

FAIR WORK COMMISSION

AM2020/99; AM2021/63; AM2021/65

WORK VALUE CASE – AGED CARE INDUSTRY

SUBMISSIONS IN REPLY TO THE COMMONWEALTH

AGED & COMMUNITY CARE PROVIDERS ASSOCIATION LTD

AUSTRALIAN BUSINESS INDUSTRIAL

(“THE JOINT EMPLOYERS”)

10 MAY 2024

BACKGROUND

1. On 15 March 2024, the Fair Work Commission (**the Commission**) published the *Stage 3 Decision* [2024] FWCFB 150 (**Stage 3 Decision**).
2. The Commission made the following directions:
 - (a) the Commonwealth is to “*file submissions concerning operative date and phasing in*” by 4:00pm on Friday 12 April 2024 (**the Commonwealth submissions**); and
 - (b) the other parties are to “*file any submissions in response*” by 4:00pm on Friday 10 May 2024.¹
3. These submissions are filed in response to the Commonwealth submissions.

¹ *Stage 3 Decision* [2024] FWCFB 150 at [280] (**Stage 3 Decision**).

POSITION IN SUMMARY

4. The Joint Employers support the wage increases determined by the Expert Panel in the *Stage 3 Decision* (**the Stage 3 increases**).
5. The timing and phasing-in of the Stage 3 wage increases as proposed by the Commonwealth is disappointing and concerning to aged care employers and employees. However given the Commonwealth is the “*principal funder*” in the aged care sector (**the Sector**),² the Joint Employers are commercially compelled to support that approach to ensure the ongoing viability of the Sector.
6. The Commonwealth have committed to providing additional funding to the Sector in two phases:
 - (a) **Phase 1 – from 1 January 2025:**
 - (i) an increase in funding corresponding with 50 per cent of the wage increases determined for direct care workers in the *Stage 3 Decision* (including on-costs); and
 - (ii) an increase in funding corresponding with the entire increase determined for indirect care workers in the *Stage 3 Decision* (including on-costs).³
 - (b) **Phase 2 – from 1 January 2026:** an increase in funding corresponding with the remaining 50 per cent of the wage increases determined for direct care workers in the *Stage 3 Decision* (including on-costs).⁴(Collectively, **the additional Commonwealth funding**).
7. The alignment of the operation of the Stage 3 increases to the additional Commonwealth funding is material to the Expert Panel’s further consideration of s 166 of the *Fair Work Act 2009* (Cth) (**FW Act**), together with relevant considerations under ss 134 and 284.

² See *Stage 1 Decision* [2022] FWCFB 200 at [904].

³ Commonwealth’s Submissions concerning operative date and phasing in (filed 12 April 2024) at [3].

⁴ Commonwealth’s Submissions concerning operative date and phasing in (filed 12 April 2024) at [3].

8. Section 166(1) of the FW Act provides that the standard date of operation for variation determinations is 1 July (**the standard date**). The relevant principles as to this provision are set out in the *Stage 1 Decision*.⁵
9. The Expert Panel has the discretion to displace the standard date if it considers “*it is appropriate to do so*”.⁶ That displacement may take one or both of the following forms:
 - (a) specification of another day of operation;⁷ and/or
 - (b) specification that the determination take effect in stages (also referred to as “*phasing-in*”).⁸
10. In determining the operative date of a determination under Part 2-3, the Commission must exercise its power in a manner which is “*fair and just*” and “*promotes harmonious and cooperative workplace relations*”.⁹ The Commission must also take into account the objectives of the FW Act and “*equity, good conscience and the merits of the matter*”.¹⁰
11. Notwithstanding the earlier findings of the Full Bench in the *Stage 2 Decision*, whether the operative date and phasing-in of the Stage 3 increases should be aligned to the additional Commonwealth funding “*is a matter to be determined based on the particular circumstances before the Commission*”.¹¹
12. The following factors are distinguishable from the circumstances at the time of the *Stage 2 Decision* and collectively support the appropriateness of aligning the Stage 3 increases to the timetable proposed by the Commonwealth:
 - (a) the broad scope of the Stage 3 increases;

⁵ *Stage 1 Decision* [2022] FWCFB 200 at [976]-[990]; *Stage 2 Decision* [2023] FWCFB 93 at [405].

⁶ *Fair Work Act 2009* (Cth) s 166; *Stage 1 Decision* [2022] FWCFB 200 at [982]; *Stage 2 Decision* [2023] FWCFB 93 at [406].

⁷ *Fair Work Act 2009* (Cth) s 166(2); *Stage 1 Decision* [2022] FWCFB 200 at [980], citing *Australian Workers' Union* [2022] FWCFB 4 at [154].

⁸ *Fair Work Act 2009* (Cth) s 166(3).

⁹ *Fair Work Act 2009* (Cth) s 577(1)(a) and (d).

¹⁰ *Fair Work Act 2009* (Cth) s 578; *Stage 1 Decision* [2022] FWCFB 200 at [983]; *Stage 2 Decision* [2023] FWCFB 93 at [407]-[409].

¹¹ *Stage 2 Decision* [2023] FWCFB 93 at [414].

- (b) the evidence as to the impact of no additional Commonwealth funding for the Sector;
- (c) the insufficient time for home care operators to procure new home care agreements by 1 July 2024;
- (d) the insufficient time for residential aged care providers to grapple with the complexity of the Stage 3 increases;
- (e) the expert evidence as to the impact of a 10% increase to direct care employees (including PCWs, RAOs, AINs and HCWs) on the Sector that is not fully funded by the Commonwealth; and
- (f) the nature of the “*unfunded*” proportion of the Stage 3 increases (if not aligned to “*Phase 2*”).

FACTORS THAT MAKE DISPLACEMENT OF THE STANDARD DATE APPROPRIATE

Overview

13. Four factors support the appropriateness of aligning the operative date with the Commonwealth's timetable:
 - (a) **Factor 1:** the broad scope of the Stage 3 increases;
 - (b) **Factor 2:** evidence as to the impact of no additional Commonwealth funding for the Sector;
 - (c) **Factor 3:** the insufficient time for home care operators to procure new home care agreements by 1 July 2024; and
 - (d) **Factor 4:** the insufficient time for residential aged care providers to grapple with the complexity of the Stage 3 increases.
14. Each factor will be considered in turn below.

Factor 1: The broad scope of the Stage 3 increases

15. In contrast to the Stage 1 increase, the Stage 3 increases:
 - (a) apply to the majority of aged care employees, with very few exceptions;¹²
 - (b) are not “*uniform*” for direct care employees, but consist of a series of distinct percentage increases that range between:
 - (i) 2.81% to 11.73% for direct care employees currently covered under the *Aged Care Award*;
 - (ii) 2.53% to 8.23% for nursing assistants in aged care currently covered under the *Nurses Award*;
 - (iii) 1.96% to 6.97% for home care employees in aged care under the *SCHADS Award*; and
 - (c) include “*general*” employees¹³ under the *Aged Care Award*, which is a uniform increase of 3% for those employees (save for some Level 2 employees will get a total increase of 6.96%, as a result of a change to the classification structure).

¹² Namely, the most senior food services employee, home care employee level 4 pay point 2, level 5 pay point 2.

¹³ Described as “*indirect care employees*” in the *Stage 3 Decision* [2024] FWCFB 150.

16. As a result of that broad scope, in addition to minimum wage increases, each of the allowances under the *Aged Care Award* are impacted. This is because the Stage 3 increases result in a 3% increase to the standard rate under the *Aged Care Award* (which is defined as “*the minimum wage for an Aged care employee—general—level—6 in clause 14.1*”), which is relevant to the following allowances:
- (a) leading hand allowance at clause 15.3;
 - (b) nauseous work allowance at clause 15.5;
 - (c) sleepover allowance at clause 22.9; and
 - (d) the expense related allowances at clauses 15.2, 15.4, 15.6 and 15.7, which will be increased by the relevant adjustment factor pursuant to clause 15.1 of the *Aged Care Award*.
17. The allowances listed above at subparagraphs (a), (c) and (d) are available to direct care employees, such that the 3% increase to the minimum award wages of indirect care employees results in a further increase for some direct care employees.
18. Given the Stage 1 increase was limited to direct care employees, nothing gave rise to this scenario in the *Stage 2 Decision*.

Factor 2: Evidence as to the impact of no additional Commonwealth funding for the Sector between 1 July and 31 December 2024

19. In contrast to Stage 2, the Commonwealth’s timetable does not contemplate any additional funding prior to 1 January 2025. An operative date of 1 July 2024 would leave the Sector without additional Commonwealth funding until 1 January 2025.
20. From 1 July 2024, the Sector will also be grappling with any increase arising from the Annual Wage Review Decision 2023-24. Recent history shows the Sector can expect a significant increase following that determination given the current inflationary environment.
21. The evidence before the Commission throughout the Work Value proceedings has consistently addressed the vulnerable financial position of the Sector absent funding.¹⁴

¹⁴ See Stage 2 evidence: Witness Statements of Grant Corderoy of StewartBrown, Johannes Brockhaus of Buckland Aged Care Services, Michelle Jenkins of Community Vision Australia and James Shaw of Royal Freemasons’ Benevolent Institution (filed 9 February 2023); Stage 3 evidence: Witness Statement of Stuart Hutcheon dated 31 October 2023; Transcript of Proceedings – AM2020/99, 8 December 2023, PN4542-PN4543 (evidence of Chris Mamarelis: “*we’re very reliant on Government Funding to support that, we’re a not-for-profit*”).

The Sector lacks the economic framework of other industries in that it cannot respond to major cost pressures by increasing prices or largely unrestricted reduction of labour to save costs.

22. In the *Stage 1 Decision*, the Full Bench observed:

*“...the Commonwealth is the principal funder in the aged care sector. Absent additional Commonwealth funding, the cost to business of increasing aged care sector minimum wages is likely to be substantial, depending on the quantum and phasing of wage increases.”*¹⁵

23. In Stage 3, the fragility of the Sector was once again reinforced by the expert evidence from Stuart Hutcheon, Managing Partner at StewartBrown. Mr Hutcheon prepared an expert report entitled: *“ACCPA Expert Witness Report: Financial Effect of FWC Award Increase” (the Report)*.¹⁶ Mr Hutcheon concluded the current financial position and sustainability of the Sector to be *“at a very vulnerable level”*.¹⁷

24. That conclusion was underscored by the following findings:

- (a) residential aged care has experienced significant operating losses for over the last four years with the operating deficit for the 2022-23 financial year representing \$1.05 billion (\$16.54 per bed day);¹⁸ and
- (b) home care operating results have declined to be of a marginal level and were \$3.14 per client day.¹⁹

25. Mr Hutcheon also analysed the ability of the Sector to absorb increases to staffing costs by reference to the proposed percentage increases advocated for by the Unions.²⁰ In all circumstances, Mr Hutcheon concluded that absent the increases being fully funded by the Commonwealth the Sector would not have the ability to absorb the increases.

26. A summary of Mr Hutcheon’s conclusions, in the respect, are extracted below:

¹⁵ *Stage 1 Decision* [2022] FWCFB 200 at [904].

¹⁶ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3. Mr Hutcheon was also required for cross-examination: Transcript of Proceedings – AM2020/99, 7 December 2023, PN3057-PN3334.

¹⁷ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 1.

¹⁸ *Ibid* Annexure SH-3, pages 1, 6

¹⁹ *Ibid* Annexure SH-3, pages 1, 7.

²⁰ As at the time of the Stage 3 hearing.

“• A 10% increase for direct care workers (including ROAs) would increase staffing costs by an estimated \$1,148 million per annum and the aged care sector would not have the ability to absorb this without being fully funded by the Government

• A 25% increase for residential indirect care workers would increase staffing costs by a further estimated \$763 million per annum (excluding the impact of the 10% increase noted above) and the residential aged care sector would not have the ability to absorb this without being fully funded by the Government”.²¹

27. At this juncture it is unknown what proportion of the Stage 3 increase will be passed on to employees receiving above award wages and what will be absorbed into existing enterprise agreements.²²
28. When regard is had to both the analysis of Mr Hutcheon and the broad nature of the Stage 3 increases, the Expert Panel may safely conclude that absent the additional Commonwealth funding being aligned to the operative date and phasing:
 - (a) the cost to employers of the *Stage 3 Decision* increasing minimum wages will be substantial;²³ and
 - (b) the ongoing viability of the Sector cannot be guaranteed between 1 July and 31 December 2024.²⁴
29. The availability of *partial* funding 6 months later from 1 January 2025 will do very little to assist employers to cope with the substantial financial burden incurred between 1 July and 31 December 2024 should the Commonwealth’s timetable not be followed.
30. If the operative date is not aligned to the additional Commonwealth funding, aged care employers throughout the Sector will be forced to consider reducing placement offers for residents and clients, redundancies due to the inability of the employers to operate, or total business closure due to the inability to sustain the wage increases absent funding.

²¹ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, pages 1 (original underlining).

²² *Fair Work Act 2009* (Cth) s 206.

²³ *Fair Work Act 2009* (Cth) s 134(1)(f).

²⁴ *Fair Work Act 2009* (Cth) s 134(1)(f).

Factor 3: The insufficient time for home care operators to procure new home care agreements by 1 July 2024

31. Following the *Stage 2 Decision*, the Sector had 4 months to prepare for the operation of the Stage 1 increase.²⁵ That same lead up time will not be available with an operative date of 1 July 2024.
32. Assuming a determination is made prior to 1 July, that short window presents an insurmountable hurdle for home care operators in terms of essential communications that must take place prior to the operative date. Those communications are as follows:
 - (a) *First*, the Commonwealth must confirm the mechanism by which funding will be provided to home care operators (i.e. to the home care operators directly or through the home care package). Whilst the Commonwealth has indicated it will likely adopt the same funding practices as occurred with the Stage 1 increase,²⁶ that is not a guarantee. Anticipatory statements do not enable home care providers to take any meaningful preparatory steps: a clear and fixed outline of the commitment is required.
 - (b) *Second*, if the funding is to be provided via the home care packages, it is crucial that the Commonwealth communicate with all home care package recipients regarding the increase in funding for their packages and the linkage of this to the Stage 3 increases. Home care recipients will need information from government to ensure that they can make informed decisions regarding the changes to prices under their home care agreements with home care operators.
 - (c) *Third*, home care operators require time to procure this change in service pricing by a home care agreement with the client. Given the increase in pricing that will likely be necessary to cover the increase in costs to operators, clients may be more hesitant to agree to a change in the pricing in their agreement (hence the importance of the communications listed in paragraph [(b)] above). Absent that agreement, two consequences may arise:
 - (i) even with alignment to the additional Commonwealth funding, this could mean some home care providers could be required to pay the Stage 3 increases without the ability to recover costs from the increased package funding; and/or

²⁵ *Stage 2 Decision* [2023] FWCFB 40 (21 February 2023).

²⁶ Commonwealth's Submissions concerning operative date and phasing in (filed 12 April 2024) at [8], [8.1].

- (ii) the client may simply use the allotted government funding to acquire additional services at the original pricing as contracted with the operator.
- 33. Noting the security of tenure provisions specified in the *User Rights Principles 2014* (Cth), home care operators cannot simply bring their home care agreement with a vulnerable elderly client to an end if the client does not agree to a change in prices under the package.²⁷ Putting aside the commitment of home care operators and staff to provide services to their vulnerable elderly clients, these government regulations limit the ability for operators to cease an agreement. It is seen as a last resort and the operator is to find another operator to provide the services to the client prior to ceasing an agreement. Finding another operator can be difficult depending on location and the needs of the client.
- 34. The process is only further complicated by the following:
 - (a) the Stage 3 increases are not uniform across home care employees;
 - (b) the operation of transitional arrangements for existing home care employees to be “re-classified”; and
 - (c) the operation of any increase following the Annual Wage Review Decision for 2024.
- 35. Accordingly, the lead up time to the operative date of the Stage 3 increases is pivotal to mitigating any detrimental impact upon the home care sector.²⁸
- 36. It is also within that critical period that home care operators undertake planning and financial analysis prior to the operative date. Following the publication of final determinations, the certainty as to the actual rates of the increase will, in part, assist with the commencement of the financial analysis and planning (e.g. working out transitional arrangements). However, that alone is not enough to mitigate financial loss to the Sector. Home care operators very much depend upon the timely communication by the Commonwealth with respect to the issues listed in paragraphs [32(a)] and [32(b)] above. Absent that communication, home care providers will struggle to procure new home care agreements that are essential for accessing the benefit of any additional funding.

²⁷ *User Rights Principles 2014* (Cth) s 17.

²⁸ *Fair Work Act 2009* (Cth) s 134(1)(f).

37. Once this information is available, then home care operators can undertake pricing analyses, financial planning and communications with clients to seek agreement to the necessary changes in pricing.
38. The lead up time should be at a minimum 3 months.
39. Even with the prompt timetable set by the Expert Panel for receiving submissions following the *Stage 3 Decision*, the available time before 1 July 2024 is insufficient to ensure both the Commonwealth and home care operators can attend to all necessary communications prior to the operative date of the Stage 3 increases.
40. In such circumstances, it is appropriate that home care operators be provided a reasonable opportunity to comply with the variations and without detriment to their business operations which provide essential services to vulnerable elderly clients.
41. If the Expert Panel were minded to align the operation of the Stage 3 increases to the additional Commonwealth funding, home care operators would seek that the communications referred to in paragraphs [32(a)] and [32(b)] above are, as soon as reasonably practicable, undertaken by the Commonwealth and commence no later than 1 October 2024.

Factor 4: The insufficient time for residential aged care providers to grapple with the complexity of the differing wage increases and ensure access to additional funding

42. Residential aged care providers require time to ensure all essential preparatory steps and necessary communications are made and received prior to the operative date of the variations.
43. Met with an operative date of 1 July 2024, residential aged care providers will struggle to complete the following essential steps;
 - (a) confirm and secure funding, which is dependent upon steps being taken by the Commonwealth; and
 - (b) communications to all aged care employees about the nature of the variations to be implemented.
44. Both steps are considered below.

Confirm and secure funding from the Commonwealth

45. Given the broad nature of the variations across the *Aged Care Award*, residential aged care providers should be provided a reasonable opportunity to complete all necessary pricing and financial analysis.

46. Such preparatory steps, in major part, depend upon the promptness of the action taken by the Commonwealth following the publication of the final determination for the *Aged Care Award*.
47. As set out in the Commonwealth Submissions, the action required to affect implementation of the additional funding inevitably takes time because:
- (a) 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;²⁹
 - (b) the calculation of the actual rate of the Stage 3 increases for residential aged care workers based on independent pricing advice from the Independent Health and Aged Care Pricing Authority;³⁰
 - (c) the implementation of subordinate legislation necessary to affect the increases for residential aged care workers is developed and in place ahead of the operative date;³¹ and
 - (d) relevant information and communications technology changes required to implement the increased funding are correctly developed and in place ahead of the operative date.³²
48. Due to the complexity involved in such steps, the Joint Employers have substantial doubts in the ability of the Commonwealth to complete such steps in less than 2 months.
49. Further, even in the unlikely event that such steps were able to be completed before 1 July 2024, providers would still struggle to complete all necessary pricing and financial analysis before 1 July 2024 – which, again, will be relevant to communications sent out to employees about the implementation and impact of the variations on their employment.
50. The Commonwealth’s timetable, in that respect, addresses the difficulties encountered with the implementation of the Stage 1 increase. In addition to funding, the smooth

²⁹ See Commonwealth’s Submissions concerning operative date and phasing in (filed 12 April 2024) at [8.2.3].

³⁰ Ibid at [8.3.1].

³¹ Ibid at [8.3.2].

³² Ibid at [8.3.3].

implementation of the Stage 3 increases requires coordination between the Commonwealth and the Sector. The increased lead up time before the implementation is critical to enabling that coordination to occur.

Communications to all employees about the nature of the variations

51. The Stage 3 increases impact all residential aged care employees to differing degrees. Residential aged care providers need sufficient time to implement the transitional arrangements set out in the determination (including classification changes) and provide an explanation of the changes to each affected employee.
52. Whilst it is true that residential aged care providers have had some opportunity to commence communications following the publication of draft determinations, providers cannot be confident that the rates included in those draft determinations are the actual rates (particularly given the close proximity of the annual wage review decision).
53. The regulatory burden arising from implementation of the Stage 3 increases, in that respect, may be distinguished from the implementation of the Stage 1 increase. This is because residential aged care providers are not implementing a uniform percentage wage increase for all employees. Rather, they are implementing a distinct and different increase for all aged care employees (save for the most senior food services employee) and changes to classification structures.
54. This step is pivotal, especially in the context where there is a perceived imbalance amongst some employees and employers between the wage increases for “*direct care*” vs “*general*” employees.
55. The Joint Employers have previously raised in submissions the practical issue of managing perceptions of inequality between “*direct care*” and “*indirect care*” employees in their operations.³³
56. The evidence of Chris Mamarelis, CEO at Whiddon also referred to desire for “*a positive outcome for non-care employees*” to “*assist in unifying our team*”.³⁴ During cross-examination, Mr Mamarelis referred to the “*damaging*” impact of the imbalance of the Stage 1 increase upon the workforce at Whiddon:

“The fact that we have had a – again, appreciating the complications involved, a pause of about six months between the decision for care workers and non-

³³ See Addendum to Question 49 (ACCPA) (filed 30 March 2023).

³⁴ Witness Statement of Chris Mamarelis dated 1 November 2023.

care, it's been very damaging based on my experiences. And when you talk to non-care employees and you talk to even the care employees, they talk about the division, the tension and you know, it's one team. They all operate as one team. I have spoken about the continuity of care and how important that is."³⁵

57. That tension was also referenced in the lay evidence of employees filed by the HSU and UWU in Stage 3.
58. Whilst we accept that the *Stage 3 Decision* does not diminish the importance of the work of indirect care employees,³⁶ the practical result is that the distance between award minimum wages for “*direct care*” and “*general*” employees under the *Aged Care Award* has increased.

59. As with home care operators, residential aged care providers should be provided a lead up time of at least 3 months from the Commonwealth’s completion of the steps above in paragraph [47]. Absent this time the regulatory burden that arises from compliance with the variations becomes onerous.³⁷
60. Given the steep penalties that accompany non-compliance with award provisions, the residential aged care providers (together with home care operators) should be provided with a fair opportunity to review, understand and comply with the variations.

³⁵ Transcript of Proceedings – AM2020/99, 8 December 2023, at PN4543 (Chris Mamarelis).

³⁶ *Stage 3 Decision* [2024] FWCFB 150 at [237].

³⁷ *Fair Work Act 2009* (Cth) s 134(1)(f).

FACTORS THAT MAKE PHASING-IN APPROPRIATE

Overview

61. If the Expert Panel were satisfied that 1 January 2025 was an appropriate operative date for the Stage 3 increases, the Sector would have the benefit of “Phase 1” of the additional Commonwealth funding.
62. Absent a decision to phase-in the Stage 3 increases, the Sector would be required to absorb the remaining 50 per cent of the wage increases determined for direct care workers in the *Stage 3 Decision* for a period of 12 months.³⁸ This would have a material impact on the financial viability of the Sector.³⁹
63. Two factors support aligning the phasing-in of the Stage 3 increases to the timetable proposed by the Commonwealth:
 - (a) **Factor 1:** the expert evidence as to the impact of a 10% increase to direct care employees (including PCWs, RAOs, AINs and HCWs) on the Sector that is not fully funded by the Commonwealth; and
 - (b) **Factor 2:** the nature of the “unfunded” proportion of the Stage 3 increases (if not aligned to “Phase 2”).
64. Each factor will be considered in turn below and is, once again, distinguishable from that before the Commission in Stage 2.

Factor 1: The expert evidence as to the impact of a 10% increase to direct care employees (including PCWs, RAOs, AINs and HCWs) on the Sector that is not fully funded by the Commonwealth

65. At the time of the *Stage 2 Decision*, the expert evidence before the Commission did not address the specific impact of an unfunded increase less than the Stage 1 increase. Rather, the evidence of Mr Grant Corderoy considered two scenarios:
 - (a) **Scenario A:** the Commonwealth timetable for additional funding and phasing-in was adopted;⁴⁰ and

³⁸ Noting “Phase 2” commences 1 January 2026.

³⁹ *Fair Work Act 2009* (Cth) s 134(1)(f).

⁴⁰ Witness Statement of Grant Corderoy dated 8 February 2023 at [33].

- (b) **Scenario B:** the Commonwealth timetable for additional funding and phasing-in was not adopted, such that the Stage 1 increase became operative in full from 1 July 2023.⁴¹
66. In Stage 2, the Commission held that the evidence did *“not allow [the Full Bench] to conclude that the employers cannot support 5 per cent of the increase for a period of 12 months”*.⁴²
67. By contrast, the Expert Panel in Stage 3 has the Report of Mr Hutcheon. That report addresses the capacity of the Sector to absorb a 10% increase to the staffing costs of direct care employees (namely, PCWs, RAOs, AINs and HCWs) without full funding by the Commonwealth.⁴³ That evidence assists the Expert Panel to form a view about the impact of a limited unfunded increase to the Sector.
68. As to the impact on the Sector, Mr Hutcheon sets out his findings as follows:
- *\$1,148 million increase in staffing costs*
 - *\$923 million increase in residential staffing costs and \$225 million increase in home care staffing costs. The variance in \$ terms is due to the higher number of residential staffing costs, but the overall financial effect will be similar in percentage terms for both segments*
 - *The impact on home care is different to the extent that the price charged to the consumer (care recipient) will be required to be increased to meet the increased staff costs and this will introduce a possible time lag issue for home care Providers that is not present for residential care even if funding is aligned to the increase*
 - *For-profit (private) Providers will have a slighter higher impact due to the requirement to remit payroll tax. In an aggregate sense, Table 1 shows the estimated impact for each segment, however from an individual Provider perspective the impact between each segment will be less due to the relationship between the subsidy funding and the staffing cost are materially similar.*⁴⁴

⁴¹ Witness Statement of Grant Corderoy dated 8 February 2023 at [34].

⁴² *Stage 2 Decision* [2023] FWCFB 93 at [416]

⁴³ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 8.

⁴⁴ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 8.

69. Turning to further specific impacts arising from a 10% increase not fully funded by the Commonwealth, Mr Hutcheon's findings include:

(a) *"for residential aged care the FY23 average operating deficit of \$16.54 per bed day would deteriorate to a deficit \$29.98 per bed day";*⁴⁵ and

(b) *"for home care the FY23 average operating surplus of \$3.14 per client day would deteriorate to a small surplus of \$0.90 per client day which is marginal and insufficient to remain sustainable in the short to medium term. This also assumes that Providers can pass on the effect of the increase to consumers through higher service prices".*⁴⁶

70. Mr Hutcheon concludes: *"[t]he ability for the aged care sector to financially tolerate a 10% award increase that is not fully funded by the Federal Government is **virtually nil**".*⁴⁷

Factor 2: The nature of the "unfunded" proportion of the Stage 3 increases (if not aligned to "Phase 2")

71. Unlike the position before the Full Bench in Stage 2, the nature of the unfunded proportion of the Stage 3 increases cannot be reduced to a simple figure (e.g. 5%).

72. As set out above, the Expert Panel did not award a uniform increase to direct care employees under the *Aged Care Award* or *SCHADS Award*.

73. It would also be an over-simplification to simply *"halve"* the percentage increases set out above at paragraph 15, with a view to capture the proportion of the unfunded increase. This is because that analysis does not factor the following:

(a) the impact of increases to allowances (referred to above at paragraph 16); or

(b) the reach of the impact of each individual increase in light of both the transitional arrangements and varying percentage increases between each classification.

74. Each of these circumstances suggest the Expert Panel should approach its assessment of any impact upon the Sector absent additional funding with caution.

⁴⁵ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 8.

⁴⁶ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 8.

⁴⁷ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 8.

75. Aligning the operation of the Stage 3 increases to the Commonwealth's funding fairly and reasonably balances the tension within these considerations in the context of the present matter.
76. It would be inappropriate to de-link operation and funding as this would materially disturb the careful balance the Commission should seek as it would weigh against s 134(1)(f) by materially and detrimentally impacting employers in the Sector.
77. When considered together with the expert evidence before the Expert Panel about the estimated impact of an unfunded increase of 10% for direct care workers, there is an appropriate basis for staging the effect of the increase to be in line with the timetable proposed by the Commonwealth. Namely, to ensure that viability of businesses working in either residential aged care or home care in the Sector.

SECTIONS 134(1) AND 284(1)

78. The Expert Panel set out its “*provisional conclusions*” concerning the modern awards objective and the minimum wages objective in the *Stage 3 Decision* at [211]-[212]. These conclusions are to be confirmed when the Expert Panel make determinations varying the awards.⁴⁸
79. The Commonwealth submit that the question before the Expert Panel, in respect of sections 134 and 284, is as follows:
- “[G]iven the Commonwealth’s decision on the timing of its funding of the Stage 3 wage increases, what timing and phasing in of the Stage 3 wage increases is necessary or appropriate, including to meet the modern awards objective and minimum wages objective?”⁴⁹*
80. The question identified by the Commonwealth is apt. However, in light of the provisional conclusions (see relevant passages extracted below), two further questions should be raised in the context of the Commonwealth’s funding commitment being crystallised in terms of timing and phasing-in:
- (a) **Question 1:** Absent alignment of the operation of the Stage 3 increases to the additional Commonwealth funding, will the pay variations endanger the security of employment for direct care employees in the Sector?
 - (b) **Question 2:** Absent alignment of the operation of the Stage 3 increases to the additional Commonwealth funding, will the variations have a significant direct impact on business (including on productivity, employment costs and the regulatory burden)?
81. Both questions will be considered below.

⁴⁸ *Stage 3 Decision* [2024] FWCFB 150 at [210].

⁴⁹ Commonwealth’s Submissions concerning operative date and phasing in (filed 12 April 2024) at [7].

Question 1: Absent alignment of the operation of the Stage 3 increases to the additional Commonwealth funding, will the pay variations endanger the security of employment for direct care employees in the Sector?

82. The Expert Panel reached the following provisional conclusion with respect to s 134(1)(aa):

*“The Commonwealth has, subject to the appropriate determination of operative date and any phasing-in period, made a commitment to funding the pay increases that may arise from this decision. **Having regard to these commitments, we are satisfied that the pay variations will not endanger the security of employment for direct care employees in the aged care sector. This is therefore a neutral consideration.**”⁵⁰*

83. In order for the provisional conclusion with respect to s 134(1)(aa) to remain sound, the operation of the Stage 3 increases must align to the additional Commonwealth funding.

84. The evidence before the Expert Panel establishes that the Sector cannot remain viable absent funding from the Commonwealth.⁵¹ Such that if the operative date was set at 1 July 2024, given the Commonwealth’s proposal to commence additional funding from 1 January 2025, the pay variations would endanger the security of employment for direct care employees in the Sector.⁵²

85. The same endangerment would persist if the Commission was not minded to phase-in the increase for direct care employees in two stages. Whilst the Commission previously concluded that the Sector could withstand the impact of a 5% increase in wages for direct care employees that finding was made without the benefit of specific evidence as to the impact of any unfunded component of the Stage 1 increase.⁵³

86. As set out above, the evidence of Mr Hutcheon highlights the inability of the Sector to absorb even a 10% increase to direct care employees if it is not supported by funding.

⁵⁰ *Stage 3 Decision* [2024] FWCFB 150 at [211] (emphasis added).

⁵¹ See especially, Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3.

⁵² See *Stage 1 Decision* [2022] FWCFB 200 at [904]; Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3; Transcript of Proceedings – AM2020/99, 8 December 2023, PN4542-PN4543 (evidence of Chris Mamarelis: “we’re very reliant on Government Funding to support that, we’re a not-for-profit”).

⁵³ See Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, pages 1, 8.

Question 2: Absent alignment of the operation of the Stage 3 increases to the additional Commonwealth funding, will the variations have a significant direct impact on business (including on productivity, employment costs and the regulatory burden)?

87. The Expert Panel reached the following provisional conclusion with respect to s 134(1)(f):

“The variations will have a significant direct impact on employment costs for aged care employers, but this will be wholly or substantially ameliorated by the Commonwealth’s funding commitment. It is possible that if the wage adjustments proposed lead to a greater capacity to recruit and retain directly-employed staff, this may result in savings due to a lower degree of labour hire utilisation which, the evidence demonstrates, have significantly higher costs to the employer than directly-employed staff. Lower turnover of employees may also lead to reductions in recruitment and training costs. An improved capacity to attract and retain staff could also improve the capacity for employers to operate at a higher occupancy rate, which might enhance their financial viability. The employer cost aspect of the consideration weighs against the variations but not to a significant degree because of the Commonwealth’s funding commitment and the potential offsetting effects. The other aspects of the consideration are not relevant.”⁵⁴

88. The variations will not only have a significant direct impact on employment costs for aged care employers, but also an initial and material impact on the regulatory burden for both home care operators and residential aged care providers.

89. We support the submissions advanced by the Commonwealth at paragraph [8.3]⁵⁵ and repeat the submissions at paragraphs [31] to [60] above.

⁵⁴ *Stage 3 Decision* [2024] FWCFB 150 at [211] (emphasis added).

⁵⁵ Commonwealth’s Submissions concerning operative date and phasing in (filed 12 April 2024) at [8.3].

CONCLUSION

Operative Date

90. If the operation of the Stage 3 increases is not aligned to the Commonwealth's timetable:
- (a) the Sector will have to absorb the Stage 3 increases for at least 6 months without any additional funding;
 - (b) the Sector will not be able to maintain or sustain their ongoing viability from 1 July 2024; and
 - (c) the Sector will be denied a reasonable opportunity to ensure all necessary communications and essential preparatory steps in relation to the Stage 3 increases occurs (a period of less than two months would be insufficient even with funding).
91. Further, the detrimental impact on the Sector would be exacerbated by the far-reaching nature of the Stage 3 increases as the overwhelming majority of aged care employees will be the beneficiary of a wage increase.
92. It is imperative that the operative date be aligned to the Sector's access to additional Commonwealth funding.

Phasing-in

93. The Sector cannot financially tolerate an unfunded increase in wages for PCWs, RAOs, AINs and HCWs.⁵⁶ In light of the evidence before the Expert Panel, the Commission could not comfortably conclude that aligning the operative date to the Commonwealth's timetable but without phasing-in would be immaterial to the Sector. Especially in circumstances where the Stage 3 increases do not apply uniformly to the direct care workforce. The Sector will also be grappling with any increase arising from the annual wage review in 2025.
94. Unlike the circumstances before the Commission in Stage 2, the expert evidence underscores the appropriateness of aligning the operation of the Stage 3 increases with the Commonwealth's timetable.
95. The alignment to the additional Commonwealth funding will result in further delay and this is disappointing and concerning to both aged care employers and employees. Due

⁵⁶ Witness Statement of Stuart Hutcheon dated 31 October 2023, Annexure SH-3, page 8.

to the central role of Commonwealth funding in the Sector, however, the Joint Employers are commercially compelled to support that approach to ensure the ongoing viability of the Sector.

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10 May 2024