

IN THE FAIR WORK COMMISSION

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

Matter: **APPLICATION TO VARY THE AGED CARE AWARD 2010;
APPLICATION TO VARY THE SOCIAL, COMMUNITY, HOME CARE AND
DISABILITY SERVICES INDUSTRY AWARD 2010; APPLICATION TO VARY
THE NURSES AWARD 2020**

Matter No: **AM2020/99; AM2021/65; AM2021/63**

HEALTH SERVICES UNION SUBMISSIONS IN REPLY ON STAGE 2

INTRODUCTION

1. Pursuant to the amended directions of the Commission dated 6 December 2022, the HSU makes the following submissions in response to the Joint Employer Submissions dated 20 January 2023. The HSU continues to rely upon its earlier submissions without re-stating them at length.

JOINT EMPLOYER SUBMISSIONS

Commission's Consideration of Gender-Based Undervaluation

2. The Joint Employers accept that it is necessary for the Commission to apply the new s.157(2B) by ensuring that the consideration of work value reasons is free of assumptions based on gender and includes consideration of whether the work of relevant employees has been historically undervalued because of

assumptions about gender. The Joint Employers further accept that the Commission must take into account the considerations set out in the new ss.134(1)(ab) and 284(1)(aa), in short, the need to achieve gender equality by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, addressing gender pay gaps and facilitating women's full economic participation.

3. However, the Joint Employer's submissions appear to assume that those tasks have been exhausted by the existing consideration of the Full Bench. The Joint Employers submit, at [13], that the Commission can be comfortable that any new obligations arising from s.157(2B) have been met and that it can conclude as much. At [23], the Joint Employers submit when addressing the new factor set out in s 284(1)(aa):

The notion of gender based undervaluation is not new as is evidenced by the Commission considering the issue at length in its Decision. The requirement is to 'eliminate' this and by properly setting fair minimum wage rates in the relevant awards the Commission has rightly concluded that this has been achieved.

4. The HSU does not fully accept that characterisation of the Full Bench Decision by the Joint Employers. The Joint Employer's submissions appear to suggest:
 - a. that the Commission's task of setting the rates in the relevant awards has been completed (when the Full Bench has made plain that the interim increase it has determined is justified by work value reasons does not exhaust the extent of the increase which is justified and that it has not completed consideration of the modern awards objective or minimum wages objective factors); and
 - b. that reference to the considerations in s.284(1)(aa) are only relevant in the assessment of work value reasons contemplated by s.157(2A) as now

supplemented by s.157(2B). As the new ss.134(1)(ab) and 284(1)(aa) make clear, the need to achieve gender equality is a factor that must be taken into account more generally in providing a fair and relevant minimum safety net and establishing and maintaining fair minimum wages. It is, in particular, relevant in the consideration of the submission of the Commonwealth as to the phasing of the interim increase, and is a factor militating against delay in giving effect to the interim increase.¹

5. In the same vein, the HSU contests the Joint Employers' submission at [24] that "addressing" the gender pay gap has already been fully achieved by the Commission or that the Commission has reached a view that the gender pay gap would be eliminated by a 15 percent interim increase. That factor is also relevant to the question of phasing, and militates against that approach, and will need to be considered by the Full Bench again in determining what further increases are justified in Stage 3 of the proceedings.
6. The Joint Employers also repeat, at [24], a submission that "some care" should be applied to how a statistical concept derived from aggregate level of pay should be translated into a jurisdiction concerned with setting fair minimum rates. The Joint Employer's submissions ignore that Parliament has expressly required, in the new s.284(1)(aa), the Commission to take into account "the need" to address gender pay gaps in establishing and maintaining a safety net of fair minimum wages.
7. Although it can be measured in various ways, the "gender pay gap" refers to the difference between average earnings of men and women: see, for example, *Re Annual Wage Review 2017-2018* [2018] FWCFB 3500 at [37]. This is consistent with how the concept of the gender pay gap is understood in the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs,*

¹ Submissions for the Health Services Union with respect to Stage 2, 20 January 2023 (**HSU Stage 2 Submissions**), [16(g)]

*Better Pay) Bill 2022 (Cth).*² That is, the need to address the gap in average earnings between men and women is, unremarkably, a matter Parliament has determined the Commission must take into account in establishing and maintaining fair minimum wages.

8. At [31], the Joint Employers also appear to distinguish between the task of “setting” and “varying” minimum wages, noting that the Commission’s task in the present case is the latter. It is unclear what is sought to be made of the alleged distinction. The minimum wages objective applies both to the conduct of annual wage reviews under Part 2-6 and to the exercise of the Commission’s functions under Part 2-3 so far as they relate to setting, varying or revoking modern award minimum wages: s.284(2). The distinction is one without a difference.
9. Furthermore, the current matter is not properly described as involving “the variation of fair minimum wages”. Firstly, the proper conclusion in the present matter is that the current rates of pay in the relevant awards do not represent a safety net of fair minimum wages because, as the Full Bench has found, the current rates of pay substantially undervalue the work of employees. Secondly, the task of setting minimum wages involves more than merely a consideration of work value and must take into account the various considerations in the minimum wages objective which now expressly include the need to ensure equal remuneration, eliminate gender-based undervaluation of work and to address gender pay gaps.
10. The Commission can be satisfied that the interim increases to modern award minimum wages found to be justified by work value reasons are necessary to achieve the modern awards objective, albeit that the interim increase will not fully achieve the objective.

² Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)*, p10.

Increases in Employment Costs/Impact on Business

11. The Joint Employers emphasise, at [42], that the factor in s 134(1)(f) refers to the “likely impact of any exercise of modern award powers on business” and that impact could be negative, neutral or positive. As set out in the HSU Stage 2 Submissions, any exercise of modern award powers may have a number of different impacts on business, some of which might be described as positive others as negative. Section 134(1)(f) itself, in providing a non-exhaustive list of possible impacts, acknowledges that employment costs are not the only type of impact that the Commission must take into account.³
12. The Joint Employers contend that, without full and ongoing funding, the impact on business becomes “materially negative”. At [51], the Joint Employers continue:

If the interim increases are introduced without funding (or the funding mechanisms don't deliver the funding to employers to pay) the impact on business will be materially negative and this would weigh heavily against such an outcome.
13. That submission is elevated, at [52], to a contention that there will be a material negative impact on the capacity of providers to “viably operate” and “provide critical services to vulnerable members of the community”.
14. The suggestion that operators will be “unable to provide critical services” is a serious one. If there are such situations contemplated as a consequence of the proposed interim increase, that claim is one which should be supported by evidence. The less serious allegation, about the capacity of providers to “viably

³ HSU Stage 2 Submissions at [47]-[48].

operate” should, equally have been supported by evidence addressing the present circumstances. None has been provided.

15. There is no suggestion in this matter that the interim increases will be unfunded. The Commonwealth affirmed its commitment to provide funding for any increases determined by the Commission in its Submission dated 29 August 2022, where it said:

Despite what is in paragraph 14 above, the Commonwealth affirms its commitment to provide funding to support any increases to award wages made by the Commission...

16. The Commonwealth has expressed its *support* for timing and phasing, in the following language:

*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.*

17. It is by no means certain that the Commonwealth will refrain from providing funding support for any determination of the Commission that the interim increases take effect in advance of the preferred Commonwealth timetable. In the absence of a clear statement from the Commonwealth that it will so refrain, the Commission would not be persuaded it would, given its earlier commitment.

18. Even if the Commonwealth were to decline to provide funding in advance of the timeframe it identifies at paragraph [5.1] and [5.2] of its Submission, it does not follow that the impact on business of implementing the interim increases will be *materially* negative, and certainly not universally so. In that event, employers would be required to meet increased costs for about a 3 month period before receiving substantial funding support from the Commonwealth. Thereafter, they would have to deal with a gap between the level of funding and wage increase for a 12 month period.
19. The Joint Employers having filed no evidence analysing the impact of such a circumstance, the Commission would not conclude that any gap between the interim increase it determines and funding support from the Commonwealth will be uniformly and materially negative for employers. As observed in the HSU Stage 2 Submissions, the position of the Joint Employers has been that existing funding levels are not sufficient and the gap is being met by providers to ensure that compliant and quality care services are being provided to consumers.
20. In light of that absence of evidence, the Commission would not accept the submission of the Joint Employers that s.134(1)(f) weighs *heavily* against a determination that the interim increase take effect forthwith. In any event, for reasons already canvassed in the HSU Stage 2 Submission, the Commission would not regard this consideration as outweighing the other considerations supporting the immediate implementation of the interim increase. Levels of funding or the appropriateness of funding models are not within the control of the Commission and any possible impact of funding decisions upon providers or service provision is the product of political decisions and not the exercise of the arbitral functions of the Commission.
21. The Joint Employers, at [48], raise an issue as to the commitment of the Commonwealth to provide funding with respect to on-costs associated with

the employment of relevant employees. The Commonwealth has explained, at paragraphs [14]-[18] of its submissions, that its funding commitment includes funding for on-costs and has explained its proposed approach to funding on-costs. That approach is proposed to initially use average labour costs by Program and, in subsequent years, obtain advice through IHACPA to inform future price setting arrangements.⁴ The Joint Employers have not raised any objection to the approach proposed by the Commonwealth other than a general request for “further clarity”. On the material available, there is no reason for the Commission to infer that any additional issue arises with respect to the adequacy of the Commonwealth’s commitment to provide funding with respect to on-costs.

22. At [52], the Joint Employers suggest it is speculative whether any party proposed to “de-link” the implementation of the interim increases from the Commonwealth’s funding proposal, appearing to suggest that the HSU Stage 2 Submissions contending for increases to be effective immediately might catch it by surprise. The submission ought not be accepted. If it was not already apparent from the manner in which the union parties have advanced their cases to date, the Joint Employers could not be in any doubt as to the intent of the union parties to have the increases implemented in full as soon as possible. Any doubt as to this position cannot be sustained given the Joint Statement regarding Stages 2 and 3 of the Work Value Case dated 16 December 2022, in which both the union and employer parties agree:⁵

*The 15% interim increase to the pay rates of the Direct Aged Care Worker classifications (as defined above) should commence operation under the relevant Awards and enterprise agreements **as soon as possible**. This increase in pay*

⁴ Submissions of the Commonwealth dated 16 December 2022 at [17].

⁵ Joint Statement regarding Stages 2 and 3 of the Work Value Case dated 16 December 2022 at [2].

rates is not to be phased in over time and instead should occur from the first full pay period on or after a single specific date.

23. Although various employers have made clear that their position is that the Commonwealth must provide funding to aged care employers on and from the operative date of any increase, it is the common view of all relevant parties that the interim increase should commence as soon as possible and not be phased in over time. It has been plain from the outset that this is the position of the union parties.

Home Care Funding

24. At [55], the Joint Employers portend an increase in regulatory burden, at least initially, in Home Care. The Joint Employers point to the need to change service pricing, to which the client will need to agree. To state the obvious, there is no evidence before the Commission that demonstrates that any increase in award wages will require a change to the pricing of services to Home Care clients.
25. The Joint Employers then imagine a circumstance of clients who are unwilling to agree to price increases, and demands to continue to receive services at the previous price despite an increase in funding to packages. The submission is speculative, and unsupported by evidence as to the terms of existing packages, including terms providing for arrangements where there are wage rises, or any previous experience of such elderly bad actors. Indeed, conversely at [59]-[62], the Joint Employers express great confidence in efficiently and swiftly carrying out the necessary communications with clients in order to make any necessary changes to home care packages.
26. The Commission would expect that home care operators have some experience in managing the implementation of increases to award wages. That is an event that ordinarily occurs annually. In circumstances in which increases in awards

wages occur on a regular basis, the Commission would not infer that providers would be unable to accommodate any necessary consequent adjustments to arrangements with their clients without there being a substantial burden. Furthermore, it is unclear what “regulatory burden” is said to arise which would be relevant to s.134(1)(f).

27. In her Second Supplementary Statement, Professor Eagar:
 - a. Expresses her expert opinion (at [28]) that it is feasible to fund any increases awarded by the Commission prior to 1 July 2023;
 - b. Explains, at ([31(b)] and [32]) the mechanisms by which such funding increases may be distributed: by including them in a subsidy or by reimbursing employers directly from the date that the pay related expenses are incurred (the discussion in the Joint Employer submissions at [59] appears to concede this approach would be effective, limiting their dire predictions to a scenario where the funding was paid directly into home care packages as opposed to the operator reimbursement approach described by Professor Eagar); and
 - c. Provides a description (at [33]-[34]) of previous Commonwealth experience implementing additional payments before the end of the financial year.
28. The Commission would readily accept Professor Eagar’s evidence, and the Commission would not accept the Joint Employers’ submissions in this respect, including the contention at [82](e). Implementing the reimbursement approach described by Professor Eagar does not necessarily require an increase in the price paid by consumers, nor the regulatory burden described by the Joint Employers. Any reimbursement is paid directly by the Commonwealth to an employer and is not dependent on a change in pricing or varied contractual arrangements with consumers.

29. In any event, a variation to award rates of pay would not in, and of itself, give rise to the regulatory burden foreseen by the Joint Employers. Any burden imposed is as a result of any separate funding arrangements, contractual arrangements and accountability measures that might exist. The regulatory burdens to which s.134(1)(f) are directed are those which are a consequence (or “impact”) of the exercise of modern award powers, rather than regulatory burdens that arise from the implementation of government funding or regulatory arrangements.
30. The Joint Employers do not, in any event, bring any evidence in relation to the proportion of service prices that wages represent, or the profitability of home care employers, for the Commission to understand the degree to which the interim increase may have an impact upon the employers if unfunded for a short period, then partially funded for a period. In the absence of such evidence and analysis, the Commission can give little weight to the submission.

Capacity to Pay

31. The Joint Employers submit, at [86], that absent Commonwealth funding, “the Sector has little capacity to pay the interim increases.” The Commission would not accept a submission in such universal terms in the absence of cogent evidence.
32. The HSU does not dispute that operators in the sector rely on Commonwealth funding. Whilst the Commission might accept that some operators would be caused a level of difficulty in meeting unfunded increases, as set out above, the Commonwealth has committed to provide funding support and any period where there is a gap between that support and the level of increase will, at worst, be finite. In the absence of evidence addressing that circumstance there

is no basis to understand the *extent to which* such a period would impact the operations of employers across the entire industry.

33. There is little evidence before the Commission in relation to the adequacy of funding generally or with respect to particular operators beyond general statements to the effect that the industry relies on Government fundings.⁶ To the extent that reference is made to the StewartBrown report, it is relevant to note the context of the report provided in the reply statement of Ms Lauren Hutchins dated 22 April 2022. Ms Hutchins explains that the data in the StewartBrown report is drawn from aged care providers who nominate themselves as participants in the survey and the report does not purport to represent a comprehensive or even representative survey of providers.⁷ In itself, the StewartBrown report can be accorded little weight, particularly in the absence of evidence from its authors as to the methodology and purposes of the report or the availability of any method of verifying the information in the report.

ANMF Submissions

34. The HSU generally supports the Stage 2 Submissions of the ANMF dated 20 January 2023 and it is necessary to make only a limited number of observations with respect to the submissions.
35. At [24]-[27], the ANMF addresses the new factor in s.134(1)(aa) which requires the Commission to take into account the need to improve access to secure work across the economy. It appears to be accepted by all parties that the variations at issue in these proceedings do not directly seek variations which are relevant to security of employment. However, the ANMF suggests that the interim

⁶ See, for example, Statement of Paul Sadler at [48]-[52]; Statement of Anna-Marie Wade at [26]-[45].

⁷ Reply Witness Statement of Lauren Hutchins at [43]-[44].

increase would improve the attraction and retention of employees in the aged care sector and, at least so far as retention is concerned, would thereby have a positive impact on secure work.

36. The submissions of the ANMF in this respect appear to go beyond the object set out in s.134(1)(aa). Although the concept of “secure work” is not defined and the extrinsic materials are of limited assistance,⁸ the fact that s.134(1)(aa) refers to the need to “improve access to secure work” suggests that the subsection is directed at security from the perspective of the employee. That is, the objective is to ensure that modern awards provide security to employees in relation to matters such as certainty of ongoing engagement and predictability of duties, hours of work and pay. Having said that, the findings of the Full Bench with respect to attraction and retention, and the ample evidence before the Commission on that subject, are otherwise relevant to the task of providing a fair and relevant minimum safety net of terms and conditions of employment and, in particular, at least to the factors in s.134(1)(c) and (f).
37. The ANMF suggest, at [77] and [86]-[89], that the Commission might order that the interim increase come into effect at the date of determination, but order that the operation of the variation be deferred for a period of weeks, after which the variation would apply retrospectively. The HSU agrees that it would be possible for the Commission to apply the interim increase in that manner if satisfied it would necessary to achieve the modern awards objective and minimum wages objective. However, the primary position of the HSU is that such a deferral is not necessary or appropriate and that the interim increase can be applied from the date of determination.
38. The Commission would only consider deferring the interim increase if there was evidence demonstrating the necessity for a period of adjustment. There is

⁸ Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay)* Bill 2022 (Cth) at [336]-[338].

not presently any such evidence before the Commission and it is unclear why a period of adjustment would be required in the case of a variation providing for a simple increase in rates of pay, albeit a substantial one. This matter is quite different from *Re Australian Workers' Union* [2022] FWCFB 4 in which a period of adjustment of three months (6 months from the original decision) was found to be appropriate. That decision concerned the imposition of a floor of minimum earnings for piece rates workers. The effect of that variation required changes to work practices and working arrangements for some employers at least who did not have appropriate processes in place for recording hours of work and supervising pieceworkers.

39. The HSU agrees with the submissions of ANMF, at [96], that the regulatory burden referred to by the Commonwealth, which is said to arise from accountability mechanisms it proposes to implement in association with the additional funding, is not relevant for the purposes of s.134(1)(f). The Commonwealth already provides funding to aged care providers. If the Commonwealth proposes to change or enhance accountability processes in association with the provision of additional funding, that is a matter which arises from those funding mechanisms not the interim increase. To the extent that any regulatory burden arises from additional accountability mechanisms imposed by the Commonwealth, that is not an impact of the exercise of modern award powers by the Commission for the purposes of s.134(1)(f).

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Dated: 9 February 2023