly recognise the value of work which has been historically substantially undervalued;

⁴ Commonwealth Submissions dated 8 August 2022 at [178].

⁵ The Hon Anthony Albanese, 'Albanese Government's Fee-Free TAFE Blitz Smashes Target Six Months Early', media release dated 28 August 2023.

- (b) promote workforce participation by attracting and retaining skilled workers; and
 - (c) provide incentives for workers to increase their skills, which in turn will increase their productivity and efficiency.
10. Finally, the Commonwealth (at [8]) indicates that it is committed to fully implementing the recommendation of the Aged Care Royal Commission in relation to minimum care time standards. Relevantly, in Recommendation 86 the Royal Commission recommended the introduction of a minimum staff time standard which will progressively increase over time.⁶ This initiative is to be applauded and will do much to improve the quality of care provided to aged persons in residential care. It will not, and is not intended to reduce the intensity or complexity of the work of RNs, Enrolled Nurses or Personal Care Workers and will increase the demand for staff to satisfy the minimum staff time standards

REPLY TO JOINT EMPLOYER SUBMISSION

11. The submissions of the Joint Employers address four subject-matters: the wage increase justified for indirect care workers; the impact of the COVID-19 pandemic; work intensification and staffing levels; and the financial stability of aged care providers.

Indirect Care Workers

12. The Health Services Union and other applicants embrace the apparent acknowledgement by the Joint Employers (at [16]) that the industry welcomes the prospect of an increase for indirect care employees, and its call (at [17]) for the increase for indirect care workers to be the same as that ultimately awarded to direct care workers. Those submissions accord with the submissions already made at length by the Health Services Union and other applicants, which we do not propose to repeat.

⁶ Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3A, p419

Such outcome is entirely consistent with a proper application of principle leading to a correct valuation of the work those workers perform.

13. The Joint Employers observe, at [19(f)] and following (and, in particular, at [27]-[29]), the features of the work of indirect care workers, the skills and responsibilities involved and the conditions under which it is done, that justify increases to their wages. In particular, it is noted that the Joint Employers acknowledge the extent to which:
- (a) Indirect care workers are subject to increased training obligations with respect to the Aged Care Quality Standards, infection control, elder abuse, mandatory reporting, person-centred care and various other matters and reorientation of the delivery of services to residents directed at providing person-centred care.
 - (b) Indirect care workers are expected to be able to observe residents for any sign of concerns about the welfare of the resident and to act as a first responder, if needed, in the event of a fall or other incident. Although the Joint Employers assert (at [55]) that indirect care workers are not required to provide 'clinical care', that does not take into account the first aid role indirect care workers may undertake or the importance of all staff having the capacity to identify concerns in relation to the welfare and condition of residents.
 - (c) Indirect care workers are likely to encounter residents who have dementia and are increasingly likely to observe and have interactions with residents that have varying degrees of dementia. The Joint Employers acknowledge (at [64]) that the evidence suggests that indirect care workers are required to be conscious of the prevalence of dementia in residents and possess an understanding that dementia can impact how a resident communicates and behaves. To the extent it is suggested an indirect care worker should leave the room and contact the care team if a resident demonstrates challenging behaviour, this only demonstrates that indirect care workers are required to have knowledge of and make judgements about the management of their interactions with residents exhibiting challenging behaviours and that there are inherent risks in the work.

- (d) Indirect care workers will encounter family members and visitors and engage in informal interactions, attend to matters within their scope of responsibility and competence or refer family members or visitors to other appropriate staff members. That role must be seen in the context of the findings of the Full Bench as to the increased engagement of aged care workers with family and next of kin and the increased expectations of the community in relation to the nature and standards of care and facilities provided.⁷
 - (e) Indirect care workers, in endeavouring to perform their work within the context of providing person-centred care, are increasingly required to interact and communicate with residents in a manner that acknowledges their independence and choice and respects the resident's experience.
14. In responding to the submissions of the HSU, the Joint Employers assert (at [80])((e) and (f)) that certain aspects of the work of indirect care workers referred to in those submissions has already been considered by the Full Bench in Stage 1 of the proceedings. Given that the Commission has yet to determine what increase is justified by work value reasons for indirect care workers, obviously enough, these matters must now be considered. That is not to suggest that the Commission must revisit the findings already made in relation to, for example, the 'increased emphasis on diet and nutrition for aged care residents'.

Impact of the Pandemic

15. Broadly two issues arise with respect to the impact of the COVID-19 pandemic on the work of employees in the aged care sector: (1) the extent to which COVID-19 resulted in changes to the level of skill and responsibility involved in doing that work and the conditions under which work is performed, particularly with respect to infection prevention and control (IPC) measures; and (2) the degree to which those changes are likely to be, and should be regarded as, a permanent feature of the aged care sector and not merely a transitory situation.

⁷ *Aged Care Award 2010* [2022] FWCFB 200 at [890](12).

16. The Joint Employers appear to now accept (at [110] and [135]) what is obvious, that is, that COVID-19 is a permanent risk to be managed by residential aged care facilities and that IPC and outbreak control measures and requirements are ongoing and will not disappear. Although there are particular vulnerabilities with respect to COVID-19 in the operations of residential aged care facilities, the same conclusion must follow with respect to the home care provided to aged persons. This is demonstrated in the further evidence filed by the HSU.⁸
17. The Joint Employers endeavour to downplay the ongoing impact on workers of IPC and outbreak control measures by suggesting (for example at [111]-[112], [129] and [134]-[135]) that IPC and outbreak management policies existed prior to the pandemic and that COVID-19 mitigation measures have now, at least in some instances, been incorporated into general infection control policies. Those submissions understate the evidence of the ongoing impact on the work of aged care workers and the conditions under which it is performed, including because:
 - (a) The Joint Employers' submissions (at [96]-[109]) themselves give a sense of the extent to which new, more detailed and more onerous regulations and guidelines have been implemented by bodies such as the Department of Health and Aged Care, the Aged Care Quality and Safety Commission and State and Territory health ministries.
 - (b) The evidence unarguably supports the conclusion that the COVID-19 pandemic has resulted in a comprehensive overhaul of education, procedures and responsibilities with respect to infection control management and a reassessment of any pre-existing processes. The impact of the pandemic has not simply been a 'respiratory infection' to be managed.
 - (c) The evidence of individual workers filed recently by the HSU demonstrates the ongoing impact of new and more complex IPC and outbreak management measures on work in the sector, including with respect to testing, operation of PPE, isolation procedures, communication with residents and clients and their

⁸ See, for example, Witness Statement of Catherine Evans, 19 September 2023, at [8]-[20].

family members, and provision of services in the circumstances of lockdowns and the associated training obligations.⁹

18. To the extent that the Joint Employers submit (at [129]) that a material change in the level of responsibility of workers is limited to the position of the 'IPC lead', the submission could not be accepted. As the Joint Employers' submissions acknowledge, the need for and advent of the role of IPC lead itself demonstrates the requirement for all staff to have increased awareness, skills and responsibility with respect to infection control and ignores the effect of IPC and outbreak management processes on the actual performance of work within residential aged care facilities and in the provision of home care services.

Understaffing and Work Intensification

19. The Joint Employers address the issue of work intensification and staffing shortages (at [19](u)-(w) and [140]-[147]) and suggest a cautious approach should be adopted to any recognition that work intensification has work value consequences given the prospect that staffing shortages may be temporary.
20. The Full Bench accepted that work intensification may be relevant to an assessment of work value, but observed that it may be relevant whether work intensification is a permanent feature of the work in question; or a transitory phenomenon which will abate when staffing levels increase.¹⁰ As set out above, there is no reason to think the present staffing shortages, nor the intensification of work resulting from understaffing, will be temporary. Those phenomena are the product of structural demographic factors (an ageing and increasingly frail population with increasing demand for aged care of a more intensive nature) and a longstanding, entrenched, gender-based undervaluation and underappreciation of care work.
21. The suggestion in the Joint Employers' Submissions (at [144]) that the industry is responding to the shortage of employed staff by reducing capacity and increasing its reliance on agency staff is not supported by the evidence. The evidence referred to in

⁹ Witness Statement of Virginia Ellis, 20 September 2023, at [9]-[34]; Witness Statement of Paul Jones, 20 September 2023, at [7]-[28]; Witness Statement of Susan Digney, 15 September 2023, at [5]-[29]; Witness Statement of Catherine Evans, 19 September 2023, at [8]-[20].

¹⁰ *Aged Care Award 2010* [2022] FWCFB 200 at [220].

the HSU's earlier submissions amply demonstrated that residential aged care facilities and home care operations are frequently operating without adequate staffing. Furthermore, the use of agency staff and the frequent turnover of staff itself adds to the work demands of remaining staff. As the Stakeholder Statement put it:¹¹

Labour turnover and the use of lower hours, part-time, casual and agency staff in home and residential care results in longer-serving and permanent staff having more responsibility for continuity of care. These staff then need to mentor new starters and irregularly employed employees as well. Casual and agency staff face the added pressure of dealing with changing settings and consumers.

22. In any event, as set out in the Health Services Union's 22 September 2023 Submissions, work intensification is a feature of the work which exists independently of skills shortages, being driven largely by the increasing frailty of those receiving care, changes to regulatory requirements and the shifting model of care. The effect of that matter, together with the other matters considered by the Full Bench, contributed to the interim increase awarded for direct care workers, but their impact must nonetheless be considered in assessing what further increases is justified.

Financial Stability

23. The Joint Employers (at [150]-[155]) rely on the report of Stuart Hutcheon of StewartBrown to support a submission that, absent government funding, increases in employment costs will threaten the financial stability of aged care providers.¹² It is accepted that the extent of government funding in the context of the aged care sector will be relevant to the modern awards objective factor referred to in s 134(1)(f) (namely, 'the likely impact of any exercise of modern award powers on business, including on ... employment costs').¹³
24. However, the Joint Employers have correctly accepted throughout the proceedings that questions of affordability might at most be relevant to issues of operative date and phasing, but are not a relevant consideration in relation to the actual setting of rates of

¹¹ Stakeholder Consensus Statement at [20].

¹² Witness Statement of Stuart Hutcheon, 1 November 2023, Annexure SH-3 at [1.3].

¹³ See *Aged Care Award 2010* [2022] FWCFB 200 at [915] and [1086].

pay.¹⁴ The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net and it is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sector.¹⁵

17 November 2023

MARK GIBIAN SC | H B Higgins Chambers

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¹⁴ Transcript 26 April 2022 PN464.

¹⁵ *Re 4 yearly review of modern awards – SCHADS Award* [2019] FWCFB 6067 at [137]-[142].