

FAIR WORK COMMISSION

MATTER NUMBERS AM2020/99; AM2021/63; AM2021/65

WORK VALUE CASE – AGED CARE INDUSTRY

REPLY SUBMISSIONS OF THE COMMONWEALTH

A. INTRODUCTION

1. These reply submissions are made on behalf of the Commonwealth of Australia in accordance with the consolidated directions of the Full Bench of the Fair Work Commission (Commission) issued on 13 January 2023.

B. THE COMMONWEALTH'S FUNDING DECISION

2. The Commonwealth reiterates its support for a wage increase for aged care workers and its commitment at paragraph [5] of the 8 August 2022 submission (**August submissions**) to provide funding to support any increases to award wages made by the Commission in this matter.
3. The Commonwealth's submissions of 16 December 2022 (**December Submissions**) set out details of the funding commitment of the Commonwealth in respect of the Commission's proposal for a 15 per cent interim increase for direct care workers (**Interim Increase**).
4. The timing of the Commonwealth's funding commitment is the result of a decision of the Commonwealth Government (**Funding Decision**). While the December Submissions provided a brief rationale for the Funding Decision, the Commission is not reviewing the Funding Decision, and that rationale and its merits are not relevant to the issues before the Commission. In particular, the Commission does not need to consider whether it would theoretically be possible for the Commonwealth to fund the full Interim Increase through its funding mechanisms sooner than it has decided.¹ The question for the Commission is, given the Funding Decision, what (if any) timing and phasing in of the Interim Increase is necessary or appropriate, including to meet the modern awards objective and minimum wages objective.
5. The Commonwealth does not submit that the timing of its funding is determinative of the Commission's decision as to the timing or any phasing in of the Interim Increase. Rather, the Commonwealth submits that the timing of its funding affects the Commission's assessment of s 134(1)(f), given its

¹ Cf. HSU Stage 2 Submissions at [25].

influence on the impact that the Interim Increase will have on business. This position was set out in paragraph [24] of the December Submissions.

6. However, for completeness and without detracting from the Commonwealth's submission above in paragraph [4], the Commonwealth responds to some of the other parties' submissions about the Funding Decision in the **Annexure** to these submissions.

Responses to questions and submissions about the effect of the Funding Decision

7. The Commonwealth confirms that its overall position on its funding commitment remains as set out in [5] of its August Submissions — the Commonwealth will provide funding to support any increases to award wages made by the Commission in this matter.² However, the details of that support — including timing — require separate decisions of the Commonwealth Government. Those details in respect of the Interim Increase were the subject of the Funding Decision and are as set out in the December Submissions.
8. It is not an accurate reflection of the Commonwealth's position that the Funding Decision is 'effectively an argument for the Commission to determine a 10 per cent interim increase for some classifications only'.³ Similarly, the December Submissions do not indicate any opposition to extending wage increases to other employees.⁴ The Commonwealth remains committed to providing funding to support any increases to award wages made by the Commission including in Stage 3 (as set out in the August Submissions). The details of the Commonwealth's funding commitments in respect of final wage increases determined in Stage 3 would be the subject of a further decision of Government.
9. To address the issue raised by [48] of the Joint Employer submission, the Commonwealth confirms that its funding commitment in respect of the Interim Increase extends to on-costs in the manner described in its December Submissions (see [14]–[18]). The extent to which the specific costs identified in the Joint Employer submission will be covered will be determined through the approach taken, as set out in the December Submissions.
10. The Commonwealth confirms that its funding commitment as set out in [5] of its August Submissions extends to any decision of the Commission regarding funding increases for Head Chefs/Cooks and RAOs. The Commonwealth acknowledges that parties have since conferred and propose that these workers receive the 15 per cent interim increase at the same time as direct care workers. However, given that no decision has yet been made by the

² Cf. HSU Stage 2 Submissions at [26]–[27]; AMNF Stage 2 Submissions at [12]–[15].

³ HSU Stage 2 Submissions at [21].

⁴ Cf. UWU Stage 2 Submissions at [1](d).

Commission in respect of Head Chefs/Cooks and RAOs, the timing of the Commonwealth's funding commitment and any applicable phasing is subject to a future decision of Government.

Backpay proposal

11. The union parties⁵ have proposed an option where the Commission would specify an immediate commencement date for the Interim Increase, but with a deferred commencement date for the obligation to pay the increased wage rates. The effect of this proposal would be that employers would be required to pay backpay for the period between the date of the Commission's determination and the commencement date for the obligation to pay the increased wage rates.
12. The Commonwealth's Funding Decision is to fund wage increases that commence on 1 July 2023 in the manner set out in the December Submissions, and accordingly that Funding Decision does not extend to funding any backpay in accordance with the backpay proposal.

C. AMENDMENTS TO THE FW ACT

Relevance of s 134(1)(aa)

13. As set out in its December Submissions ([47]–[50]), the Commonwealth submits that the consideration in s 134(1)(aa) is neutral in relation to whether and when the Interim Increase should be made. The Commonwealth submits that the Commission should not take into account issues of attraction and retention under s 134(1)(aa).⁶ Attraction and retention are concerned with an individual's choice to become or remain employed, while secure work is concerned with the security of an individual's position while employed, as determined by factors outside the individual's choice.

Impact on timing and phasing in

14. The Commonwealth supports a conclusion, consistent with the Explanatory Memorandum and Second Reading Speech for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth), that the amendments made by the Amending Act place gender equality at the 'heart' of the Commission's decision making.⁷ However, this does not mean the

⁵ HSU Stage 2 Submissions at [19]; ANMF Stage 2 Submissions at [77] and [86]–[87]; UWU Stage 2 Submissions at [2](b).

⁶ Cf ANMF Stage 2 Submissions at [24]–[26].

⁷ Cf ANMF Stage 2 Submissions at [14]. The ANMF's submissions state that the amendments placed gender 'equity' at the heart of the Commission's decision making. However, the Commonwealth notes that the bill was amended in the course of debate in the House of Representatives on 10 November 2022 to use the phrase 'gender equality' rather than 'gender equity'. As noted in the passage of the Revised Explanatory

amendments displace the existing objects of the FW Act or the other elements of the modern awards objective and minimum wages objective. The Commission remains tasked with an ‘evaluative exercise’ engaging in ‘competing value judgments about broad questions of social and economic policy’⁸ when exercising its modern award functions and powers. There is a well-recognised tension between some of these considerations.⁹

15. The Commonwealth agrees and accepts that the amendments to s 3(a) and new ss 134(1)(ab) and 284(1)(aa) are relevant to the Commission’s consideration of the timing and implementation of the Interim Increase. However, it does not agree that these new provisions mandate the Interim Increase commencing immediately, or that any other decision would fail to achieve these objectives.¹⁰ The new provisions do not displace the well-established principle that there is no primacy to any of either the s 134(1) or s 284(1) considerations.¹¹ Similarly, the Commission’s obligation under s 578(a) is to take into account all of the objects of the FW Act. The Commission’s consideration must remain a balancing exercise.

Date: 10 February 2022



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These submissions were settled by Yaseen Shariff SC and Dan Fuller, counsel for the Commonwealth of Australia.

Memorandum at [334], quoted by the ANMF at [13], this reflects an intention to use language consistent with the *Convention on the Elimination of All Forms of Discrimination against Women* and the *ILO Convention concerning Discrimination in Respect of Employment and Occupation*.

⁸ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368, [49] (**Penalty Rates Review**).

⁹ See November Decision at [291], citing *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [210].

¹⁰ Cf ANMF Stage 2 Submissions at [83]–[85]; HSU Stage 2 Submissions at [18].

¹¹ See November Decision at [271] (citing *Penalty Rates Review* (2017) 253 FCR 368 at [33]), and at [291] (citing *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [210]).

Annexure — Response to issues raised regarding the Commonwealth’s Funding Decision

Timing and other issues for funding wage increases in the residential care sector

1. Paragraphs [11]-[12] of the December Submissions set out the likely funding mechanisms to implement the Interim Increase proposed by the Commission in its decision of 4 November 2022 (**November Decision**). These paragraphs also identify the reasons why it is not feasible to roll out funding to support the Interim Increase earlier than 1 July 2023.
2. In response to Professor Eagar’s second statement filed by the HSU, the Commonwealth agrees it may be theoretically possible to provide additional funding to the sector relatively quickly following a final decision by the Commission regarding the Interim Increase. However, as set out in the December Submissions at [12.3], the Commonwealth has a responsibility to ensure funding is distributed accurately and appropriately including:
 - 2.1. to ensure value and efficient use of taxpayer funding; and
 - 2.2. to ensure there is sufficient funding that is well targeted for aged care providers to support the increased costs in respect of increases to award rates.
3. The Commonwealth agrees with Professor Eagar’s statement at [31] that it would be possible to incorporate award increases into the Australian National Aged Care Classification (**AN-ACC**) price. This is an option being considered by the Department of Health and Aged Care in close consultation with the Independent Health and Aged Care Pricing Authority (**IHACPA**), as is appropriate given the IHACPA’s advisory role. However, it does not follow that this can or should be done immediately, as set out below.
4. The Commonwealth agrees with Professor Eagar’s statement at [21] that, if a change to the AN-ACC set price is used as a funding mechanism, updating the set price would only involve changes to subordinate legislation (currently in the *Aged Care (Subsidy, Fees and Payments) Determination 2014*; and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*). However, a significant amount of work has to be completed to ensure that if the Commonwealth were to use this funding mechanism, the price is set correctly.
5. The Commonwealth recently implemented the new AN-ACC casemix funding model for residential aged care in response to recommendation 120 of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**). The AN-ACC was implemented in residential aged care from 1 October 2022 through amendments to the *Aged Care Act 1997* (**Aged Care Act**) and the *Aged Care (Transitional Provisions) Act 1997*, along with amendments to a

number of pieces of subordinate legislation, including legislative Principles and Determinations.¹²

6. This funding model is underpinned by independent pricing and costing advice developed for the Commonwealth Government by the IHACPA, a reformed body in response to recommendations 11 and 115 of the Royal Commission. This IHACPA advice is evidence-based and supports the Commonwealth Government's decisions on residential aged care pricing and funding. As the Royal Commission's Final Report stated, '*[t]he introduction of independent pricing is critical to restore or to instil confidence and trust between the sector and government, and to instil confidence in the sustainability of the system in the wider community*'.¹³
7. IHACPA advice on the Interim Increase may take several months following a final decision by the Commission in respect of the Interim Increase. While the Commonwealth could theoretically make an AN-ACC price decision without IHACPA advice, that would be contrary to the design of the new funding model implemented in response to the Royal Commission's Final Report. As such, the Commonwealth does not intend to implement an AN-ACC price increase without independent pricing advice from IHACPA.
8. The Commonwealth does not agree with Professor Eagar's statement at [32]-[34] that a reimbursement funding model would be a feasible option for all providers. Although home care funding is paid in arrears (that is, after the services are delivered and providers lodge a claim), residential aged care funding is paid in advance at the start of each month based on an estimation of the amount of the service's entitlement.¹⁴ Each month, following receipt of a claim from the residential aged care provider in respect of the service, Services Australia reconciles the advance payment and the actual amount due to the provider based on a number of factors.¹⁵ Given residential aged care providers currently receive most of the Government funding paid to them in advance and operate their businesses in accordance with this model, reimbursement is generally a more difficult option for residential aged care providers. Under such a model, providers would be required to pay increased wages in advance of receiving the additional funding and some residential aged care providers may not have the financial capacity to do so, potentially putting the viability of these providers at risk.

¹² As noted in [529]–[533] of the November Decision.

¹³ Royal Commission Report, Volume 3A, page 55 (Commissioner Pagone). See also Volume 3A, page 77, where Commissioner Briggs stated: '*Commissioner Pagone and I agree that it is very important that an independent agency should be responsible for determining the costs of providing safe and high quality aged care services*'.

¹⁴ Aged Care Act, ss 43-2 and 43-3.

¹⁵ Aged Care Act, ss 43-3(3), (4) and (5) and 43-4. As to recovery of overpayments, see Aged Care Act, s 43-9 and Part 6.5, Division 95.

9. Professor Eagar refers to the COVID-19 Aged Care Support Program at [34] as an example of a current reimbursement model being used to deliver aged care funding. This Program is a grant program separate from the usual funding arrangements.¹⁶ In addition, providers are required to submit claims for reimbursement of additional expenses incurred in managing the direct impacts of COVID-19 on their services, including providing evidence of eligibility and receipts where requested. These expenses generally relate to additional labour, personal protective equipment (PPE), waste removal, and equipment. There would be greater administrative complexity for the Commonwealth and providers in operating a similar reimbursement model in the context of increasing wages for existing direct care workers, where additional costs are not easily identifiable and verifiable through receipts and other evidence such as test results, and where the increased wages will be an ongoing cost for an indefinite period of time.

Timing and other issues for funding wage increases in the home care sector

10. In respect of paragraphs [10]–[16] of Professor Eagar’s statement:
- 10.1. Subsidy payments for approved providers of home care packages are authorised by or under relevant provisions in the Aged Care Act, including a number of legislative instruments.¹⁷ As set out in [11.2] of the December Submissions, commencement on 1 July 2023 should allow for appropriate indexation to occur and the necessary changes to subordinate legislation after a final decision of the Commission on Stage 2.
- 10.2.** The Commonwealth Home Support Programme (**CHSP**) is largely governed and operated through funding agreements between the Commonwealth and providers, rather than under the Aged Care Act and associated subordinate legislation.¹⁸ As set out in [11.3] of the December Submissions, changes to funding provided under the CHSP would need to be facilitated through changes to a large volume of grant agreements. Commencement of 1 July 2023 would allow for these agreements to be re-negotiated.

¹⁶ Details of the grant program are published at <https://www.grants.gov.au/Go/Show?GoUuid=410cfd78-dacf-4668-a14c-d4f25d4a410d&msclkid=bfc6cfdbc10011ecb3e3b31e00d53d89>

¹⁷ Aged Care Act, Chapter 3, Part 3.2; *Subsidy Principles 2014*, Chapter 3; *Aged Care (Subsidy, Fees and Payments) Determination 2014*, Chapter 3.

¹⁸ Details of the administration of the administration of the CHSP and operation of these grant agreements are set out in the *CHSP Program Manual 2022-2023*, available at: <https://www.health.gov.au/sites/default/files/2022-12/commonwealth-home-support-programme-chsp-manual.pdf>