

IN THE FAIR WORK COMMISSION

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

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

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

**SUBMISSIONS FOR THE HEALTH SERVICES UNION  
WITH RESPECT TO STAGE 2**

**Introduction**

1. These are the HSU's submissions in respect of Stage Two as identified in the Commission's statements of 17 November 2022 and 23 November 2022 and in accordance with the amended directions dated 6 December 2022. The submissions are intended to address:
  - (a) 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 of the Commission in *Re HSU and ors* [2022] FWCFB 200 (**Decision**);
  - (b) Whether making the interim increase to modern award minimum wages applicable to direct care aged care workers in these proceedings is necessary to achieve the **modern awards objective** and the provisional views outlined at [1001]–[1072] of the Decision;

- (c) Whether the interim increases to modern award minimum wages applicable to direct care aged care workers are necessary to achieve the **minimum wages objective** and the provisional views outlined at [1073]–[1083] of the Decision;
- (d) The following 4 **amendments to the *Fair Work Act 2009 (Cth)* (FW Act)**, together with any other provisions that have commenced and that the parties consider relevant to Stage 2 of these proceedings:
- i. Amendments to the object of the FW Act to include reference to the promotion of job security and gender equality;
  - ii. Amendments to the modern awards objective to include secure work and gender equality considerations, including 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;
  - iii. Amendments to the minimum wages objective to include gender equality considerations including ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and
  - iv. The addition of s.157(2B) specifying that the Commission’s consideration of work value must be free of assumptions based on gender and include consideration of whether historically the work has been undervalued because of assumptions based on gender.
- (e) if relevant, **consultation** between interested parties in respect of increases to minimum wages for Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers.

2. The last issue is addressed first.

### Scope of workers

3. In the Decision, the Full Bench determined that a variation of the minimum wages of the direct care classifications in the Aged Care Award and Schedule E of the Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHADS Award**) to provide for an interim increase of 15 per cent is plainly justified by work value reasons. Relevantly, the Full Bench indicated (at [933]) that the interim increase will apply to all Personal Care Workers and Home Care Workers under the Aged Care Award and SCHADS Award respectively.
4. Notwithstanding apparent concessions in the Joint Employers' submissions that an increase was justified by work value reasons, the Full Bench declined, in the Decision, to provide for an interim increase for the classifications of Head Chef/Cook or for Recreational Activities Officers/Lifestyle Officers (**RAOs**). Rather, the Full Bench (at [935]-[937] of the Decision) directed the parties to confer and indicated that, if agreement could be reached upon the quantum of an interim increase and the classifications to which it applies, it would give further consideration to determining an interim increase for these employees.
5. The relevant union and employer stakeholders have agreed in the *Joint Statement regarding Stages 2 and 3 of the Work Value Case* filed on 16 December 2022 that the interim increase of 15 per cent applicable to direct care workers should additionally be applied to the classifications of 'head chefs and head cooks' (being employees in the food services stream of the Aged Care Award at Aged Care Employee Level 4 to Level 7) and RAOs (to the extent that RAOs were not already entitled to any increase by virtue of being paid and/or classified as a 'direct care worker'). In light of that agreement, the Full Bench should now determine that the interim increase of 15 per cent apply to Head Chefs/Cooks and RAOs.
6. The Commonwealth submits (at [33]-[35] of the Commonwealth Submissions) that further consideration should be given to defining the scope of who is a 'direct care worker' contemplated in the Decision and suggests, in particular, that there is insufficient delineation in Schedule E of the SCHADS Award between caring and

non-caring roles. The HSU notes that the term ‘direct aged care workers’ is defined at page 6 of the Decision as follows: ‘Employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs’. The latter term is defined at page 7 of the Decision as ‘Home care worker or Home care employee’, the description for each of the 5 levels of classification in Schedule E. Other parts of the Decision (including at [49], [922] and [933]) are consistent with a conclusion that the interim increase apply to ‘each level’ of home care employee. Accordingly, the HSU understands the direct care workers to whom the interim increase is proposed to apply include all classifications of Home care employee in Schedule E of the SCHADS Award from Levels 1 to 5 inclusive and submits that there is no lack of clarity in the Decision. The formal order giving effect to the interim increase will no doubt identify the relevant classifications expressly.

### **Amendments to the Fair Work Act**

7. Since the Decision was handed down, the FW Act has been relevantly amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Amending Act**). In particular:

(a) the objects of the Act have been amended as follows (with addition underlined):

#### *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;*

...

(b) the modern awards objective set by s.134(1) has been expanded to include:

- i. at new (aa), the need to improve access to secure work across the economy;
- ii. at new (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,

(c) the minimum wages objective set by s.284(1) has been similarly expanded to include at new (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

(d) s.157 has been amended to include, in the new subsection (2B)(a) and (b), a requirement that any work value assessment must be free of assumptions based on gender and include consideration of whether historically the work has been undervalued because of assumptions based on gender.<sup>1</sup>

8. In respect of the modern awards objective, only s.134(1)(ab) is of real significance to the present case, with s.134(1)(aa) presenting as a neutral consideration. Section 134(1)(ab) requires the Commission to take into account three distinct matters:

- (a) equal remuneration for work of equal or comparable value, which arguably contemplates a comparator-based exercise;

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<sup>1</sup> There could be no sensible suggestion that the November 2022 Decision involved any assumptions about gender, and there is thus no need to further consider s.157(2B)(a).

(b) *separately*, the elimination of gender-based undervaluation, that is, an obligation to, where undervaluation is detected, increase wages to correct it; and

(c) the need to provide workplace conditions that facilitate women's full economic participation which does not appear to be directly relevant here.

9. Section 284(1)(aa) also requires the Commission to take into account three elements for the purpose of establishing and maintaining a safety net of fair minimum wages, with the first two being the same as in the new s.134(1)(ab). Section 284(1)(aa), however, also imposes a direct requirement to take into account the need to address gender pay gaps.
10. The obligations imposed by s.157(2B)(b) are not arid. Read with the amendments to s.134(1) and s.284(1), and the related new objects of the Act, it is clear that the purpose of s.157(2B)(b) is to ensure that where any such historical gender-based undervaluation is detected that it is corrected, that is, by sufficiently increasing wages. The Revised Explanatory Memorandum to the Amending Act explained (at [8]):

*Part 5 would amend section 157 and Part 2-7 of the FW Act to guide the way the FWC considers equal remuneration and work value cases. The amendments to section 157 would require that the FWC's consideration of work value reasons be free of assumptions based on gender, and include consideration of whether there has been historical gender-based undervaluation of the work under consideration*

11. In the Decision, the Full Bench considered (at [355]) that the statutory task did not involve a requirement to assess *why* the rates had not been properly fixed; instead, the question was simply one of establishing the true value of the work. That statutory task has, in light of the above amendments, expanded. In this new context, the findings:

(a) at [758](6), that historical wage fixing approaches have not properly recognised and corrected for undervaluation based on gendered assumptions;

(b) at [785]-[857], that the roles require skills which, because of assumptions about gender, were traditionally 'hidden' and thus not compensated for within current wage levels; and

(c) at [865], that the proper valuation of the work and corresponding wage increases would likely reduce the gender wage gap,

not only strongly weigh in favour of a conclusion that the interim increase is necessary to meet both the modern award and minimum wage objectives as now amended, but given the approach outlined above, indicate that a more significant increase is likely warranted (which the HSU proposes to address in more detail in Stage 3). As discussed below, the factors now required to be taken into account by s.134(1)(ab) and s.284(1)(aa) also favour the interim increase commencing immediately or as soon as practicable.

## **Timing and phasing**

### *The HSU's position*

12. In accordance with s.166 of the Act, while the default position is that a decision varying modern award minimum wages comes into effect on 1 July in the next financial year, this may be varied if the Commission considers it appropriate to do so: s.166(2). The earliest time a determination that sets, varies or revokes modern award minimum wages can come into operation is the day on which the determination is made, unless the determination is made under s 160 (to remove ambiguities or correct errors) and the Commission is satisfied that there are exceptional circumstances that justify specifying an earlier day: s.166(3).
13. The approach which has been adopted in past decisions to the timing and implementation of variations to modern awards has been explored in decisions

including *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001, *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)* [2021] FWCFB 6021 and *Re Australian Workers’ Union* [2022] FWCFB 4. The Full Bench, at [976]-[990] of the Decision, discussed the approach which has been adopted in previous decisions and the HSU broadly agrees with the summary which has been provided. In short:

- (a) s.166(1)(a) creates a ‘default rule or presumption’ that a determination varying modern award minimum wages comes into operation on 1 July in the next financial year after it is made;
- (b) To displace the presumptive operative date the Commission need only be satisfied that it is ‘appropriate’ to specify a different operative date and the presumption is one that is not difficult to displace;
- (c) Relevant considerations in assessing questions of the timing and phasing of any variation can be grouped into three categories: the statutory context, the substantive decision of the Commission determining to set or vary award conditions and fairness;
- (d) As to the statutory framework, any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective;
- (e) In relation to the s.134(1) considerations, the determination of questions of timing and transitional arrangements is likely to require particular focus on relative living standards and the needs of the low paid (s.134(1)(a)), the likely impact on business, including productivity, employment costs and the regulatory burden (s.134(1)(f)) and the need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g));
- (f) Fairness is a relevant consideration, given that the modern awards objective speaks of a ‘fair and relevant minimum safety net’ and the Commission is otherwise, by s.577(a) and s.578, required to perform its functions and exercise



its powers in a manner that is 'fair and just' and take into account the objects of the Act and 'equity, good conscience and the merits of the matter'.

(g) Fairness in this context is to be assessed from the perspective of both the employees and employers covered by the modern award in question and, whilst a negative impact of a variation on employees or employers will be a relevant consideration, such an impact cannot 'totally subrogate' the interests of other affected persons.

14. In this matter, there are compelling reasons why the interim wage increase determined by the Full Bench to be warranted for direct care workers should be implemented immediately or as soon as practicable. It is first appropriate to note the following matters of background known to the Full Bench:

(a) the 2018 Aged Care Workforce Strategy Taskforce - *A Matter of Care – Australia's Aged Care Workforce Strategy* – proposed that the sector develop a strategy to support the transition of personal care workers and nurses to pay rates that better reflect their value and contribution to delivering care outcomes;

(b) the Royal Commission into Aged Care Quality and Safety resolved, in its Interim Report issued on 31 October 2019, to deal with the matter of wages and conditions in the sector in its Final Report;

(c) in its Final Report, delivered on 1 March 2021, the Royal Commission recommended that the industry unions, Commonwealth and employers collaborate to vary the award rates;

(d) there is otherwise a general community consensus that urgent action in this respect is required and has been for some time, which is reflected in the factual findings made in the Decision; and

(e) the relevant employers, and the Commonwealth would have appreciated the likely prospect of substantial increases following the Royal Commission Final

Report and have been on notice of the proposed interim increase since November 2022.

15. The findings of the Full Bench and the basis of the Decision to provide for an interim increase in wages of 15 per cent demonstrate the necessity for the interim increase to commence operation immediately or as soon as practicable. Relevant aspects of the consideration of the Full Bench include:
  - (a) the Full Bench made extensive evidentiary findings that the work of at least direct care workers in residential aged care and home care settings has changed very substantially, including (at [890]) that the evidence supported the 16 agreed contentions;
  - (b) at [899], [922] and [1004], the Full Bench found that the evidence established that the existing minimum wage rates for direct care workers in the aged care sector do not properly compensate employees for the work performed and 'significantly undervalue the work performed by these employees';
  - (c) at [938] and [967]-[968], the Full Bench made clear that the interim increase of 15 per cent does not exhaust the extent of the wage increases justified by work value reasons in respect of direct care employees and that the interim increase 'sits comfortably below' the level of the increase that the Full Bench may determine on a final basis;
  - (d) at [1010]-[1012], the Full Bench observed that most of the award classifications which are subject of the interim increase are 'low paid' for the purposes of s.134(1)(a) and that the evidence demonstrates that many workers face challenges meeting financial obligations as a result of low rates of pay;
  - (e) although the Full Bench indicated that it has not completed its consideration of issues of understaffing the Full Bench found at [216] that the evidence before it painted a picture of chronic understaffing across the aged care sector, at [220] that it was common ground that attracting and retaining aged care employees

is a significant issue for the sector and, at [1039], that increasing minimum wages will assist in attracting and retaining workers in the aged care sector;

(f) at [1048], the Full Bench concluded that varying the relevant awards to give effect to the interim increase would have a beneficial effect on the gender pay gap and promote pay equity; and

(g) at [1072] and [1084], the Full Bench indicated that it was not persuaded that varying the relevant awards to give effect to the interim increase of 15 per cent will have any material effect on the national economy.

16. Having regard to the findings of the Full Bench, the relevant factors arising with respect to the modern awards objective and minimum wages objective and considerations of fairness also demand a conclusion that the interim increase commence operation immediately or as soon as possible, including for the following reasons:

(a) any delay in the implementation of the interim decision will result in direct care workers in the aged care sector continuing to receive wages which are very significantly below the true value of the work they perform. Considerations of fairness and the obligation of the Commission in s 134(1) to ensure that modern awards provide a fair and relevant safety net of terms and conditions and, in s 284(1), to establish and maintain a safety net of fair minimum wages strongly support the interim increase commencing at the earliest possible date;

(b) the consequence of the finding of the Full Bench that the quantum of the interim increase does not exhaust the entire increase justified by work value reasons for direct care workers and was set at a level 'comfortably below' the increase the Full Bench may determine on a final basis is that, even after the commencement of the interim increase, direct care employees will continue to receive wages which are significantly less than the true value of their work. This fact further supports the urgent commencement of the interim increase;

- (c) it is inherent in the interim nature of the increase determined by the Full Bench that it was intended to commence operation within a short period and, indeed, the reasoning of the Full Bench (at [922]) was that there is no reason to delay an increase in minimum wages at least for direct care employees whilst further complex issues are being determined. The proposal of the Commonwealth that the full interim increase not commence until 1 July 2024 would, if adopted, have the effect of defeating the intent of the Full Bench that the increase occur in advance of further proceedings taking place to determine the residual issues;
- (d) the fact that most of the classifications to which the interim increase will apply are 'low paid' for the purposes of s.134(1)(a) and that many employees are experiencing financial difficulties due to low rates of pay is significant: see, for example, *4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims* [2019] FWCFB 7094 at [39]. The interests of employees on low rates of pay receiving the increase determined by the Commission to be warranted are strong and the consideration in s.134(1)(a) favours a conclusion that the interim increase should commence at the earliest possible date;
- (e) although the likely impact on business, referred to in s.134(1)(f), particularly in relation to employment costs, is influenced by the position of the Commonwealth with respect to funding, there are other potential effects on business which are relevant. In particular, any delay in the implementation of the interim increase is likely to perpetuate the industry's attraction and retention difficulties and, in turn, have a negative impact on business and the standard of care able to be provided to elderly persons;
- (f) the factor in s.134(1)(g), namely, the need to ensure a simple, easy to understand, stable and sustainable modern award system, is of limited significance in relation to the timing of the interim increase. The interim increase involves a straightforward percentage increase in rates of pay akin to the exercise employers are required to undertake each year as a result of the

annual wage review. There is no reason to conclude that any period of adjustment is needed to permit employers to give effect to the interim increase which has been determined by the Full Bench, and no evidence has been provided demonstrating any particular difficulty in carrying out such an adjustment;

(g) the new considerations in s.134(1)(ab) and s.284(1)(aa) and, in particular, the requirement that the Commission take into account the need to eliminate gender-based undervaluation of work and address gender pay gaps further supports the early commencement of the interim increase. As the Full Bench found, the interim increase will go some way towards addressing the gender-based undervaluation of work in the aged care sector (albeit not fully achieving that objective); and

(h) finally, there are no other reasons which warrant any delay in the implementation of the interim increase. In that regard, the HSU notes the finding of the Full Bench that the increase is not likely to have any relevant impact on the national economy for the purposes of s.134(1)(h) and s.284(1)(a).

17. There is no compelling reason why rectifying the substantial undervaluation of the work should be deferred any further. The Commonwealth's preference for phasing does not provide a proper basis for further delay. Those submissions are addressed below and, for those reasons, the Full Bench should not accept the propositions advanced by the Commonwealth in relation to the practicability of implementing the interim increase.

18. In light of all the considerations to which reference has been made, the position of the HSU is that the Full Bench should determine that the relevant awards be varied to give effect to the interim increase with effect immediately from the date of the Commission's determination. Any further delay in the commencement of the interim increase would not give effect to the modern awards objective and the minimum wages objective and would perpetuate the profound unfairness in direct care workers receiving wages which do not reflect the value of their work.

19. If, contrary to the submissions made below, the Full Bench is persuaded that there is some practical difficulty with the interim increase commencing immediately from the date of the Commission's determination as a result of the nature of Commonwealth funding mechanisms, the prejudice which would otherwise be caused to employees should be addressed by the variations providing for back payment to employees at least to the date of the determination. That could be achieved through a number of mechanisms including:
- (a) the awards being varied with immediate effect, but for the liability to make payment of the higher rates of pay being deferred for a short transitional period such that employers are not required to actually make payments reflecting the increased rates of pay until the conclusion of the transitional period, but that the payments then required include backpay to the date of the determination; or
  - (b) the award being varied with effect from a future date, but for the award variations to require the payment, as wages, of a one-off lump sum calculated based on the difference between what the employee was actually paid and what they would have been paid had the rates been set properly at an earlier time: see approach with respect to workplace determinations in *Application by Parks Victoria* [2013] FWCFB 950 at [152].

### ***Commonwealth Funding***

20. On 16 December 2022, the Commonwealth filed submissions stating (at [4] of those submissions) that it supports the interim increase and is committed to funding the full 15 per cent interim increase to minimum award wages for direct care workers, including on-costs incurred by aged care providers, in all Commonwealth funded aged care. However, the Commonwealth indicated a present commitment to provide funding in two phases with the following timing:

- (a) an increase corresponding to a 10% increase in wages (including on-costs) from 1 July 2023; and
  - (b) an increase corresponding to a 5% increase in wages (including on-costs) from 1 July 2024.
21. The submission is effectively an argument for the Commission to determine a 10 per cent interim increase for some classifications only, as it might reasonably be thought that the final increases will be determined well in advance of 1 July 2024. Nothing in the Commonwealth's submission provides a proper basis to take such an approach, given the findings in the Decision concerning the undervaluation of the relevant work.
22. The Commonwealth has not filed any evidence explaining why or how it devised this approach or any economic basis for it. It has not addressed the fact that these are interim, rather than final increases. It has, however, made a number of – again unsupported – assertions in relation to how the funding regime will work to accommodate any award increases. In particular, the Commonwealth suggests (at [12] of the Commonwealth Submissions), that it is not feasible for a funding increase to be implemented prior to 1 July 2023 for three reasons:
- (a) The Commonwealth does not provide funding to directly fund wages and associated on-costs in the aged care sector;
  - (b) Because the interim increase will apply to direct care workers, some difficulty will be encountered in calculating the uplift required to fund the increase across the various aged care programs; and
  - (c) It is necessary to ensure that the increased funding is distributed accurately and that there are appropriate accountability mechanisms in place.
23. Leaving aside the absence of any evidence to support these assertions, the Commonwealth also does not explain, or provide any rationale for, its proposal that only 10 per cent of the interim increase should operate from 1 July 2023 and that the remaining 5 per cent should not commence until 1 July 2024.

24. The second supplementary report of Professor Kathy Eagar dated 20 January 2023 explains in more detail the funding arrangements presently in place with respect to residential aged care (now through the model known as the Australian National Aged Care Classification (**AN-ACC**)), Home Care Packages and the Commonwealth Home Support Program. The second supplementary report of Professor Eagar demonstrates, among other things, that:

(a) The role of the Independent Health and Aged Care Pricing Authority (**IHACPA**) with respect to aged care is advisory and the authority to make decisions with respect to pricing and funding rests with the Commonwealth Government;

(b) No changes are required to be made to legislation in order for the Commonwealth Government to increase payments to providers to cover pay increases or other costs and changes in prices may be implemented, where necessary, by administrative determination;

(c) The Commonwealth funds providers monthly in arrears;

(d) It is feasible for the Commonwealth to fund any increase awarded by the Commission prior to 1 July 2023 including by:

a. incorporating award increases into the AN-ACC starting price for residential care and incorporating award increases into the subsidy paid to each Home Care provider; or

b. for aged care providers to begin paying the increased rates of pay and to be reimbursed by the Commonwealth for the additional expenses (**Reimbursement Method**);

(e) The Reimbursement Method of providing additional funding to aged care providers has been used in the past, most recently in funding that is currently provided through the COVID-19 Aged Care Support Program, and systems are already in place to allow it to be used for the purpose of providing reimbursement for additional expenses; and



- (f) The Commonwealth has access to adequate information in relation to the staffing mix and staff profile for the purposes of preparing budget forecasts and determining the funding necessary to address increases in rates of pay in the aged care sector.
25. The Full Bench should not accept the unsupported assertions of the Commonwealth that it is not feasible to provide funding with respect to the interim increase prior to 1 July 2023. As has been observed, no justification is provided for the proposal to defer 5% of the interim increase until 1 July 2024. If the Commission were to accept the unsupported assertions of the Commonwealth, then the award rates should be varied as soon as possible and any delay in payments occasioned by delays in funding should be dealt with via a suitable backpay arrangement.
26. It is further significant that whilst the Commonwealth may prefer staged increases, the Commonwealth does not explicitly withdraw the commitment that it made in its submission on 8 August 2022, namely:
- However, as the primary funder of aged care services, the Government has committed to ensuring that the outcome of the aged care work value case is funded. The Commonwealth submits that the Commission can therefore proceed on the basis that the impact on business of significant increases to award minimum rates in the case will not be material.*
27. If the Commission determines that the increases are to take effect in advance of the Commonwealth's proposed timeline, and if the Commonwealth then departs from its commitment above, there will be some, rather than no, financial impact on employers. This is true of any variation to award minimum wages. It is not itself a justification for phasing. The position of the Commonwealth should not be accepted. Fundamentally, it would involve the Commission abdicating its powers to the Commonwealth; allowing the Commonwealth to control wage fixation in the industry rather than the Commission. Funding should react to the needs of the industry including wages, rather than the other way around.

28. As the Commission observes at [911] of the Decision, an impact on business is only one of the considerations that must be taken into account. The countervailing considerations in s.134(1) and s.284(1), in particular, the needs of the low paid, and the need to eliminate gender-based undervaluation of work, militate strongly in favour of the entire interim increase being given effect at the time of the determination. It is important to note that, given the Commission's findings, even if the entire amount of the interim increase were to be paid immediately, workers in receipt of such increases would still almost certainly be paid significantly less than the true value of their work.
29. It additionally is an approach which gives no weight to the needs of employees, who have, as the Commission has found, been unfairly remunerated since the inception of the relevant awards. This is particularly so in circumstances in which the Commonwealth's justification for a delay in increasing wages is:
- (a) nothing more than assertion; and
  - (b) not supported by the actual evidence before the Commission.

### **The modern awards objective**

30. The Full Bench has invited submissions with respect to whether making the interim increases to modern award minimum wages applicable to direct care workers is necessary to achieve the modern awards objectives and the provisional views outlined at [1001]-[1072] of the Decision and whether it is necessary to achieve the minimum wages objective and the provisional views outlined at [1073]-[1083] in the Decision.
31. The position of the HSU is that the interim increases are necessary to achieve the modern awards objective and the minimum wages objective having regard to the findings of the Full Bench, in particular that the work of direct care workers in residential and home care is significant undervalued and that work in feminised industries like care work has been historically undervalued. As has been observed,

in addition to the considerations referred to by the Full Bench, the new s.134(1)(ab) and s.284(1)(aa) also support the conclusion that variations to give effect to the interim increase are necessary to achieve the modern awards objective and the minimum wages objective respectively.

32. The HSU substantially relies on its earlier submissions in respect of the modern awards objective factors in s.134(1) and the minimum wages objective factors in s.284(1). In short, it contends that the award minimum rates of pay must be varied to include *at least* these interim increases if the Awards are to meet the modern awards objective.
33. At [1001]-[1072] of the Decision the Bench has set out various findings it has made and the provisional views in respect of the modern awards objective it has correspondingly formed. It is important to distinguish between the two. While it would not be appropriate for any party to attempt to re-run its case in respect of the former an invitation to comment in respect of the latter has been issued. By way of illustration, at [1030] in respect of s.134(1)(c) the Decision records:
  - (a) a finding that the proposed variations would not encourage collective bargaining; and
  - (b) a corresponding provisional view that this weighs *against* the variation of the relevant awards.
34. The first is a finding made on the basis of the cases already advanced, and is not amenable to further challenge. The latter, as the HSU understands it, is the Full Bench's provisional view as to the *significance* of that finding to the overall evaluative exercise. The invitation to put forward further submissions is directed only at the latter.
35. With respect of provisional views expressed by the Full Bench, the HSU agrees with each of them subject to the following comments.

*The need to promote collective bargaining*

36. As to the consideration of s.134(1)(b) at [1030] of the Decision, it does not follow from a finding that the variations would not encourage collective bargaining that the factor necessarily weighs *against* variations being made to give effect to the interim increase. Section 134(1) is an indicative list of considerations that may or may not be significant in any given application, not a list of criteria each of which must necessarily be satisfied.
37. If the Bench had accepted the employer's claim (as summarised by the Full Bench at [1021]) that the variations would '*create a disincentive*' to collective bargaining, this would weigh against the variations being made; however, it has not done so. In circumstances where the true finding appears to be that the variations will have no real impact on bargaining, s.134(1)(b) is more correctly considered a neutral consideration. At most, it could be said that the consideration in s.134(1)(b) does not support the variations: see, for example, *Re General Retail Industry Award 2010* [2020] FWCFB 3427 at [65] and *Re Horticulture Award 2020* [2021] FWCFB 5554 at [484]. The factor does not 'weigh against' variations being made to give effect to the interim increase.

*Equal remuneration for work of equal or comparable value*

38. At [1048], the Decision records the Full Bench's findings that the variations sought would as a matter of fact:
- (a) address historical gender-based undervaluation of the work;
  - (b) have a beneficial effect on the gender pay gap; and
  - (c) otherwise promote pay equity.
39. The more contentious issue addressed by the Full Bench concerned the proper construction and application of s.134(1)(e) and s.284(1)(d). As the Full Bench observes at [1050]-[1061] of the Decision, there is something of a tension between

the various approaches historically taken to these subsections, that is, whether the subsections:

- (a) direct attention at the general *principle* of pay equity; or
- (b) are, as appears to have been said in the *Teachers' Case*, relevant only where there is a direct male *comparator* (which is not present in this case).

40. It should be observed that, while the Full Bench in the Teachers Case did indeed conclude that s.134(1)(e) was not '*relevant*' because it would not equalise wages of workers in the sector with any other group of male workers, the decision itself does not elaborate *why* this was so and it does not appear to have been the subject of detailed argument. It is worth noting that that matter involved a concurrent application for an equal remuneration order, which involved a high degree of focus on whether there was an available male comparator, which has at least potentially coloured the approach to s.134(1)(e).
41. The former approach – that is, that s.134(1)(e) is directed at the broader *principle* of gender-neutral remuneration – is more consistent with the approach generally taken by the Commission, as the Decision sets out. It is also a more comfortable fit within a section directed at broad evaluative considerations than the kind of case-by-case analysis the narrower view requires. To increase wages for a group of employees who are subject to historical gender-based undervaluation or in a manner which would have a beneficial effect on the gender pay gap or gender pay equity would be consistent with the principle of equal remuneration for men and women workers for work of equal or comparable value.
42. It is, however, no longer necessary to resolve the issue. As set out above, s.134(1)(e) and s.284(1)(d) have been repealed and replaced with s.134(1)(ab) and s.284(1)(aa) respectively. Both those subsections expressly require the Commission to take into account the need to eliminate gender-based undervaluation of work and, in the case of s.284(1)(aa), addressing gender pay gaps. Those subsections now make plain that, to be relevant to the variation of a modern award or modern award minimum wages, it is unnecessary for the Commission to consider whether a

relevant male comparator group has been identified. In light of the findings set out at [1048] of the Decision, the considerations under s.134(1)(ab) and s284(1)(aa) strongly weigh in favour of the variations being necessary to achieve the modern awards objective.

*The impact of the variations on business including on productivity, employment costs and the regulatory burden*

43. The Commonwealth's new position in relation to funding means that the variations might have a cost impact on business in the event that, ultimately, the Commonwealth does not provide funding sufficient to support the interim increase in a manner that aligns with the commencement of the interim increase. As set out above, this is the consequence of any award variation.
44. As recorded in the Decision at [1066], the employer parties have submitted that there is a current gap between the level of funding that is provided by governments and the cost of the care that Commonwealth regulations require. Some not-for-profit operations operate at a deficit as a result. For-profit operations have remained able to operate at a profit.
45. Assuming that gap to exist, as a matter of logic an increase to the cost of that care (that is, labour costs) would, without a corresponding increase to Commonwealth funding, increase that gap: that is, these businesses will be more expensive to operate. Notwithstanding the doom foreshadowed in the employer parties' previous submissions, this is as far as the matter goes.
46. As recorded in the Decision at [911]-[915], the Commission has previously made clear that decisions of government in relation to funding in the social services sector cannot be treated as determinative of the quantum or timing of increases in award minimum wages. In *SCHADS 4 Yearly Review Substantive Claims decision* [2019] FWCFB 6067, the Full Bench said (at [138]):

*The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.*

47. In any event, a consideration of s.134(1)(f) is not confined to an examination of the costs incurred by business. As explained by Professor Eagar in her second supplementary report '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'. Any increase in minimum wages will assist in attracting and retaining workers in the aged care sector as recognised in the Decision at [1039] and have, in that manner at least, a positive impact on business.
48. The impact on business should, at its highest, be regarded as a minor factor weighing against the increases sought if there is some gap between the timing of Commonwealth funding and the commencement of the interim increase determined by the Full Bench. It is outweighed by the countervailing considerations including, critically, the need for these workers to be paid amounts reflecting the true value of the work they perform, and to remove gender-based undervaluation of their work.

### **The minimum wages objective**

49. In respect of the provisional views as to the minimum wages objective, the HSU:
  - (a) repeats its submissions above in respect of s.134(1)(e) and 284(1)(d); and
  - (b) otherwise agrees with the provisional views.

**MARK GIBIAN SC** | H B Higgins Chambers

**LISA DOUST** | 6 St James Chambers

**LEO SAUNDERS** | Greenway Chambers

Dated: 20 January 2023