

IN THE FAIR WORK COMMISSION

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

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

Matter No: **AM2020/99; AM2021/65; AM 2021/63**

**REPLY TO THE COMMONWEALTH'S SUBMISSIONS
FOR THE HEALTH SERVICES UNION AND OTHER APPLICANTS**

Table of Contents

Impact of regulatory requirements on aged care workers	2
Attraction and retention?	3
The impact of the new funding model	3
Work value reasons, and approaches to work value considerations	4
'Properly fixed rates'	4
Social utility of the work	4
External award relativities.....	5
The Modern Awards Objective.....	6
General observations	6
134(1)(g) – simple, easy to understand and sustainable system	7
s.134(1)(h) – impact on the economy etc.....	8
Conclusion.....	9

1. The HSU broadly agrees with the submissions advanced by the Commonwealth (**CS**). Certain matters of detail are addressed below.

Impact of regulatory requirements on aged care workers

2. At CS[6], the Commonwealth recognizes that, among other things, strengthened regulatory demands and associated higher standards of care have significantly impacted the work, and increased the work value of, direct and indirect care workers.
3. The submissions appropriately acknowledge that the impact of strengthened regulatory demands in the aged care sector are relevant to ‘ancillary workers’. The evidence, not to mention the Consensus Statement, makes it clear that the particular contextual demands of aged care work have an impact on all indirect care workers, as set out in the HSU’s previous submissions. The body of the Commonwealth’s submissions also accepts this: see e.g. CS[33.2].
4. In particular, the requirement under the Aged Care Quality Standards to place the consumer at the centre of every decision and to give consumers greater independence and control over their care described at CS[29]-[33] impacts all work performed in the residential care context. The submission at CS[31] that the evidence indicates that care and service plans are signed off by RNs should not overlook the evidence of PCWs being involved in the preparation, updating and implementation of care plans as the staff who inevitably have the most direct and frequent contact and interaction with residents: Report to the Full Bench on Lay Witness Evidence at [357]-[371].
5. The submissions of the Commonwealth at CS 55 and CS70 refer, by way of example, to the evidence of Ms Alison Curry, whose job title is “AIN Thereafter”. These submissions must be understood as referring to the work performed by persons employed as PCWs and “AINs Thereafter” at her employer as opposed to the work performed by AINs covered by the Nurses Award: see Statement of Ms Alison Curry, DHB11664 to 11665, at [11] to [14].

Attraction and retention?

6. At CS[9], the Commonwealth observes that appropriate wages will support attraction and retention of workers in the aged care sector. As is set out at CS[206], this is of critical importance to the future of the aged care industry, noting the estimate that an annual expansion of 6.6% is needed to ensure quality care is provided.
7. Conventionally, concerns about attraction and retention have not formed part of an assessment of work value, and have been dealt with separately: see, for example, *Australian Nursing Federation v Queensland Department of Health* (2003) 126 IR 244 at [40]-[64]; *Re Equal Remuneration Case* (2011) 208 IR 345 at [104]. The HSU does not rely on these considerations as work value reasons justifying the increase for the purposes of s 157(2A).
8. However it is apparent that these are matters which the Commission can and should take into account in considering whether the increases separately meet the modern awards objective, in particular under s 134(1)(c), as the Commonwealth correctly submits at CS[184]. Given the difficulties being experienced, and likely to be experienced in the future, by operators with respect to attraction and retention of staff in aged care, those issues are also relevant to the factors in s 134(1)(f) and (h) in respect of the Modern Awards Objective, and correspondingly s.284(1)(a) and (b) as to the Minimum Wages Objective.

The impact of the new funding model

9. At CS[74.1], the Commonwealth suggests that the forthcoming move from ACFI to AN-ACC will 'reduce the associated administrative burden on...staff' as a result of approved providers of residential care no longer being required to make their own assessments of residents for funding purposes.
10. This is, at this point, speculative, and is yet to be demonstrated by any evidence. To the extent that it is put as a submission that the complexity and skill required of aged care workers will somehow decrease, it should not be accepted. At most, some administrative work involved with the actual task of

undertaking and documenting the assessment might transfer to independent assessors.

Work value reasons, and approaches to work value considerations

'Properly fixed rates'

11. As previously submitted, the HSU agrees with the Commission's provisional view that the rates in the Aged Care and SCHADS Awards have not been properly fixed. This is put in the sense that they have not been assessed with reference to the actual value of the work at any relevant point.
12. Neither this submission, nor as the HSU understands it the Commission's preliminary view, is as narrow as the proposition that the process set out in the ACT Child Care Case¹ was not followed: c.f. CS[79.1]. Instead, the HSU's contention is that the rates have not been assessed with reference to the actual value of the work at any relevant point, using any available methodology.
13. The HSU agrees with the Commonwealth's contention at CS[79.2-4] that the ACT Child Care Case, was developed under a different statutory regime in light of quite different wage fixing principles, and need not be strictly applied in the present case nor is it an appropriate starting point for the analysis required in assessing whether increases in award rates of pay are justified by 'work value reasons'.

Social utility of the work

14. At CS[91], the Commonwealth appears to confuse what the HSU has submitted should be taken into account – the social utility, that is the contribution that the work makes to both the economy and the good functioning of civil society as a whole – with the different concept of 'social value' i.e. how the work is generally regarded.
15. The HSU agrees with the proposition that the latter should not inform the Commission's decision. That is in part because this work has, as extensively

¹ *Australian Liquor, Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 – re wage rates* [2005] AIRC 28 (ACT Child Care Case).

explored in the HSU's prior submissions, been persistently perceived as having less value than it in fact does, in part due to gender-based factors. The Commonwealth's submission appropriately recognises that the Commission should be alert in ensuring that the lack of value or prestige attached to caring work does not affect assessment of its value.

16. The Commonwealth recognises that the pandemic has led to an increased recognition of the actual complexity and skill required of this work and the responsibilities assumed by those who perform the work – as, indeed, has the Royal Commission. The task for the Commission remains to undertake a rigorous, and unbiased, analysis of the work itself.
17. Certainly the work cannot be sensibly described as having 'perceived prestige' as opposed to an understood importance: c.f. CS[91]. Aged care workers cannot eat applause; prestige in employment terms is fundamentally measured by money. The HSU's point is that the work should be prestigious, and the increases sought will go some way to achieving this, by at least beginning to properly reflect the actual value of the work.

External award relativities

18. At CS[102]-[106], the Commonwealth discusses the relevance, or otherwise, of external award relativities i.e. maintaining consistency with the rates set out in the Manufacturing and Associated Industries and Occupations Award 2010.
19. The HSU agrees with the proposition at [106] that external award relativities have never been a hard barrier. Qualifications, as is observed at CS[126], can provide a useful indicator of at least part of the skill involved in a particular job in some cases. The AQF framework is neither the final answer in this respect and nor is skill the only, or even predominant consideration, as the Commonwealth recognises at CS[129] and [105] respectively. Obviously other considerations may be relevant, not limited to the conditions under which work is performed.
20. This is made most obvious when one considers indirect care workers. A trade-qualified maintenance worker working in aged care may have an identical Certificate III-equivalent trade certificate as a maintenance worker in a

manufacturing facility. It is common ground, however, that the aged care maintenance worker exercises additional, completely different skills (for example, in interacting with residents) which are completely outside the contemplation of the qualification.

21. An AQF-only focus – i.e. treating the C10 framework as handcuffs permitting only the most marginal departures, as the ABL Submissions urge - is obviously wrong. The Commission would exercise real caution before even giving it significant weight in the context of this particular industry. To that end, the HSU notes and embraces the Commonwealth's submissions at CS[134]-[140] as to the deficiencies that have been introduced into the AQF since the structural efficiency principle was developed 30 years ago.

The Modern Awards Objective

General observations

22. As set out above, the HSU agrees with the Commonwealth's submissions as to the modern awards objective considerations, subject to the clarifications below.
23. In particular, the HSU agrees that:
24. the question of appropriate minimum rates is influenced by the nature of the sector and other contextual factors, including whether it is a funded or profit-making sector: CS[159];
25. maintaining a relevant award system additionally requires reference to market rates, to ensure that awards are not 'hollowed out' by the enterprise bargaining system: CS[162];
26. gendered assumptions should not influence the assessment of fair wages and conditions in the aged care sector: CS[164];
27. the wage increases sought, in the context of this application and the Commonwealth's funding commitments, are not capable of being considered unfair to employers: CS[165];

28. the reality of the challenges faced by these workers attempting to survive on the current rates is a relevant consideration, and this evidence should not be disregarded as sought by ABL: CS[165];
29. bargaining in the sector is not likely to improve wages, but remains available to drive flexibility and productivity: CS[174];
30. the increases will assist in attraction and retention of staff, including lower skilled or unqualified workers, leading to potentially increased workplace participation: CS[184]-[186];
31. considerations about the need to address gender-based wage undervaluation, the gender wage gap generally and specific undervaluation of skills are all relevant considerations, without the need for a male comparator to be identified: CS[189]-[190]; and
32. in the context of the Government's commitment to ensuring that the outcome of the aged care work value case is funded, the cost to business of the increase sought will not be material and the overall impact on business will be positive by facilitating a strengthened ability to recruit staff and meet regulatory requirements: CS[200]-[201].

134(1)(g) – simple, easy to understand and sustainable system

33. It should also be observed that applying a wage-fixing methodology which relies on a decades-old decision made, fundamentally, in the context of a particular industry is not particularly 'simple' or 'easy to understand' within the meaning of s.134(1)(g), once one steps outside niche industrial relations circles. It is easy to see how an aged care worker might have some difficulty identifying why their wage cannot increase significantly, or at all, because of what a manufacturing tradesperson is paid.
34. Although it is correct that principled approaches to wage fixation do serve the end goal of stability within the system (see CS[203]), the desirability of a stable wage system should not be confused with a pursuit of a completely ossified one – which is fundamentally what the ABL approach would lead to.

35. The better course is as submitted at CS[204]: a rigorous work value analysis performed in light of the particular case, unfettered by artificial limitations.

s.134(1)(h) – impact on the economy etc

36. At CS[207]-[208], the Commonwealth discloses the outcome of modelling apparently done by Treasury. The modelling itself has not been disclosed, let alone put into evidence.

37. Read correctly, it appears that Treasury considers that increasing award wages by 25% for aged care workers will have a very minor positive effect on the economy (although close to negligible). This strongly suggests that the wages ought to be increased by *at least* the percentage sought.

38. To the extent that warnings as to inflationary pressure are alluded to at CS[208], these should be disregarded as:

39. they depend on further wage claims in different industries being firstly made and secondly succeeding, which is not guaranteed and is eminently controllable by the rigorous assessment of work value discussed above; and

40. in any event the assertion could not be accepted without permitting the parties to test the underlying modelling – which, to the extent it can be understood from the submissions, appears predicated on the presently questionable concept of inflation being principally wage-driven.

Conclusion

28. The Commonwealth's submissions correctly identify that the material before the Commission overwhelmingly suggests that the HSU's increases are:
- a. more than justified by work value reasons; and
 - b. necessary to achieve the Modern Awards Objective.
29. The variations accordingly ought be made.

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Dated: 17 August 2022