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**Subject:** AM2020/99, AM2021/63, AM2021/65 - Aged Care Work Value

Dear Associates

We refer to the transcript of proceedings dated 13 February 2023 at PN171 and the Commission's ruling that the evidence filed by the Joint Employers on 9 February 2023 was to be admitted, subject to reserving leave to the ANMF (and other parties) to make submissions as to the weight the Commission would give to that evidence.

Please find attached the ANMF's submissions in PDF and Word format by way of filing.

Regards

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**FAIR WORK COMMISSION**

AM2021/63

**AUSTRALIAN NURSING AND MIDWIFERY FEDERATION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *AGED CARE AWARD 2010* AND *NURSES AWARD 2020***

First Matter

AM2020/99

**HEALTH SERVICES UNION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *AGED CARE AWARD 2010***

Second Matter

AM2021/65

**HEALTH SERVICES UNION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES  
INDUSTRY AWARD 2010***

Third Matter

**AUSTRALIAN NURSING AND MIDWIFERY FEDERATION SUBMISSIONS  
IN RELATION TO THE WEIGHT TO BE GIVEN TO EMPLOYER EVIDENCE**

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1. On 13 February 2023, the Commission ruled that the evidence filed by the Joint Employers on 09 February 2023 was to be admitted, subject to reserving leave to the ANMF (and other parties) to make submissions as to the weight the Commission would give to that evidence. These are the ANMF’s submissions.

**A. Grant Corderoy**

2. It should be uncontroversial that Mr Corderoy’s evidence is advanced by the Joint Employers as being in the nature of expert opinion evidence, within the meaning of section 79 of the *Evidence Act 1995* (Cth).<sup>1</sup> While the rules of evidence do not apply to proceedings before the Commission, the *Evidence Act* provides “*general guidance*” to the Commission and would not be ignored.<sup>2</sup>
3. It should also be uncontroversial that criteria for the admissibility (or relevantly here, weight) of expert opinion evidence include that:<sup>3</sup>

“... the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or substantially based,’ applies to the facts assumed or observed so as to produce the opinion propounded.”

4. Mr Corderoy’s evidence does not meet these standards, for *five* reasons.
5. *First*, to begin with, he was not asked to (and does not) explain what is the field of “*specialised knowledge*” in which he expresses an opinion. The Commission can readily accept that: (a) accountancy is an area of “*specialised knowledge*”; and, (b) Mr Corderoy has training, study, or experience which permits him to express views in relation to that field of specialised knowledge.
6. However, Mr Corderoy’s opinion goes well beyond accountancy. In effect, he analyses data given to him by a sample of businesses trading in an industry, and uses that analysed data as a basis for expressing opinions about the industry as a whole. That involves a few kinds of expertise which Mr Corderoy does not say he possesses:

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<sup>1</sup> And presumably for this reason, Mr Corderoy was asked, by those instructing him, to comply with the Federal Court’s Expert Witness Code of Conduct—see his statement, annexure A, page 3.

<sup>2</sup> *Australasian Meat Industry Employees’ Union v Dardanup Butchering Company Pty Ltd* (2011) 209 IR 1 at [28], citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2004) 143 IR 354 at [47]–[50].

<sup>3</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

- (1) the expertise possessed by a statistician, who would be able to express a view about whether a particular survey sample group is representative of the industry population as a whole, and a view about how much potential for error exists by reason of uncertainty about (*inter alia*) whether the surveyed group is representative of the overall population;
  - (2) the expertise possessed by an economist, who would be able to express a view about the microeconomic effect in a given industry of changes to money flows within that industry (here, *e.g.*, resulting from potential divergences between funding and outgoings).
7. In the absence of these kinds of specialised knowledge, the Commission cannot be satisfied that the views Mr Corderoy expresses are representative of the aged care sector as a whole, nor can the Commission be satisfied as to Mr Corderoy's prognostications of what the effect of particular funding changes will be on the industry.
8. This criticism is dealt with proleptically in the FY22 survey that has been entered into evidence before the Commission, on page 3 (left-hand side). There, the authors accept that there are differences between their survey group and the sector as a whole (*e.g.*, the survey group is weighted towards not-for-profit providers, and excludes listed providers), but says that there is a "*low standard deviation and margin of error.*"
9. What a low standard deviation means is that there is low variability within a particular dataset. It does not mean that the data is representative of the broader population. Margin of error is a function of standard deviation and critical value. How critical value was calculated has not been identified. And in any case:
  - (1) if the reference to low margin of error is intended to suggest that variability from the population is small, how that conclusion was reached is not identified either;
  - (2) if the reference to low margin of error is just another way of saying that the surveyors are confident that the actual results for the surveyed dataset are within a small margin of the figures reported in the survey, then again that does not inform the Commission about the population.
10. In the report considered by the ANMF in its 22 April 2022 submissions (see at [149]), the report explicitly identified what the ANMF described (at [149]) as, "*the proportion of home care packages represented in the survey [varying] wildly from jurisdiction to*

- jurisdiction.*” The more-recent documents in evidence (FY22, September 2022) do not even enable identification of what sort of coverage the survey has from location to location, or sector to sector.
11. *Second*, and this is related to points previously made, it is abundantly clear that lots of work has gone on in the background prior to the actual reporting of the survey results, but the Commission is substantially in the dark as to what that work was, and what its parameters were.
  12. So, for example, the survey excludes “*outliers.*”<sup>4</sup> Who determines that a particular figure is an outlier, and why, and based on what sort of analysis, is not fully explained. And so far as there is a partial explanation, it emphasises why the survey is not suitable as an industry-wide indicator. On page 2 of the FY22 document (pages 2–3 of the September 2022 document), it is stated that “*[e]xamples of outliers include*” (emphasis added) facilities under sanction, facilities undergoing refurbishment, recently acquired facilities, facilities with occupancy less than 80 per cent, and “*[r]evenue and expense lines that are out of range with supporting explanation.*”
  13. To begin with, the list is (apparently) not complete. And, the examples given involve, especially in the last case, subjective judgment. How that judgment has been exercised, and why, and what sorts of data is therefore excluded, is not explained.
  14. *Third*, continuing from this last point, the purpose of preparing the StewartBrown survey is expressly not to produce a set of results that describes the entire industry. Rather, it is to enable “*participating providers to benchmark individual aged care facility and home care programs against similar de-identified comparators using a range of metrics*” (emphasis added).<sup>5</sup>
  15. This explains why, for example, StewartBrown excludes facilities that have been recently acquired. It expressly states that all facilities/programs included are referred to as being “*mature.*”<sup>6</sup> It will not assist survey subscribers to have their results compared (for benchmarking purposes) with new facilities; the results of new facilities

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<sup>4</sup> See FY22 document at page 3.

<sup>5</sup> FY22 document at page 2, September 2022 document at page 2.

<sup>6</sup> FY22 document at page 2, September 2022 document at page 3. See also Mr Corderoy’s statement at [15].

may be too different from established facilities, and hence will not be informative to mature providers of what sorts of revenue or expense figures they should expect.

16. Similarly, it explains why StewartBrown excludes “[r]evenue and expense lines that are out of range with supporting explanation.” So if, for example, a particular provider has revenue that is abnormally high without an explanation that satisfies StewartBrown (based on the application of unknown criteria), then that provider’s results will not be useful for benchmarking purposes for other providers (who may not, for example, have a particular unusual revenue stream).
17. As Mr Corderoy says at [17] of his statement, if a particular revenue or expense amount is inconsistent with “similar sized and regionally located comparators,” and the provider does not provide, “explanatory confirmation,” then the result is excluded from the survey. That makes sense if the purpose of an analysis is benchmarking; it probably would not happen (or at least would happen very differently) in a survey the objective of which was to capture results for an entire industry. In the latter case, as long as the figure is accurate, it does not matter whether the participant can explain it.
18. In short, the point of the StewartBrown survey is to produce a set of results that deliberately excludes providers whose results may not be useful for benchmarking. This is no criticism of StewartBrown: it is evidently what its clients want, and they evidently find it valuable. But it is not the same as a sector-wide, representative, survey.
19. *Fourth*, there is a “data cleansing” process.<sup>7</sup> One of the steps in this process (step 7) is that, “[t]he software program performs a further cleansing process.” What software program? What cleansing? Why is this done? How is it done, and by reference to what criteria? Another step in the process (step 9) is that, “[a]ll results outside the range that have abnormal results are excluded.” What range? Who determines that a result is “abnormal,” and by reference to what criteria?
20. These criticisms were made of the StewartBrown analysis on 22 April 2022, in the ANMF’s submission of that date, at [152]. And yet, no explanation is given by Mr Corderoy of these processes in his statement.

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<sup>7</sup> See FY22 document at page 23, September 2022 document at page 22.

21. It is not altogether surprising that the StewartBrown reports do not contain a statement of reasoning adequate to meet rules for expert evidence developed by the legislature and the Courts: that is not the purpose of the reports; their subscribers would probably not be interested to have all that detail.
22. But the Commission needs all that detail if it is to be put in a position to scrutinise whether Mr Corderoy's opinions can be accepted, as has been explained in authority:<sup>8</sup>

“It is necessary to avoid the insidious risk that the trier of fact will simply accept the opinion without careful evaluation of the steps by which it was reached, and hence the evidence must state the criteria necessary to enable the trier of fact to evaluate that the expert's conclusions are valid. The evidence must reveal the expert's reasoning – how the expert used expertise to reach the opinion stated. It is not enough for evidence tendered under s 79 merely to state the expert's qualifications in a field of expertise and the conclusion.”
23. For the StewartBrown reports to assist the Commission, it would have been necessary for Mr Corderoy, in his statement, to have filled in the gaps: to provide the statement of reasoning necessary to enable the Commission to scrutinise the figures stated and the conclusions expressed. But he has not done so.
24. *Fifth*, and relatedly, the HSU noted in its oral submissions on 13 February 2023, the bottom-line figures given by Mr Corderoy in his statement (at [34]), of impact on industry of unfunded wage increases, is not supported by any calculation at all. There is no explanation of how those figures were reached. The figures are inscrutable and amount to a bare *ipse dixit*. They cannot be accepted.
25. For these reasons, the Commission would afford the StewartBrown analyses, and the statement of Mr Corderoy, very little weight. They would not be used as a basis for making findings about the likely effect of wage increases on industry.

**B. Johannes Brockhaus, James Shaw, and Michelle Jenkins**

26. In addition to the matters that were put by the ANMF in oral submissions on 13 February 2023, the ANMF makes the following submissions with respect to the statements of Mr Brockhaus, Mr Shaw, and Ms Jenkins:

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<sup>8</sup> *Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd* (2013) 84 NSWLR 410 at 428 [101] (Barrett JA, Meagher and Ward JJA agreeing), quoting *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) at 638 [129] (Heydon J).

- (1) *First*, the assertions made by those witnesses as to the financial positions of their respective organisations are not supported by financial records. Absent those financial records, the ability to test and understand that evidence is limited;
- (2) *Second*, the calculations contained in those statements lack proper foundations and particulars. The statements do not provide an evidentiary basis for a number of the underlying figures and assumptions or properly explain how conclusions are arrived at. Again, this would significantly limit the ability for the Commission to test or understand this evidence; and
- (3) *Third*, Mr Brockhaus purports to give opinion about various matters at [31] and [33]. Those opinions are purportedly given from his “*experience*”. Mr Brockhaus sets out his experience at [2] to [6]. That experience does not amount to a field of “*specialised knowledge*” upon which the opinions at [31] and [33] are properly based.

27. Accordingly, the Commission would also afford the statements of Mr Brockhaus, Mr Shaw, and Ms Jenkins very little weight.

**J C McKenna**

**J E Hartley**

*Counsel for the ANMF*

16 February 2023

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Gordon Legal

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