

FAIR WORK COMMISSION

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

S 158 – APPLICATION TO VARY OR REVOKE A MODERN AWARD (AGED CARE AWARD 2020);

S 158 – APPLICATION TO VARY OR REVOKE A MODERN AWARD (NURSES AWARD 2010)

s 158 APPLICATION TO VARY OR REVOKE A MODERN AWARD (SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010)

AGED CARE WORK VALUE

SUBMISSIONS IN RESPECT OF STAGE 2

Introduction and summary

1. On 16 December 2022 the Australian Commonwealth Government (**the Commonwealth**) filed Submissions in relation to this matter urging FWC to adopt a timeframe in relation to the necessary improvements to wages and employment conditions in the aged care sector¹ (**the Commonwealth's Submissions**). The Commonwealth's submissions cause UWU members significant concern. On the Commonwealth's timeframe:
 - a. no improvement to wages in the aged care sector will occur until 1 July 2023;
 - b. the improvement to wages it envisages on 1 July 2023 is only a part-payment (10 per-cent) and the full *interim* increase found by FWC to be necessary will not take effect until 1 July 2024;

¹ Submissions of the Commonwealth, 16 December 2022

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- c. the extension of these increases to Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers remains unaddressed (and are perhaps opposed);
 - d. the extension of these increases to other aged care employees remain the subject of a further process before FWC to occur sometime in 2023 (and are perhaps also opposed).
2. In these submissions, UWU submits:
- a. The interim increases to modern award minimum wages granted in the decision of FWC on 4 November 2022 December² (**the 4 November 2022 Decision**) are necessary to achieve the modern award objectives;
 - b. The Commonwealth's timeframe for the timing and phasing in of the interim increase to modern award minimum wages should not be adopted and instead the increase should be implemented in full as soon as possible, from the date the determination is made. In the alternative, if the FWC decides in favour of some further time for implementation, that any order requires back payment to the date that the determination is made.³
 - c. The amendments to the *Fair Work Act 2009* (**the Act**) arising from the *Fair Work (Secure Jobs, Better Pay) Bill 2022* have the effect of making the FWC's 4 November 2022 December decision even more compelling, and its implementation more urgent.
 - d. The interim increases to modern award minimum wages should be implemented with respect to Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers at the same time as the interim increase is implemented with respect to Direct Care Workers;
 - e. FWC should carry out the process known as "Stage 3" as urgently as possible, to determine, among other things, whether the increase to modern award minimum wages having application to direct care workers should also be applied to other aged care staff.

² [2022] FWCFB 200

³ Per HSU Submissions in Respect of Stage 2, at [19].

Context of these submissions

3. On 23 November 2022 FWC issued a Statement⁴ (**the 23 November 2022 Statement**) in relation to this matter which included Directions as to its further conduct. On 6 December 2022 FWC issued Amended Directions which included the following (**the Amended Directions**):
 - a. By 5 pm on Friday, 20 January 2023 (AEDT), the Applicant Unions, Joint employers and other interested parties will file submissions and evidence regarding:
 - i. the matters set out at paragraph [3] of the 23 November 2022 Statement (namely, the timing and phasing in of the interim increase to modern award minimum wages applicable to direct care workers arising from the 4 November 2022 Decision, and whether making the interim increases to modern award minimum wages applicable to direct care aged care employees is necessary to achieve the modern award objectives and the provisional views outlined in the 4 November 2022 December Decision at [1001]-[1072] and [1073]-[1083]).
 - ii. four matters, together with any other provisions that have commenced and that the parties consider relevant to State 2 of these proceedings, namely:
 1. amendments to the object of the *Fair Work Act 2009* to include reference to the promotion of job security and gender equity;
 2. 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;
 3. amendments to the minimum wages objective to include gender equality considerations including ensuring equal remuneration

⁴ [2022] FWCFB 214

for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps;

4. 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.

- iii. If relevant, paragraph [10] of the 17 November 2022 Statement (consultation in respect of increases to minimum wages for Head Chefs/Cooks and Recreational Activities Officers / Lifestyle Officers).

4. These submissions are made in relation to the Amended Directions. The UWU has also had the benefit of viewing the Submissions of the Health Services Union (**HSU**) in respect of Stage 2.

The Secure Jobs Better Pay amendments

5. The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth) (**the Amendment Act**) was passed by Parliament on 2 December, with Royal Assent on 7 December 2022.
6. Relevant to these proceedings, the Amendment Act introduces a number of provisions that require the FWC to consider gender equity, gender-based undervaluation, job security and gender pay gaps in respect of any modern award variation that takes place after 7 December 2022.
7. The Amendment Act:
 - a. Amended paragraph 3(a) of the *Fair Work Act 2009* (the Act) to include reference in the Objects of the Act to "*promote job security and gender equity*";
 - b. Amended subsection 134(1) of the Act to include reference in the Modern Award Objective to new paragraphs 134(1)(aa) and 134(1)(ab), as follows:

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(aa) the need to improve access to secure work across the economy; and

(ab) the need to achieve gender equity in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and

- c. Amending subsection 284(1) of the Act to include reference in the Minimum Wage Objective to new paragraphs 284(1)(aa), namely “*the need to achieve gender equity, 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. Amending section 157 of the Act to include new subsection 157(2B), which states that:

The FWC's consideration of work value reasons must:

(a) be free of assumptions based on gender; and

(b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

- 8. The Commonwealth has made a number of submissions regarding the operation of the Amendment Act.⁵ UWU agrees with this submission generally, except in so far as they are relevant to the timing of the implementation of the interim increase.
- 9. For the reasons discussed below, the Amendment Act supports both the interim increase, but also a timely implementation of the interim increase.

The interim increase is necessary to achieve the modern awards objective

- 10. At [1012] of the *4 November 2022 Decision* FWC expresses a provisional view that the consideration in s 134(1)(a) of the Act– relative living standards and the needs of the low paid – weigh in favour of the decision to award the interim increase. UWU supports this provisional view.

⁵ See [37] to [69] of the Submissions of the Commonwealth of 16 December 2022 in respect of Stage 2.

11. At [1030] of the *4 November 2022 Decision* FWC expresses a provisional view that the consideration in s 134(1)(b) of the Act – the need to promote collective bargaining – weighs against the decision to award the interim increase. UWU does not support this provisional view.
12. In arriving at this provisional view, FWC refers to but does not specifically address submissions made by ANMF that an increase in minimum wage rates would increase the incentive or necessity to negotiate enterprise-specific trade-offs and productivity benefits⁶. FWC observes that the proposition “*that increasing minimum wages may encourage collective bargaining on matters other than pay seems to us to be somewhat optimistic and speculative*”⁷.
13. While UWU accepts the difficulty in the predicative exercise required by s 134(1)(b) and that perhaps, at best, the factor will always be finely balanced, we respectfully submit FWC’s observation gives too short shrift to the ANMF submission – that an increase in minimum wage rates in the aged care sector would incentivise the negotiation of enterprise trade-offs and productivity benefits. Plainly, low rates of pay prevail in the aged care sector⁸. In a manner of speaking, there is nothing to bargain with.⁹ A finding – that an improvement in minimum rates of pay with concomitant improvements in funding will provide more scope for industrial parties operating in the sector to engage in collective bargaining – would not be a speculative finding – it is entirely consistent with the evidence before FWC. UWU submits this finding should be made, and that it tips the balance in respect to the s 134(1)(b) in support of the variation of the Awards to give effect to the interim increase.
14. At [1040] of the *4 November 2022 Decision* FWC expresses a provisional view that the consideration in s 134(1)(c) of the Act – the need to promote social inclusion through increase workforce participation – weighs in favour of the decision to award the interim increase. UWU supports this provisional view.

⁶ ANMF Form 46 Application to vary a modern award (AM2021/63) dated 17 May 2021 at [27]; *4 November Decision* at [1015]

⁷ *4 November Decision* at [1029]

⁸ *4 November Decision* at [1012]

⁹ See, for example the Statement of Christine Spangler of 29 October 2021 at [42], Trial Book p. 15722 regarding the difficulties of bargaining; the Statement of Kevin Crank of 29 October 2021 at [11]-[14] regarding wages, Trial Book p. 13458; the Expert Report of Dr Sara Charlesworth at [39], Trial Book p. 7168; Statement of Christopher Friend at [1], Trial Book p. 11805.

15. At [1063] of the 4 November 2022 Decision, FWC invites further submissions from the parties on the proper construction of ss 134(1)(d) and s 284(1)(d) of the Act - the principle of equal remuneration for work of equal or comparable value.
16. The FWC notes a number of matters at [1048] to [1052] and expresses *provisional views* between [1053] to [1063]. It is also notable that the 4 November 2022 Decision pre-dates the Amendment Act and changes to the modern award objectives and similar.
17. The UWU agrees with the observation of the FWC at [1057] that “*If the principle in ss.134(1)(e) and 284(1)(d) were to be confined to the circumstance suggested in the Teachers Decision, it would seem to have very little work to do*”. The UWU agrees with the provisional views expressed between [1053] to [1063].
18. To the extent necessary to satisfy the modern award objective, it is open to and the FWC should depart from the earlier decisions of the FWC in respect to the proper construction of ss 134(1)(d) and s 284(1)(d) of the Act. Indeed, in the context of the Amendment Act, the continued application of the *Teachers Decision*, the *Equal Remuneration Decision 2015* and the *Annual Wage Review 2021-22* (and similar) in respect of s 134(1)(e) and 284(1)(d) would be inconsistent with the new ss 134(1)(aa) and 134(1)(ab) and s284(1)(aa).
19. In this matter the FWC has already made findings that gender based undervaluation of work exists. The FWC has already made findings, consistent with the evidence of experts such as Dr Charlesworth and Associate Professor Junor, that many of the ‘hidden skills’ have not factored into the valuation of the work, nor has such work been properly valued. Were the FWC to simply perform the “*comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees*’ explained by the Full Bench in the *Equal Remuneration Decision 2015* [2015] FWCFB 8200¹⁰, it is our respectful submission that the Commission would fall into error. In such circumstances, the FWC would potentially be comparing properly valued worked (the male work) with aged care work that has not been properly valued. It would not be comparing like, with like. Indeed, it would have the effect of perpetuating

¹⁰ Cited with approval in the *Annual Wage Review 2017-18* [2017] FWCFB 3500 at [34], and endorsed in the *Annual Wage Review 2021-22* [2022] FWCFB 3500.

the gender pay gap because of the historical undervaluation of work in aged care – that is, it would cement the existing pay disparity based on gender.

20. The FWC should instead adopt a broader interpretation of s 134(1)(e) and s 281(1)(b) because it would be consistent with, or ‘promote’ or ‘further’ *‘the principle of equal remuneration for men and women workers for work of equal or comparable value’*, as discussed at [1059].
21. The timely implementation of the interim wage increase would have the effect of reducing the gender pay gap sooner, and in this respect be consistent with the modern award objectives of s 134(1)(e) and s 281(1)(b). It would also benefit female participation in the workforce.
22. The new ss 134(1)(ab) and 284(1)(aa) support the above approach, as these subsections require as part of the modern award objective and the minimum wage objective that the FWC consider *‘the need to achieve gender equity 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’*. Again, the timely implementation of the interim wage increase would be consistent with both this modern award objective and the minimum wage objective.
23. In respect of the operation of s 134(1)(ab) and s 281(1)(aa) the UJU agrees with the Submission of the HSU in respect of Stage 2 at [7] - [11], and [38] – [42].
24. In the *4 November 2022 Decision*, FWC was unable to reach a concluded view on its consideration of s 134(1)(f) of the Act – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden¹¹.
25. As noted by the FWC in the *4 November 2022 Decision* *‘the extent of the Commonwealth funding to support the increase in minimum wages arising from the proceedings is unknown at present. It follows that we are unable to reach a concluded view on our consideration of s.134(1)(f) at this time’*.¹²

¹¹ *4 November 2022 Decision* at [1067]

¹² *Ibid.*

26. The Commonwealth's submissions indicate that it "*is committed to funding the interim increase in relation to Commonwealth funded aged care*".¹³ The effect of funding on business should therefore be seen to be negligible. It is therefore difficult to arrive at a position other than that the consideration in s 134(1)(f) is neutral as regards interim increase (factors associated with the timing of the increase and the relevance of s 134(1)(f) to those matters are dealt with below).
27. At [1072] of the 4 November 2022 Decision, FWC expresses the view that the consideration in s 134(1)(h) of the Act is neutral, as it is not persuaded that varying the relevant Awards to give effect to the interim increase will have any material effect on the national economy. UWU previously made submissions in relation to s 134(1)(h)¹⁴ but does not seek to press this position, noting the provisional views of the FWC.

The interim increase is necessary to achieve the minimum wages objective

28. At [1073]-[1083] of the 4 November 2022 Decision FWC notes that there is much overlap between the minimum wages objectives and the modern award objectives, and makes a number of provisional views, which correlate to the various modern award objectives. The UWU agrees with this approach.
29. As mentioned at paragraph 8(c), above, the Amendment Act introduces a new minimum wages objective that was not in operation when the 4 November 2022 Decision was issued, namely s 284(1)(aa) which includes "*the need to achieve gender equity, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps.*"
30. Section 284(1)(aa) operates similarly to the new s 134(1)(ab), and in this respect UWU restates our submissions in paragraphs [15] to [23], above.

The increase should be implemented from the date of the determination

31. The Commonwealth submits that the variations to the relevant Awards necessary to give effect to the interim increase should be phased in over two instalments: (a) an increase of 10 per cent from 1 July 2023 and (b) an increase of 5 per cent from 1 July

¹³ Submissions of the Commonwealth of 16 December 2022 in respect of Stage 2 at [8].

¹⁴ In particular, see UWU Reply Submissions of 19 August 2022 at [18].

2024¹⁵. UWU opposes this submission and submits that the variations to the relevant Awards should be made effective from the first pay period on or after the date of the determination.

32. If the FWC is of the view that there are practical difficulties with immediate implementation, then the UWU supports the position outlined by the HSU at [19] of their Submissions.
33. The Commonwealth's submissions are noticeably silent on why there is a need to implement the 15% interim wage increase in stages – and in particular why the remaining 5% should not be paid until 1 July 2024. The Commission should not be satisfied that there is a need to phase in the interim increase, particularly when factoring in both the modern award objectives and the minimum wage objectives.
34. Section 166 of the Act provides that variation determinations varying modern awards generally come into operation on 1 July in the next financial year after the determination is made, unless FWC considers it appropriate to specify another day. Consistent with the relevant authorities, the Commonwealth concedes that the presumption inherent in this provision is not difficult to displace¹⁶.
35. In considering whether it is appropriate to specify another day, “fairness” is a key factor¹⁷. In this regard, a particular focus should be had on the considerations at s 134(1)(a) – the needs of the low paid; and s 134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and s 134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards¹⁸. In addition to the matters identified in the *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001, consideration should also be given to the new provisions, s 134(1)(aa) the need to improve access to secure work; s 134(1)(ab) the need to achieve gender equity.

¹⁵ The Commonwealth's Submissions of 16 December 2022 at [5], [27] and [31]

¹⁶ Submissions of the Commonwealth of 16 December 2022 at [26]; *Australian Workers Union* [2022] FWCFB 4 at [154]; *4 November Decision* at [982].

¹⁷ *4 November Decision* at [984]; *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001 at [69] (the *Penalty Rates Transitional Decision*)

¹⁸ *Penalty Rates Transitional Decision* at [143]

36. The Commonwealth submissions appear to consider the impact on business the dominant factor and thus argues the variation to the awards should be aligned to its funding commitment, resulting in an impact on business and employer costs that is “minimal”¹⁹.
37. In this proceeding, most of the award classifications which will be the subject of the interim increase are low paid²⁰. Further, the FWC has already made findings of gender-based undervaluation of work.
38. We note that the determination of transitional arrangements requires the exercise of board judgement and is not a formulaic or mechanistic exercise involving the quantification of the weight accorded to each particular consideration²¹.
39. However, the Commonwealth’s position appears to give *no weight* to the needs of the low paid, to job security or to gender equity, in relation to the consideration of whether it is appropriate to deviate from the presumption in s 166, that the variation to give effect to the interim increase should take effect from the next 1 July date.
40. In respect of objectives of gender equity, for the reasons outlined in [15] – [23], it is appropriate to deviate from the presumption of s 166 to implement the interim increase as soon as possible.
41. In respect of the objectives concern the needs of the low paid and job security, regard should be had to the considerable evidence before the FWC about retention and workforce issues.
- a. The report authored by the Committee for Economic Development of Australia (**CEDA report**) found:

“Improving the quality of care for older generations is not only a social imperative, but also an economic one. The sector currently receives more than \$22 billion of government funding per year, supports more than 7.3 million people receiving some form of care service’ and employs more than 360,000 people.”²²

¹⁹ Commonwealth’s Submissions of 16 December 2022 at [32]

²⁰ *4 November Decision* at [1012]

²¹ *Penalty Rates Transitional Decision* at [142]

²² Reply Witness statement of Lauren Elizabeth Beamer Hutchins, LH-12, “Introduction”

- b. The CEDA report also found that by 2030 there will be a shortfall of at least 110,000 workers in the aged care sector if the workforce expands at its current pace and 17,000 more direct aged care workers are required each year to meet basic standards of care.²³
- c. In its Final Report, the Royal Commission into Aged Care Quality and Safety said:

“There are other reasons why the sector as a whole has had difficulties attracting and retaining well-skilled people to work in aged care. These include low wages and poor employment conditions, lack of investment in staff and, in particular, staff training, limited opportunities to progress or be promoted, and no career pathways.”²⁴

- 42. Delay in the implementation of any increase, as proposed by the Commonwealth, will compound the retention and workforce issues. In contrast, the implementation of the increase from the first full pay period after the date of the determination will have a positive effect on attraction and retention of employees, in circumstances where that sector is critical to the sustainability and performance of the national economy, while meeting the needs of the low paid pursuant to s 134(1)(f), by increasing wages appropriately to the value of work performed, and providing improved job security.
- 43. In *ALHMWU re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates*²⁵ (the **ACT Child Care Decision**) FWC said:

“We accept that aligning these key classifications in the manner proposed will, of itself, result in significant wage increases. This is evident from the analysis at Table 14 on page 45 of our decision. The employers' contend that increases of this magnitude will result in increases in child care fees. In this context it is suggested that such fee increases will put Commonwealth funded child care out of the reach of many families leading to an increase in backyard operators. Such a development is said to be a consideration which weighs against granting the union's claim. Implicit in this proposition is the notion that the

²³ Above n 17, at [50].

²⁴ Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect, Volume 2, section 4.10, p.213

²⁵ [2005] AIRC 28, PR954938 at [368] – [374]

provision of appropriately accredited child care is in the public interest. We accept the premise upon which this argument is put. The review of the evidence in section 5 of our decision makes a number of findings relating to the link between quality child care and subsequent development. In particular we have concluded that the available research supports the proposition that the provision of quality child care is directly related to better intellectual/cognitive and social/behavioural outcomes in children. The quality of care, and hence outcomes for children, is positively related to the level of the qualifications of the staff working with children. The available research also suggests that money directed to the early years of children's development results in positive long term outcomes and is cost effective.

But in our view the fact that wage increases will lead to fee increases and hence there will be less access to accredited child care is only one consideration. And, of course the question of where the public interest lies in a particular matter will often depend on balancing interests, including competing interests. The whole of the circumstances in a particular matter must be weighed in order to determine where the public interest lies. Two other general considerations are also relevant.

The first relates to the Commission's statutory obligation to establish and maintain "fair minimum wages". In setting such wage rates the WR Act and general principle requires the Commission to have regard to the skill responsibility and the conditions under which the work is performed. The Commission's approach to the proper fixation of minimum rates is dealt with at section 4 of our decision.

A consequence of the employer's contentions is that the minimum award rates applicable to child care workers would be set at a level which is below that applicable to comparable classification levels (in terms of AQF qualification levels) in other awards. Such an outcome is neither fair nor equitable.

Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer's submissions the conditions under which the work of child care workers is performed do not warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the

case. *Child care work is demanding, stressful and intrinsically important to the public interest.*

The second general consideration concerns the consequences of not properly fixing the rates of pay for the employees affected by these applications. We have already made findings about the critical shortage of qualified employees in the child care sector and that this impacts on the ability of child care services to meet minimum legislative and quality standards. The shortage of qualified staff has the potential to jeopardise the future of quality child care in Australia. Further, we have found that limited career path options and low pay have contributed to the current recruitment and retention problems.

Failing to properly fix the minimum rates of pay for child care workers will only exacerbate these problems. In this context we note the following observations from the Think Tank Report:

"It is an irony that at the time when we understand more about the early years of a child's development, and the contribution that high quality care can make, we also have a lack of qualified workers to support the provision of care."

44. In the *Penalty Rates Transitional Decision*, FWC said:

"The Commission's statutory obligation is to give effect to the modern awards objective – to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. We have concluded that the existing Sunday penalty rates in the Hospitality, Fast Food, Retail and Pharmacy Awards do not achieve the modern awards objective, because among other things, the existing Sunday penalty rates in these awards overcompensate employees for the disutility of Sunday work. Given this conclusion, we are not satisfied that it is appropriate to impose any further delay in the implementation of our decision."²⁶

45. In the *4 November 2022 Decision*, FWC determined that *"in respect of direct care workers in the residential and in-home aged care sector that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of*

²⁶ *Penalty Rates Transitional Decision* at [138]

*the work performed.*²⁷ This determination is made in the context of a finding that the rates of pay in the relevant awards have not been properly fixed²⁸.

46. UWU submits that:

1. A decision to make a variation to the relevant awards operative from 1 July 2023, and not to determine it appropriate to operationalise the variation at an earlier date gives no weight to the needs of the low paid, job security and pay equity and is not consistent with fairness.
2. The approach taken in the *Penalty Rates Transitional Decision* – where FWC had found a variation to the Award was necessary to ensure the award provided a fair and relevant safety net – is apposite to the approach FWC should take in this matter, where it has determined that in respect of direct care workers in the residential and in-home aged care sector that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed. If the variation to the awards is not made until 1 July 2023, direct care workers in the aged care sector will continue to perform work for compensation less than the value of the work performed for a period of more than six months.
3. The approach taken by FWC in the *ACT Child Care decision*, where the consequences of not properly fixing rates of pay in the sector over staff shortages is apposite in this matter, where significant material is before FWC showing a significant workforce crisis in the sector caused at least in part by low wages.
4. The existing cases do not consider the new modern award objectives or minimum wage objectives from the Amendment Act.
5. There is no evidence before the FWC that supports the need for a phased in implementation of the interim wage increase.

47. For the reasons outlined above, the FWC should implement the interim wage increase from the date of the determination.

²⁷ 4 November 2022 Decision at [931]

²⁸ 4 November 2022 Decision at [353] and [354]

Head Chefs/Cooks/ Recreational /Lifestyle Officers

48. At [1093] of the *4 November 2022 Decision* in respect of Head Chefs/Cooks, the parties were directed to "*confer in respect of this issue and if they are able to agree upon the quantum of an interim increase and the classification(s) to which it applies, we will give consideration in Stage 2 to determining an interim increase for these employees.*"
49. Similarly, at [1094] of the *4 November 2022 Decision* in respect of Recreational Activity Officers/Lifestyle Assistants, the parties were directed to "*confer in respect of this issue and if they are able to agree on the quantum of an interim increase, we will give consideration in Stage 2 to determining an interim increase for these employees.*"
50. The parties to this matter have conferred in relation to the above.
51. On 16 December 2022 a Joint Statement was filed with the Fair Work Commission, which was supported by:
 - a. Aged & Community Care Providers Association (ACCPA);
 - b. Anglicare Australia Australian Nursing and Midwifery Federation (ANMF);
 - c. Baptist Care Australia Catholic Health Australia Council of the Aged (COTA);
 - d. Health Services Union (HSU);
 - e. Older Persons Advocacy Network (OPAN);
 - f. The Australian Workers' Union Queensland Branch;
 - g. UnitingCare Australia; and
 - h. United Workers Union (UWU).
52. The Joint Statement at [3] noted that:

"The classifications of Recreational Activities Officers and 'head chefs and head cooks' (the latter being employees in the food services stream of the Aged Care Award 2010 at Aged care employee levels 4 to 7) should also have a 15% interim increase applied to their pay rates at the same time as the Direct Aged Care Workers. These classifications were not included in the definition of Direct Aged Care Workers by the Fair Work Commission other than those

Recreational Activities Officers who are classified and paid as Direct Aged Care Workers under the Award.”

53. The Commonwealth has not provided a formal response to the above.
54. At [1093] and [1094] the FWC indicated that if parties could not agree then any wage increase for Head Chefs/Cooks/RAOs would be dealt with in Stage 3. Given the agreement reached between Unions and the majority of employers, the UWU respectfully submits that the FWC should instead make a decision regarding the interim wage increase to apply to Head Chefs/Cooks/RAOs before Stage 3, consistent with the Joint Statement. Namely, that the classifications of Recreational Activities Officers and ‘head chefs and head cooks’ (the latter being employees in the food services stream of the Aged Care Award 2010 at Aged care employee levels 4 to 7) should also have a 15% interim increase applied to their pay rates at the same time as the Direct Aged Care Workers. Such a determination would be consistent with the modern award objectives and the minimum wage objectives, outlined above.

Conclusion

55. In summary, the UWU submits that:
 - a. The interim wage increases for direct care workers in both the *Aged Care Award 2010* and *Social, Community, Home Care and Disabilities Award 2020* should be implemented as soon as possible, from the first full pay period after the determination is made.
 - b. The interim wage increase should not be phased in.
 - c. The interim increases to modern award minimum wages should be implemented with respect to Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers at the same time as the interim increase is implemented with respect to Direct Care Workers.
 - d. FWC should carry out the process known as “Stage 3” as urgently as possible, to determine, among other things, whether the increase to modern award

minimum wages having application to direct care workers should also be applied to other aged care staff.

**Filed on behalf of the
United Workers Union
20 January 2023**