



President's statement

Expert Panels - Provisional Views

Justice Hatcher, President

Melbourne, 24 February 2023

[1] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) amends the *Fair Work Act 2009* (Cth) (Fair Work Act) to establish new Expert Panels within the Commission. The amendments will commence on 6 March 2023 if not proclaimed to commence earlier.

[2] In my [statement](#) of 3 February 2023, I set out the Commission's plan for implementation of the new Expert Panel provisions. I also noted that the Secure Jobs, Better Pay Act provides that the new Expert Panel provisions will apply to matters already before the Commission, and that the Commission is undertaking an audit to identify matters currently before the Commission that may require an Expert Panel to be constituted.

When is an Expert Panel required?

[3] The three new Expert Panels are:

- an Expert Panel for pay equity (s 620(1B))
- an Expert Panel for the Care and Community Sector (s 620(1C)), and
- an Expert Panel for pay equity in the Care and Community Sector (s 620(1D)).

[4] An Expert Panel for pay equity must perform the following functions:

- making a determination under s 157(2) (a determination varying modern award minimum wages for work value reasons), other than one that the President considers might relate to the Care and Community Sector, "*if the President considers that substantive gender pay equity matters might require the making of [such] a determination*"; and
- making an order under s 302 (an equal remuneration order), other than one relating to the Care and Community Sector (new ss 617(6)-(7)).

[5] An Expert Panel for the Care and Community Sector must perform the function of making a determination under s 157(1) (a determination making, varying¹ or revoking a modern award) that the President considers might relate to the Care and Community Sector (new s 617(8)).

¹ Other than varying minimum wages or a default fund term.

[6] An Expert Panel for pay equity in the Care and Community Sector must perform the following functions:

- making a determination under s 157(2) (a determination varying modern award minimum wages for work value reasons) that the President considers might relate to the Care and Community Sector; and
- making an order under s 302 (an equal remuneration order) that the President considers might relate to the Care and Community Sector (new ss 617(9)-(10)).

[7] The new provisions do not define the terms “*substantive gender pay equity*” or “*Care and Community Sector*”.

[8] The Revised Explanatory Memorandum at [380] states:

“The ‘Care and Community Sector’ includes the aged care, early childhood education and care and disability care sectors. This is not intended to be an exhaustive list.”

[9] In relation to “*substantive gender pay equity matters*”, the Revised Explanatory Memorandum at [381] states:

“Without limiting the factors that the President may take into account when considering whether substantive gender pay equity matters might require the making of a determination, they may include whether it relates to work that is performed in a female dominated industry, sector or occupation.”

[10] The Senate Supplementary Explanatory Memorandum (at [4] on p.2) explains the purpose of the words “*that the President considers might relate to*” in ss 617(6)-(10):

“This would make it clear that it is for the President to make an assessment as to whether a particular matter might relate to the Care and Community Sector, such that those subsections would require a determination, modern award or equal remuneration order made in respect of that matter to be made by an Expert Panel constituted for that purpose.”

[11] New s 617(10A) provides that, for the purposes of new ss 617(6)-(10), if the President considers that an equal remuneration order, determination or modern award might relate to the Care and Community Sector, then it does not matter if the President considers it might also relate to another sector.

Audit completed and provisional views

[12] Staff of the Commission have now completed an audit of all applications to vary a modern award pursuant to s 157 currently before the Commission.

[13] There are no equal remuneration applications currently before the Commission.

[14] There are at least some matters currently before the Commission which may need to be referred to an Expert Panel once the amendments commence. I propose to express provisional views about which matters will require referral and the category of Expert Panel to which they must be referred, and then provide interested parties with an opportunity to comment. Parties making new applications to make or vary a modern award or for an equal remuneration order after the amendments commence will be asked to indicate in the application form whether their application relates to the Care and Community Sector or to substantive gender pay equity matters.

[15] It is my *provisional* view that once the amendments commence, the following matters must be dealt with by an Expert Panel for the Care and Community Sector. Each of these applications seek to vary modern awards which appear to cover parts of the Care and Community Sector but do not involve issues of work value or substantive gender pay equity:

- AM2023/2 – Application by Mental Health Australia to vary the *Social, Community, Home Care and Disability Services Industry Award 2010*.
- AM2022/28 – Application by the Indigenous Education and Boarding Australia to vary the *Educational Services (Schools) General Staff Award 2020*.
- AM2020/6 – Application by the Federation of Parents & Citizens Associations of New South Wales to vary the *Educational Services (Schools) General Staff Award 2020*.

[16] It is my *provisional* view that once the amendments commence, the following matter must be dealt with by an Expert Panel for pay equity in the Care and Community Sector:

- AM2020/99, AM2021/63 and AM2021/65 – Aged Care Work Value Case.

[17] In respect of matter AM2022/29 – Review of superannuation clauses in all modern awards, this will necessarily encompass awards covering the Care and Community Sector. However, while it is likely that the matter will result in determinations being made to vary awards, including those awards covering the Care and Community Sector, it is not yet apparent that this will require the exercise of power under s 157(1) and it is more likely that the determinations would ultimately be made under s 160. Accordingly, my *provisional* view is that it is not yet necessary to refer this matter to an Expert Panel for the Care and Community Sector.

[18] I have not formed any *provisional* view as to whether AM2022/34 – Application by The Association of Professional Engineers, Scientists and Managers, Australia to vary the *Pharmacy Industry Award 2020*, which seeks an increase to the rates of pay for pharmacy interns for work value reasons not said to be related to gender pay equity, relates to the Care and Community Sector. I would be assisted by submissions from interested parties about this issue.

[19] Interested parties are invited to comment on the *provisional* views in paragraphs [15], [16] and [17] above, and to make submissions as to the matter identified in paragraph [18].

Parties are also invited to identify any other matter currently before the Commission that they consider may need to be referred to an Expert Panel. Any comments should be sent to awards@fwc.gov.au by **4:00 pm (AEDT) on Friday, 3 March 2023**.

PRESIDENT