IN THE FAIR WORK COMMISSION

FWC Matter No: AM2020/99; M2021/63; AM2021/65

Application to vary or revoke the Aged Care Award 2010, Social, Community, Home Care and Disability Services Industry Award 2010; Nurses Award 2020

SUPPLEMENTARY WITNESS STATEMENT OF KATHLEEN EAGAR

I, Dr Kathleen Eagar, Professor of Health Services Research and Director, Australian Health Services Research Institute of University of Wollongong in the state of New South Wales, say as follows:

1. I have prepared a supplementary report dated 20 January 2023 which I prepared at the request of the Health Services Union for the purposes of this proceeding (**Second Supplementary Report**).

2. A copy of the Second Supplementary Report is annexed and marked **"KE-7"**.

3. A copy of the letter of instruction issued to me by the Applicant's solicitors is annexed and marked **"KE-8"**.

4. The opinions I have expressed in the Second Supplementary Report are based wholly or substantially on specialised knowledge arising from my training, study and experience.

5. I have made all the enquiries that I believe are desirable and appropriate and no matters of significance which I regard as relevant have, to the best of my knowledge and belief, been withheld from the Fair Work Commission.

6. I have been provided with a copy of the Federal Court of Australia Expert Evidence Practice Note dated 25 October 2016, and I have read and understood the Practice Note, agree to be bound by it and have complied with it in preparing the Second Supplementary Report.

……
Kathleen Eagar

Date: 20 January 2023

Professor Kathy Eagar
Director
Australian Health Services Research Institute
Level 1, Enterprise 1
Innovation Campus
University of Wollongong
20 January 2023

AM2020/99 - Work Value Case - Aged Care Award

Supplementary Report

1. This is a supplementary report provided at the request of Maurice Blackburn Lawyers (their reference ALG/5506404 (650)).

2. I have been asked to provide expert opinion on a range of issues, each of which I deal with in turn below.

3. **Issue: the nature of the funding mechanisms for aged care including for residential aged care, Home Care and the Commonwealth Home Support Programme (including pricing methodology, how current prices have been set and what entity set those prices; transitional arrangements; payment distribution methods and frequency of payments)**

4. The Commonwealth funds three major programs - residential aged care, Home Care and the Commonwealth Home Support Programme - and a range of smaller programs. The funding mechanisms are different for each of the three large programs.

5. **Residential aged care funding** consists of three major streams and includes a mix of government subsidies (~80% of all funding) and consumer contributions (the remaining ~20%).

    a. Accommodation. This funding stream is not relevant to aged care work value and so is not discussed further.

    b. Daily living. This stream funds expenses of daily living including catering, cleaning and utilities. Residents contribute a daily fee equivalent to 85% of a single pension. Homes may charge additional daily living fees for additional services.

    c. Care. This stream funds the majority of residential care costs. Care is now funded using a new aged care subsidy model known as the Australian National Aged Care Classification (AN-ACC). I led the team that designed the AN-ACC and it was introduced on a national basis from 1 October 2022. It consists of three elements:

i. Base Care Tariff (BCT): covers fixed costs of care that are shared equally by all residents.

ii. AN-ACC Care Payment: a variable price per day for the costs of individualised care for each resident (50%) based on each resident's AN-ACC class with the price per class is standardised across Australia

iii. Adjustment payment: a one-off payment for each new resident that recognises additional, but time-limited, resource requirements when someone initially enters residential care.

d. A fundamental principle of AN-ACC funding is that price is informed by cost. The Independent Health and Aged Care Pricing Authority (IHACPA) will undertake an annual costing study and use the results of that study to recommend an annual price to government. However, government is free to accept or reject that price as IHACPA only has an advisory role. The IHACPA is discussed in more detail below.

6. The price relativities in the AN-ACC have been determined using the results of the national Resource Utilisation and Cost Study that I led and that informed the design of the AN-ACC. That research study found that, across residential aged care as a whole, 85% of costs are direct costs (80% care salaries), 7.7% of costs are indirect costs (e.g. administration, training, general consumables) and 7.3% are corporate overheads. With 80% of costs driven by staff salaries, the AN-ACC price can be readily adjusted in response to movements in salaries and wages.

7. In relation to payment distribution methods and frequency of payments for residential aged care, providers are funded monthly in arrears based on actual occupancy and on the AN-ACC class of each resident. Both providers and the Commonwealth have well established electronic systems in place for this. Payment rates are set out in a schedule of Commonwealth subsidies and supplements.

8. Commonwealth subsidies and supplements are updated regularly and are published at: https://www.health.gov.au/topics/aged-care/providing-aged-care-services/funding-for-aged-care-service-providers/aged-care-subsidies-and-supplements. In 2022 the schedule of subsidies and supplements was updated in March 2022, July 2022, September 2022 and October 2022.

9. These subsidies and supplements will be updated once pay increases flow through to providers in the form of increased Commonwealth subsidies and supplements. In relation to residential aged, this will be in the form of an updated 'AN-ACC starting price'. The AN-ACC starting price from 1 October 2022 is $216.80 for 2022/23. This figure if $216.80 will need to be adjusted upward to incorporate pay increases.

10. **Home Care Package** funding is specified as a price for a package of home care for a care recipient and the funding is allocated to the care recipient, not the provider. Care recipients may take their funding package to the provider of their choice. There are four different levels of HCP with four different prices. HCP funding is indexed by reference to general indexation measures and not HCP or aged care specific measures. There is no policy on the relationship between the cost of a HCP and the price that government pays. That is, the price that the Government pays is not determined by the cost of salaries and wages or any other specific input cost.

11. As with residential care, payments for HCP are set out in the same Commonwealth subsidy and supplement schedule which is updated regularly and published at: https://www.health.gov.au/topics/aged-care/providing-aged-care-services/funding-for-aged-care-service-providers/aged-care-subsidies-and-supplements. In 2022 the schedule of subsidies and supplements was updated in March 2022, July 2022, September 2022 and October 2022.

12. In relation to payment distribution methods and frequency of payments for HCP, the Government passed the Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Bill 2020 in December 2020. This changed the home care subsidy from being paid to an approved provider in advance of the home care services being delivered to a consumer, to a payment made in arrears after the services have been delivered. From 1 September 2021, subsidies are paid only for actual services provided and are paid in arrears each month. The provider provides a monthly statement to each care recipient itemising the services they have delivered and the dollar figure amount of Commonwealth subsidy for that month.

13. **Commonwealth Home Support Program** is a block funded program where providers such as Meals on Wheels, community transport and neighbourhood aid programs receive an annual block grant. The block grant is largely determined by historical allocations and is not determined by the cost of salaries and wages or any other specific input cost.

14. In relation to payment distribution methods and frequency of payments for CHSP, payments in arrears commenced on 1 July 2022. The CHSP service is notified at the beginning of the financial year of their grant for the year. The provider is then paid one twelfth of their annual allocation each calendar month.

15. CHSP funding is not mentioned in the schedule of Commonwealth subsidies and supplements.

16. The Government has announced its intention to bring HCP and CHSP together as one program known as the Support at Home Program in 2024. The design of Support at Home is not yet decided.

17. Issue: what role (if any) the Independent Health and Aged Care Pricing Authority (IHACPA) and/or the Commonwealth have in setting pricing and funding amounts in the aged care industry

18. The functions of the existing Independent Hospital Pricing Authority (IHPA) were expanded in 2022 with the introduction of the Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022. That Act included amendments to rename the existing organisation to become the Independent Health and Aged Care Pricing Authority (IHACPA) and to give it the role of providing costing and pricing ***advice*** on aged care to the Commonwealth Government. IHACPA's advice is to inform Commonwealth Government decisions on the pricing of residential aged care and respite care using the Australian National Aged Care Classification (AN-ACC) from 1 July 2023. This role is an advisory role only. Responsibility for pricing and funding rests with the Commonwealth government.

19. IHACPA is responsible for the costing and pricing of both public hospitals and aged care. In relation to public hospitals, IHACPA ***determines*** the price that the Commonwealth pays as its contribution to public hospitals. In relation to aged care, IHACPA has an ***advisory role*** only. It is not a determination body.

20. **Issue: what change to legislation or subordinate legislation (if any) is required to be enacted in order to change pricing and/or funding in the Aged Care industry**

21. No changes are required to legislation in order for government to increase payments to providers to cover pay increases or other costs. However, some changes in prices will need to be recorded in relevant Determinations. This is a simple administrative matter.

22. The Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022 is the relevant legislation for the introduction of the AN-ACC.

    a. Schedule 1 of that Act deals with new residential aged care funding mechanisms and amendments to other related Acts: Aged Care Act (1997); Aged Care (Transitional Provisions) Act (1997)

b. Schedule 8 of that Act deals with the establishment of the Independent Health and Aged Care Pricing Authority and amendments to other Acts: the National Health Reform Act (2011); National Health Reform Act 2011; Aged Care Act (1997) and the Aged Care Quality and Safety Commission Act (2018)

23. In relation to aged care in other settings, the Commonwealth distinguishes between Home ***Support*** and Home ***Care*** (my emphasis added).

24. The 1997 Aged Care Act allows the Minister to determine Principles. The Aged Care (Transitional Provisions) Principles defines what constitutes and does not constitute home care for the purposes of the Act. "Home Care" is defined as care consisting of a package of personal care services and other personal assistance provided to a person who is not being provided with residential care. The HCP program meets this definition. The Commonwealth Home Support Program (CHSP) is not defined as home care and there is no separate legislation for CHSP.

25. The Aged Care Act 1997 governs the Home Care Package Program (HCP) with eleven legislative instruments titled 'Principles' supporting that legislation.

26. The Aged Care (Subsidy, Fees and Payments) Determination 2014 and the Aged Care (Transitional Provisions) Act (1997) are also directly relevant to HCP. Chapter 3 of the 2014 Determination sets out subsidy rates for Home Care Packages.

27. Issue: whether, having regarding to the current funding mechanisms, it is feasible for the Commonwealth to fund any increase awarded by FWC prior to 1 July 2023

28. Yes, it is feasible to fund any increase awarded by FWC prior to 1 July 2023.

29. Issue: if the answer to the preceding question is YES, what mechanisms could be used to fund any increase

30. There are two options to fund an increase prior to 1 July 2023.

31. Option One is to incorporate award increases into existing payment systems:

    a. In relation to residential care, one option available to Government is to incorporate award increases into the 'AN-ACC starting price' and include these in an updated schedule of subsidies and supplements as well as into their automated payment systems. The IHACPA need have no role in this as IHACPA has an advisory role only.

    b. In relation to HCP, one option available to Government is to incorporate award increases into the subsidy paid for each of the Home Care Subsidy Rates and include these in an updated schedule of subsidies and supplements as well as into their automated payment systems.

    c. This same option is not available for CHSP as the Government grant is awarded to each organisation individually. Thus any increase for changes in award payments would need to be calculated for each organisation individually.

32. Option Two is to reimburse providers from the date they begin paying the increase:

    a. Department of Health advises aged care organisations to begin paying increased award rates to eligible staff from the earliest possible date and that they will be reimbursed for eligible expenses from the date those expenses are incurred. This will give providers an incentive to begin pay increases as soon as they can do so.

b. Aged care providers apply for reimbursement and provide the necessary documentation.

c. Aged care providers are reimbursed for eligible costs.

33. Issue: are there examples of any prior occasions in which the Commonwealth has changed funding or payments to providers before the end of a financial year and what mechanisms were used for enacting the funding changes

34. The reimbursement method has been used in the past and is currently being used. This means that systems are already in place to allow it to be used for the purpose of paying for award increases outside of the usual funding cycle. The best current example is the COVID-19 Aged Care Support Program. This program reimbursed eligible aged care providers for eligible expenditure incurred on managing direct impacts of COVID-19. The Program ran over 2 years in 2021-22 and 2022-23. The Program assisted Residential Aged Care, National Aboriginal and Torres Strait Islander Flexible Aged Care Program and Home Care Package providers that were subject to direct COVID-19 impacts, to deliver continuity of safe quality care for consumers. Funding for this program ends on 31 January 2023 and the government has issued a recent reminder to providers to submit any final claims. This can be seen at the following website: https://business.gov.au/grants-and-programs/The-COVID19-Aged-Care-Support-Program-Extension

35. Issue: whether there any administrative or procedural funding impediment that would prevent a full 15% increase being paid prior to 1 July 2023

36. It would be easier and administratively tidier for the Commonwealth if the 15% increase took effect from 1 July 2023. But there is no administrative or procedural impediment if the pay increase took effect before that date.

37. Issue: whether it would be administratively or procedurally simpler to administer funding of a one off 15% increase, or to administer funding of two instalments of 10% and 5% as proposed by the Commonwealth in the Submissions

38. It will not make a material difference administratively if the increases are paid in one or two instalments. But it will make a difference to the likelihood that the pay increase helps improve attraction and retention in the aged care sector. It is not an exaggeration to say that the sector is in immediate crisis in terms of its ability to staff existing aged care services and deliver necessary services to people in their own homes. I have been reliably informed by many aged care providers across the country that a significant number of aged care beds are closed simply because they cannot be staffed and that many people receiving care at home are having services cut due to staff shortages. This has been confirmed to me by staff working in public hospitals who report increasingly difficulties in transferring eligible patients to residential care, resulting in significant delays in hospital staff. I have also been informed by public hospital informants that an increasing number of aged care residents are being transferred to emergency departments for conditions that would normally be managed within the home. The reason for these additional emergency department attendances is reportedly because the home cannot provide adequate care due to staff shortages.

39. While payment in two instalments will save the Commonwealth some funding in the short term, it will exacerbate existing staff shortages and service deficiencies. It may also come at an increased cost downstream. Residents receiving inadequate care are more likely to become seriously unwell and be admitted to hospital, at a greater cost to government (Commonwealth, States and Territories). People receiving inadequate care at home are more likely to require premature residential care, at a greater cost to the Commonwealth.

40. **Issue: whether the Commonwealth has access to data on the mix of staff and staffing profile of employees in the Aged Care industry and whether this is relied upon to conduct budget forecasts and budgeting**

41. The staff profile of each organisation is subject to frequent changes as staff come and go and thus staff profile data are never entirely accurate for purposes such as budget forecasts. Nevertheless, the Commonwealth prepares budget forecasts every year with the best available data and this is the case whether or not a pay increase occurs. The Commonwealth does have access to data collected in periodic surveys from time to time. Residential aged care providers are now also required to routinely submit staff profile data for the purposes of public reporting via a new five star rating system that has recently been introduced. To the best of my knowledge the Commonwealth collects no routine staff profile data on HCP or CHSP funded services.

42. Issue: whether I consider that there would be any adverse impacts on the Aged Care industry, if the payment of the 15% interim increase is delayed

43. As I note above, this pay rise is urgently required to help improve attraction and retention in the aged care sector. The sector is in immediate crisis in terms of its ability to staff existing aged care services and deliver necessary services to people in their own homes. As I note above, many aged care providers across the country are reporting that a significant number of aged care beds are closed simply because they cannot be staffed and that many people receiving care at home are having services cut due to staff shortages. This has been confirmed to me by staff working in public hospitals who report increasingly difficulties in transferring eligible patients to residential care, resulting in significant delays in hospital staff. I have also been informed by public hospital informants that an increasing number of aged care residents are being transferred to emergency departments for conditions that would normally be managed within the home. The reason for these additional emergency department attendances is reportedly because the home cannot provide adequate care due to staff shortages.

44. .I recognise that payment in two instalments will save the Commonwealth some funding in the short term. However, I expect it will exacerbate existing staff shortages and service deficiencies. It may also come at an increased cost downstream. Residents receiving inadequate care are more likely to become seriously unwell and be admitted to hospital, at a greater cost to government (Commonwealth, States and Territories). People receiving inadequate care at home are more likely to require premature residential care, at a greater cost to the Commonwealth and ultimately to all of us as taxpayers.

45. Issue: any other information that I consider relevant

46. Nil

47. Signed: 

48. Date: 20 January 2023

49.

50. Witness: 

51. Date: 20 January 2023

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13 January 2023

Professor Kathy Eagar
Director
Australian Health Services Research Institute (AHSRI)
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University of Wollongong
NSW 2522 Australia

Email: [redacted]

Dear Professor Eagar,

Health Services Union of NSW - Regarding work value for aged care members

1. As you know we act for the Health Services Union (**HSU**) and various employees covered by the *Aged Care Award 2010* (**the Award**).

2. On 12 November 2020 the HSU filed a work value case in the Fair Work Commission (**FWC**) seeking an increase in wages and enhancing the career paths for workers who are covered by the Award (**the Residential Application**).

3. On 1 June 2021 the HSU filed a work value case in the Fair Work Commission seeking an increase in wages and enhancing the career paths for workers in the Aged Care sector who are covered by the Social, Community, Home Care and Disability Services Award 2010 Award (**SCHADS Award**)(**the SCHADS Application**).

4. We thank you for the two reports that you have prepared in relation to the Residential Application and the SCHADS Application (together, **the Applications**).

5. By way of update (following your testimony at the hearing of the Applications):

   (a) On 4 November 2022 a Full Bench of the Fair Work Commission handed down a decision in [2022] FWCFB 200 concluding (without limitation) that it was satisfied that a 15% interim increase in minimum wages of the direct care classifications in the Award and the SCAHDS Award and for nurses working in aged care covered by the Nurses Award was plainly justified by work value reasons (**the Decision**);

   (b) On 23 November 2022 the Commission issued directions regarding the filing of evidence and submissions in respect of Stage 2 of the proceedings (**the**

Directions) including regarding the timing and phasing in of the interim increase to modern award minimum wages applicable to direct care workers;

(c) On 16 December 2022 Aged Care industry stakeholders filed a Consensus Statement in relation to the Decision (**Consensus Statement**); and

(d) On 16 December 2022, pursuant to the Directions, the Commonwealth of Australia filed submissions (**Commonwealth Submissions**).

6. We request that you prepare a further report in relation to the Applications **(Report**). In so doing, we ask that you provide your expert opinion on the following matters:

(a) the nature of the funding mechanisms for aged care (including for residential aged care, Home Care and the Commonwealth Home Support Programme (including pricing methodology, how current prices have been set and what entity set those prices; transitional arrangements; payment distribution methods and frequency of payments);

(b) what role (if any) does the Independent Health and Aged Care Pricing Authority (**IHACPA**) and/or the Commonwealth have in setting pricing and funding amounts in the aged care industry;

(c) what change to legislation or subordinate legislation (if any) is required to be enacted in order to change pricing and/or funding in the Aged Care industry;

(d) whether, having regarding to the current funding mechanisms, it is feasible for the Commonwealth to fund any increase awarded by FWC prior to 1 July 2023;

(e) if the answer to the preceding question is YES, what mechanisms could be used to fund any increase;

(f) if the answer to question (d) is YES, are there examples of any prior occasions in which the Commonwealth has changed funding or payments to providers before the end of a financial year and what mechanisms were used for enacting the funding changes;

(g) is there any administrative or procedural funding impediment that would prevent a full 15% increase being paid prior to 1 July 2023;

(h) would it be administratively or procedurally simpler to administer funding of a one off 15% increase, or to administer funding of two instalments of 10% and 5% as proposed by the Commonwealth in the Submissions. If the answer to this question is YES, please explain why this is your opinion;

(i) whether the Commonwealth has access to data on the mix of staff and staffing profile of employees in the Aged Care industry and whether this is relied upon to conduct budget forecasts and budgeting;

(j) whether you consider that there would be any adverse impacts on the Aged Care industry, if the payment of the 15% interim increase is delayed; and

(k) any other information that you consider relevant.

7. At the hearing of this matter (set down for 13 February 2023) our clients intend to lead evidence (including the Report). You may be required to attend the hearing as a witness to provide your evidence to the Fair Work Commission.

8. Pursuant to the Directions the HSU must file any evidence and submissions in reply to the Commonwealth submissions by 20 January 2023. Our preference would be to receive the Report on or before **17 January 2023.**

9. We have **attached** a copy of the following to assist you in preparing your Report:

   (a) a summary of the Decision as published by the Fair Work Commission. A full copy of the Decision can be located at https://www.fwc.gov.au/documents/sites/work-value-aged-care/decisions-statements/2022fwcfb200.pdf;

   (b) the Directions;

   (c) the Consensus Statement; and

   (d) the Commonwealth Submissions

10. In addition to the Report and to facilitate your giving of evidence in the Fair Work Commission, we request that you read the **attached** Expert Witness Code of Conduct and **attached** Rule 23.13 of the Federal Court Rules and ensure that the report complies with Rule 23.13. We will also ask you to affirm or swear an affidavit that includes a statement that you have read the Expert Witness Code of Conduct and agree to be bound by its terms. Please also identify your training, study/qualifications and experience relied upon that provide you with the specialised knowledge to provide the Report and an acknowledgement that this has been relied upon to provide the opinions contained in the Report.

11. Please do not hesitate to contact us if you would like to discuss the matter further.

Yours faithfully

Alex Grayson
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EMPLOYMENT & INDUSTRIAL LAW
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Penny Parker
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MAURICE BLACKBURN LAWYERS
EMPLOYMENT & INDUSTRIAL LAW

Summary of Decision

4 November 2022

Aged Care Work Value Case

(AM2020/99, AM2021/63 and AM2021/65)

[2022] FWCFB 200

President Justice Ross, Deputy President Asbury, Deputy President O'Neill

This summary is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.

Background

[1] This decision deals with 3 applications to vary modern awards to increase the minimum wages of aged care sector workers:

1. AM2020/99 – an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (Aged Care Award)

2. AM2021/63 – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010,* now the *Nurses Award 2020* (Nurses Award), [1] and

3. AM2021/65 – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] These proceedings arose out of Recommendation 84 of the Final Report of the Royal Commission into Aged Care Quality and Safety (the Royal Commission).

[3] The Final Report of the Royal Commission was tabled on 1 March 2021. The Royal Commission received 10,574 public submissions and heard evidence from more than 600

[1] The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 per [2021] FWCFB 4504.

witnesses across 99 days of hearing.[2] Over 1,000 aged care providers were surveyed[3] and some 12 community forums and 13 expert roundtable discussions were conducted.

[4] Modelling prepared for the Royal Commission estimated that the number of direct care workers needed to maintain current staffing levels would be approximately 316,500 full-time equivalent workers by 2050, an increase of 70 per cent.[4]

[5] The Royal Commission concluded that the aged care workforce faces 'systemic' problems:

> 'In a large number of residential aged care facilities there are not enough workers to provide high quality, person-centred care. In many cases the mix of staff who provide aged care is not appropriately matched to the care needs of older people. The staff in aged care are poorly paid for their difficult and important work.'[5]

[6] The Royal Commission found that aged care workers should have a 'clear vision for career progression' and recommended that 'existing job classifications should be reviewed and new career pathways mapped to facilitate opportunities for nurses, personal care workers and other workers to advance in the aged care sector.'[6]

[7] The Royal Commission also found that a 'wages gap' exists between aged care workers and workers performing equivalent functions in the acute health sector and concluded that the 'bulk of the aged care workforce does not receive wages and enjoy terms and conditions of employment that adequately reflect the important caring role they play.'[7] To address the inadequacies in pay for aged care workers, the Royal Commission made the following recommendation:

> **Recommendation 84: Increases in award wages**
>
> Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:

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[2] Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.181, 183.

[3] Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.182.

[4] Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.125.

[5] Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.124.

[6] Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.1245.

[7] Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 2 at p.214.

a. reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or

b. seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).

[8] The Applications seek a 25 per cent increase in minimum wage rates for all aged care employees covered by the Aged Care, Nurses and SCHADS awards.

[9] At the heart of the proceedings was the Applicants' contention that the variation they sought to modern award minimum wages were 'justified by work value reasons' as required by s.157(2).

[10] There was considerable common ground between the parties in respect of the relevant factual matrix. The Unions, ACSA and LASA are signatories to the Aged Care Sector Stakeholder Consensus Statement. The content of the Consensus Statement may be viewed as broadly supportive of the Applications. The Consensus Statement represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. The Full Bench concluded that the Consensus Statement was relevant to its determination of the Applications and took it into account.

[11] Some 16 broad factual contentions were also agreed between the parties and the Full Bench concluded:

> '… we consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned. That said, we are satisfied there is a sound evidentiary basis for the 16 agreed contentions and we adopt them as findings.'[8]

[12] While there was a significant amount of agreement between the parties, the Joint Employers and the Unions disagreed on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

[13] Ultimately, the Joint Employers submitted that, based on the evidence, the work undertaken by the following classes of employee in residential aged care had significantly changed over the past 2 decades warranting consideration for work value reasons:

- RNs
- ENs
- Certificate (III) Care Workers, and
- Head Chefs/Cooks.[9]

[8] At [739].

[9] Joint Employers closing submissions dated 22 July 2022 at [4.47].

[14] The Joint Employers also confirmed that they contended that an increase in minimum wages is justified on work value grounds in respect of RNs, ENs, Certificate III Care Workers and Head Chefs/Cooks in residential aged care.[10]

[15] The parties also agreed with a range of *provisional* views we expressed during the course of the proceedings.

[16] In a Statement dated 9 June 2022[11] the Full Bench expressed the following *provisional* views:

1. The relevant wages rates in the Aged Care Award 2010, the Nurses Award 2020 and the Social, Community, Home Care and Disability Services Industry Award 2010 have not been properly fixed.

2. It is not necessary for the Full Bench to form a view about why the rates have not been properly fixed.

3. The task of the Full Bench is to determine whether a variation of the relevant modern award rates of pay is justified by 'work value reasons' (and is necessary to achieve the modern awards objective), being reasons related to any of s.157(2A)(a)-(c) the nature of the employees' work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.

[17] The parties broadly agreed with the *provisional* views[12] and in a Statement dated 5 August 2022[13] the Full Bench confirmed its *provisional* views.

[18] It was therefore accepted that, in these proceedings, the Full Bench 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 or not the minimum rates were affected by gender undervaluation.

[19] That being said, the Full Bench accepted 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. The Full Bench also accepted 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 Decision

[20] Chapter 2 provides an outline of the decision and can be accessed here.

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[10] Joint Employers closing submissions in reply dated 19 August 2022 at [5.20]

[11] [2022] FWCFB 94.

[12] ANMF closing submissions dated 22 July at [91]; HSU submissions dated 2 August 2022 at [1]–[3]; Joint Employers closing submissions dated 27 July 2022; Commonwealth submissions dated 8 August 2022 at [79]; Transcript, 25 August 2022, PN15385.

[13] [2022] FWCFB 150.

[21] The proper assessment of the skills utilised in aged care work is considered in detail in Chapter 7.

[22] The proposition that work in feminised industries is undervalued is addressed in the expert evidence of Assoc Prof Smith and Dr Lyons; Assoc Prof Junor; Prof Charlesworth and Prof Meagher.

[23] Based on the expert evidence the Full Bench accepted the followings propositions:

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.

2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.[14]

3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions[15] which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.[16]

4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value.[17] These assumptions are impacted by women's role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.[18]

5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:

    - changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.

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[14] Smith/Lyons Report at [62].

[15] Smith/Lyons Report at [47] citing A-F Bender and F Pigeyre, 'Job evaluation and gender pay equity: a French example' (2016) 34(4) *Equality, Diversity and Inclusion: An International Journal* 267 at 268–270. Assoc Prof Smith and Dr Lyons also note at [52]: 'Peetz (D Peetz, 'Regulation distance, labour segmentation and gender gaps' (2015) 39(2) *Cambridge Journal of Economics* 345) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically "feminine" in nature. The tasks performed by, and skills applied in, female-dominated occupations – such as care-giving, manual dexterity, human relations skills, and working with children – are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations.'

[16] Smith/Lyons Report at [60].

[17] Smith/Lyons Report at [59].

[18] Smith/Lyons Report at [56].

- procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.

- conceptual considerations including the subjective notion of skill and the "invisibility" of skills when assessing work value in female-dominated industries and occupations.[19]

6. 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. In particular:

    (i) The requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of tribunals to properly value the work arise because any potential errors in the valuation of the work may have predated the last assessment of the work by the tribunals.

    (ii) Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work. The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.[20]

    (iii) The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.[21]

[24] As noted in point 6 above, the constraints in historical wage fixing principles have created barriers to the proper assessment of work value in female dominated industries and occupations. Those constraints are addressed in Chapter 3, dealing with the legislative framework, and in the Full Bench's findings in respect of 'invisible skills'. The following propositions are among those distilled from the discussion in Chapter 3:

[19] Smith/Lyons Report at [93].

[20] Smith/Lyons Report at [90].

[21] Smith/Lyons Report at [92].

1. The reasons which justify the amount employees should be paid for doing a particular kind of work must be 'related to' any one or more of the 3 matters in s.157(2A)(a) to (c). There is nothing in the statutory context to suggest that the expression 'related to' in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes. The expression 'related to' is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.

2. Section 157(2A) does not contain any requirement that the 'work value reasons' consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no 'double counting', it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.

3. Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.

4. Section 157(2A) does not incorporate the test which operated under wage fixing principles of the past that the change in the nature of work should constitute 'such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.' There is simply no basis for introducing such an additional requirement to the exercise of the discretion in s.157(2), which might have been, but which has not been, enacted.

5. Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission's statutory task in s.157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:

    - alignment with external relativities is not determinative of work value

    - while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including 'invisible skills' as discussed in Chapter 7.2.6

- the expert evidence supports the proposition that the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations (see Chapter 7.2.5), and

- alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay is justified by 'work value reasons' (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).

6. Statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist are likely to be of only limited assistance in the Commission's statutory task under s.157(2). Some of those statements of principle have no relevance at all, given they are grounded in wage fixing principles which required a change in work value to constitute a significant net addition to work requirements. The adoption of the observations such as those at [190] in the *ACT Child Care Decision* runs the risk of obfuscating the Commission's statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A)(a)–(c). To adopt such an approach may also be said to be adding to the text of s.157(2A) in circumstances where it is not necessary to do so in order to achieve the legislative purpose, and may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision.

7. It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes 'work value reasons' divorced from a particular context. In our view the meaning of 'work value reasons' should focus on the text of s.157(2A). Any elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise.

[25] Chapter 8 sets out the Full Bench's consideration of the Applications in light of the evidence and submissions.

[26] Chapter 8.2 considers the appropriate way forward in light of the extent of agreement between the parties, the evidentiary findings and the range of complex issues that arise for determination. The Full Bench concluded that 3 broad considerations weigh in favour of an interim decision providing an increase in minimum wages for discrete categories of aged care workers:

1. It is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such as to justify an increase in minimum wages for these classifications. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.

2. Accordingly, in respect of direct care workers (including RNs, ENs, AIN/PCW/HCWs) the evidence establishes that the existing minimum rates do not properly compensate employees for the value of the work performed by these classifications of employees. The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.

3. A number of complex issues require further submissions (and potentially further evidence) before they can be determined and we see no reason to delay an increase in minimum wages for direct care workers while that process takes place.

[27] The decision published today constitutes the first stage in that process. In this decision the Full Bench determined the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to the Applications and have decided that an interim increase in the modern award minimum wages applicable to direct care workers is justified by work value reasons.

[28] In Stage 2 the parties will have the opportunity to make submissions and address evidence in relation to the timing and phasing-in of wage increases. The timing of the interim increase will be the subject of a subsequent decision in Stage 2.

[29] Stage 3 will include a more detailed consideration of the classification definitions and structures in the relevant Awards. Interested parties may wish to make further submissions and call additional evidence in relation to these matters in this stage of the proceedings. A further decision will then be issued finalising the classification definitions and structures in the relevant Awards.

[30] Stage 3 will also determine wage adjustments that are justified on work value grounds for employees not dealt with in Stage 1, and determine any further wage adjustments that are justified on work value grounds for direct care employees granted interim wage increases in Stages 1 and 2.

An Interim Increase

[31] As to form and quantum of the interim increase the Full Bench concluded that it was satisfied that a 15 per cent interim increase in minimum wages of the direct care classifications in the Aged Care and SCHADS Awards and for nurses working in aged care covered by the Nurses Award is ‘plainly justified by work value reasons’.

[32] The Full Bench made it clear that the interim increase does not conclude its consideration of the Unions’ claim for a 25 per cent increase for other employees, namely administrative and support aged care employees. Nor was the Full Bench suggesting that the 15 per cent interim increase necessarily exhausts the extent of the increase justified by work value reasons in respect of direct care aged care employees. Whether any further increase is justified will be the subject of submissions in Stage 3 of these proceedings.

[33] Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the

implementation of any minimum wages increases arising from these proceedings. The Full Bench concluded that the course proposed is a reasonable one and is comprehended within the staged approach adopted.

[34] A Mention will be listed for **9:30am on Tuesday 22 November 2022** for the purpose of issuing directions in respect of Stage 2 of these proceedings.

- ENDS

STATEMENT

Fair Work Act 2009
s.158—Application to vary or revoke a modern award

Aged Care Award 2010
(AM2020/99 and AM2021/63)

Nurses Award 2020
(AM2021/63)

Social, Community, Home Care and Disability Services Industry Award 2010
(AM2021/65)

DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT BRISBANE, 23 NOVEMBER 2022

Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Next Steps – Stages 2 and 3 – Variation to Directions.

[1] On 17 November 2022, the Full Bench issued a Statement in relation to Stage 2 and Stage 3 of these proceedings.

[2] A Mention was conducted before the Full Bench on Tuesday, 22 November 2022. In accordance with the Statement issued on 17 November 2022, the views of the parties were canvassed in relation to the Full Bench's *provisional view* as to the programming, set out in our 17 November 2022 Statement at [11].

[3] As we also set out in our 17 November 2022 Statement, Stage 2 of these proceedings will consider submissions and evidence in relation to:

- the timing and phasing in of the interim increase to modern award minimum wages applicable to direct care workers, including the appropriateness and application of the principles canvassed at paragraphs [974]-[990] in the *November 2022 decision*;

- whether making the interim increases to modern award minimum wages applicable to direct care aged care employees in these proceedings is necessary to achieve the modern awards objectives and the *provisional views* outlined at [1001]-[1072] in the *November 2022 decision*; and

- Whether the interim increases to modern award minimum wages applicable to direct care aged care employees are necessary to achieve the minimum wages objective and the *provisional views* outlined at [1073]-[1083] in the *November 2022 decision*.

[4] Stage 3 will consider submissions and evidence related to the classification definitions and structures in the modern awards subject of the Applications and will consider submissions and evidence in relation to whether wage adjustments are justified by work value reasons for employees not dealt with in Stage 1.

[5] Stage 3 will also consider whether further wage adjustments are justified by work value reasons for direct care workers granted interim increases in Stages 1 and 2.

[6] It was agreed at the Mention on Tuesday 22 November 2022, that the provisional view expressed by the Full Bench as to programming for Stage 2 would be amended in terms of dates by which submissions and evidence is to be filed. The amended dates and other consequential amendments, are as follows:

> 1. The Commonwealth to file submissions or evidence regarding the matters set out at paragraph [3] above and, if relevant, paragraph [10] of the 17 November 2022 Statement (consultation in respect of increases to minimum wages for Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers), by **5pm Friday 16 December 2022 (AEDT)**.
>
> 2. The Applicant Unions, Joint employers and other interested parties to file submissions and evidence regarding the matters set out at paragraph [3] and, if relevant, paragraph [10] of the 17 November 2022 Statement (consultation in respect of increases to minimum wages for Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers), by **5pm Friday 20 January 2023 (AEDT)**.
>
> 3. All parties to file any submissions and evidence in reply by **5pm Thursday 9 February 2023 (AEDT).**
>
> 4. The matters will be listed for Hearing (if required) in Melbourne at **10am Monday 13 February 2023 (AEDT)**.

[7] The programming of the matters for Stage 3, set out at paragraphs [13] and [14] of the 17 November 2022 Statement, is confirmed. Accordingly, the Commission will publish a background document regarding outstanding issues in mid to late December 2022.

[8] The parties are directed to have discussions to attempt to narrow the further issues to be determined and to report back to the Full Bench by the end of February 2023.

[9] As we have previously observed, it has been the longstanding practice of the Commission and its predecessors to determine the matters before it on the basis of the existing legislative framework and not otherwise.[1] We note that the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* is currently before the Australian Parliament and that if the Bill is passed as currently drafted, the provisions contained therein may affect these

[1] [2014] FWCFB 3500 at [299].

proceedings. Should legislative change come into force at a time which affects the timetable finalised after the Mention on 22 November 2022, parties are at liberty to apply for further amendment.

DEPUTY PRESIDENT

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<PR748207>

From: Elise Delpiano <Elise.Delpiano@hsu.asn.au>
Sent: Friday, 16 December 2022 2:01 PM
To: AMOD <AMOD@fwc.gov.au>
Cc: Alex Grayson <agrayson@mauriceblackburn.com.au>; Penny Parker <pparker@mauriceblackburn.com.au>; Nigel Ward (ACCI) <nigel.ward@ablawyers.com.au>; Jordan Lombardelli <jordan.lombardelli@ablawyers.com.au>; Alana.Rafter@ablawyers.com.au; Reeves, Stephen <Stephen.Reeves@ags.gov.au>; Ben Redford(unitedworkers) <Ben.Redford@unitedworkers.org.au>; Larissa.Harrison@unitedworkers.org.au; Philip Gardner <pgardner@gordonlegal.com.au>; nwhite@gordonlegal.com.au; Chambers - Asbury DP <Chambers.Asbury.dp@fwc.gov.au>; Chambers - O'Neill DP <Chambers.O'Neill.DP@fwc.gov.au>; Chambers - Bissett C <Chambers.Bissett.c@fwc.gov.au>
Subject: RE: AM2020/99, AM2021/63, AM2021/65 - Aged Care Work Value Case

Dear Modern Awards team,

We refer to the above matters.

Please see enclosed for filing a consensus statement reached between the parties listed.

We have copied in the active parties to these proceedings by way of service.

Kind regards,

Elise Delpiano
Industrial Officer

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Joint Statement regarding Stages 2 and 3 of the Work Value Case

(AM2020/99, AM2021/63 and AM2021/65)

16 December 2022

On 4 November 2022, the Fair Work Commission (FWC) decided that a 15% interim wage increase for direct aged care workers would be justified for work value reasons (**the Decision**). Direct aged care workers are defined in the Decision and include employees in the aged care sector covered by the *Aged Care Award 2010*, *Social, Community, Home Care and Disability Services Industry Award 2010* and *Nurses Award 2020* in caring roles, including nurse practitioners, registered nurses, enrolled nurses, personal care workers, assistants in nursing, and all classifications of home care workers (together the **Direct Aged Care Workers**).

The Commonwealth Government convened meetings of industry stakeholders representing the aged care workforce, aged care providers, and consumers on 14 and 17 November 2022. The meetings were facilitated by Ms Anna Booth, independent facilitator, to discuss the Decision and how it should be implemented. Representatives of the Commonwealth Government gave presentations and participated in these meetings.

Arising from these meetings, this Statement has been prepared by the stakeholders from the aged care sector listed below. This Statement reflects the matters over which these stakeholders have reached agreement but does not represent the entirety of the views of each of the stakeholders.

The stakeholders have reached agreement on the following matters:

1. That the interim increase of 15% be fully funded by the Commonwealth Government (including on costs) and that the increase be applied in full to both Award reliant employees and those covered by enterprise agreements.
2. 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 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. Funding for the interim increase must be provided by the Commonwealth Government in full as soon as possible. It is the position of ACCPA, Anglicare Australia, Baptist Care Australia, Catholic Health Australia and UnitingCare Australia that funding must be provided to aged care employers by the Commonwealth Government on and from the operative date of any increase to ensure that they can afford to pay the increased pay rates.
3. The classifications of Recreational Activities Officers and 'head chefs and head cooks' (the latter being employees in the food services stream of the *Aged Care Award 2010* at Aged care employee levels 4 to 7) should also have a 15% interim increase applied to their pay rates at the same time as the Direct Aged Care Workers. These classifications were not included in the definition of Direct Aged Care Workers by the Fair Work Commission other than those Recreational Activities Officers who are classified and paid as Direct Aged Care Workers under the Award.

4. That measures to ensure transparency and accountability with respect to payment of the 15% interim increase and any future payments be put in place within 3 months from the first payment. This should not delay payment of the funding for interim increases to providers and the passing on of those increases to the Direct Aged Care Workers, Recreational Activities Officers and 'head chefs and head cooks'.

5. That Stage 3 of the proceedings as detailed at [1095] – [1098] of Decision dated 4 November 2022 and subject to any amendments by the Fair Work Commission, commence as soon as possible at the Commission's earliest convenience.

6. That the interim increase of 15% on wages for Direct Aged Care Workers, Recreational Activities Officers and 'head chefs and head cooks' be implemented based on the principle that services to older Australians are not to be negatively impacted as a result of the increase in costs. The Commonwealth Government should explore all options to operationalise the funding of the increase in order to fulfil this principle.

List of stakeholders from the aged care sector in agreement on the matters in this Statement:

Aged & Community Care Providers Association (ACCPA)

Anglicare Australia

Australian Nursing and Midwifery Federation (ANMF)

Baptist Care Australia

Catholic Health Australia

Council of the Aged (COTA)

Health Services Union (HSU)

Older Persons Advocacy Network (OPAN)

The Australian Workers' Union Queensland Branch

UnitingCare Australia

United Workers Union (UWU)

From: Reeves, Stephen <Stephen.Reeves@ags.gov.au>
Sent: Friday, 16 December 2022 4:48 PM
To: AMOD <AMOD@fwc.gov.au>
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Subject: AM2020/99, AM2021/63, AM2021/65 - Aged Care Work Value Case [SEC=OFFICIAL] [AGSDMS-DMS.FID4330342]

OFFICIAL

Dear Modern Awards team,

We refer to the above matters and attach for filing the submissions of the Commonwealth.

We note the Joint Industry Statement which was filed by the HSU at around 2PM today. The Commonwealth is considering this Statement and will respond to it as necessary and appropriate in its reply submissions.

Regards,

Stephen Reeves
Senior Lawyer
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Find out more about AGS at http://www.ags.gov.au

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

Lodged on behalf of the Commonwealth of Australia.
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42980378

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.[1]

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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[1] 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'.[2]

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'.[3]

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.[4]

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[5] (***Penalty Rates – Transitional Arrangements case***) the Commission identified[6] three categories of

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2 Decision, [904].

3 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].

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

5 Cited at [980] of the Decision.

6 At [141].

considerations relevant to deciding on the transitional arrangements for a decision to apply a reduction in penalty rates:

28.1. the statutory framework;

28.2. the *Penalty Rates decision*[7] (that is, the substantive decision as to the merits of the proposed variation of penalty rate provisions); and

28.3. fairness.[8]

29. As regards the statutory framework, the Commission in the *Penalty Rates Transitional Arrangements case* noted[9] 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

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

8 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.

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

31.2. the remaining 5 per cent increase to wages for direct care workers from 1 July 2024.

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.[10]

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

[10] Amending Act, s 2(1), item 10.

the statement of Acting President Hatcher that these amendments apply to applications currently before the Commission, including these three applications.[11]

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.

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[11] 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).

> 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 <u>not</u> 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.[12] 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

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[12] 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.

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 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

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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.

FEDERAL COURT 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[1] 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.

[1] 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 o r the experts should assist in preparing such a list;

(c) **t**he 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

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

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

[2] 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

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[3] 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.

[3] 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.

Division 23.2—Parties' expert witnesses and expert reports

23.11 Calling expert evidence at trial

A party may call an expert to give expert evidence at a trial only if the party has:

(a) delivered an expert report that complies with rule 23.13 to all other parties; and

(b) otherwise complied with this Division.

Note: ***Expert*** and ***expert report*** are defined in the Dictionary.

23.12 Provision of guidelines to an expert

If a party intends to retain an expert to give an expert report or to give expert evidence, the party must first give the expert any practice note dealing with guidelines for expert witnesses in proceedings in the Court (the ***Practice Note***).

Note: A copy of any practice notes may be obtained from the District Registry or downloaded from the Court's website at http://www.fedcourt.gov.au.

23.13 Contents of an expert report

(1) An expert report must:

(a) be signed by the expert who prepared the report; and

(b) contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note; and

(c) contain particulars of the training, study or experience by which the expert has acquired specialised knowledge; and

(d) identify the questions that the expert was asked to address; and

(e) set out separately each of the factual findings or assumptions on which the expert's opinion is based; and

(f) set out separately from the factual findings or assumptions each of the expert's opinions; and

(g) set out the reasons for each of the expert's opinions; and

(ga) contain an acknowledgement that the expert's opinions are based wholly or substantially on the specialised knowledge mentioned in paragraph (c); and

(h) comply with the Practice Note.

(2) Any subsequent expert report of the same expert on the same question need not contain the information in paragraphs (1)(b) and (c).

23.14 Application for expert report

A party may apply to the Court for an order that another party provide copies of that other party's expert report.

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