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

STAGE 2 REPLY SUBMISSIONS OF THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

A. Introduction

1. These submissions of the Australian Nursing and Midwifery Federation ("**ANMF**") reply to the following submissions, all of which are dated 20 January 2023:

   (1) the submissions of the Joint Employers ("**JE S2**");

   (2) the submissions of the HSU ("**HSU S2**");

   (3) the submissions of the UWU ("**UWU S2**"); and

   (4) the submissions of the AWU ("**AWU S2**").

2. The Joint Employers' submissions are addressed in Part B. The HSU, UWU, and AWU submissions are addressed collectively in Part C. There will be references herein to the ANMF's stage 2 submissions dated 20 January 2023 ("**ANMF S2**").

B. Reply to the Joint Employers

3. This reply will be divided into three parts: *first*, a reply to miscellaneous points raised throughout **JE S2** on different topics; *second*, a reply to what seems to be the focus of **JE S2**: the likely effect on employers on exercise of modern award powers; *third*, to the extent that it differs from the second point, a reply to submissions about phasing.

B.1 Miscellaneous points

4. At **JE S2 [6]** and **[95]**, the Joint Employers submit that an interim increase for head chef, head cooks and recreational activities officers ("**RAOs**"), should be ordered "*on the basis that the increase is to be funded by the Commonwealth*." So far as this suggests that, to the extent it is unfunded, it is not consented to, that is inconsistent with the position taken by the Aged & Community Care Providers Association (ACCPA, the successor body to ACSA and LASA) in the joint statement dated 16 December 2022 at [3] and [6]. There, ACCPA agreed that the interim increase should be awarded, and that "*[t]he Commonwealth Government should explore all options to operationalise the funding of the increase in order to fulfil this principle*."

5. The Joint Employers should be held to this position, and in any case that position is right as a matter of principle: the increase is justified by work value reasons.

6. As to **JE S2 [12]**, for reasons given in **ANMF S2 [67]–[70]**, the Commission has gone a substantial way to undertaking the kind of consideration required, but revisitation of

some findings will be required. Accordingly, *cf.* **JE S2 [12]**, the new obligations in section 157(2B) of the *Fair Work Act 2009* (Cth) ("**FW Act**") are not yet met.

7. As to **JE S2 [20]**, the Commission would decline to substitute other words ("*fairness between the genders*") for the words in fact used ("*gender equality*"). Minds may very well differ about what "*fairness*" requires, as between the genders; "*equality*" is a less woolly concept, and it is the word chosen by the legislature.

8. At **JE S2 [23]**, the Joint Employers submit that the Commission has, already, "*rightly concluded that [the elimination of gender-based undervaluation] has been achieved*." There is no reference to any paragraph of the *Aged Care Award* [2022] FWCFB 200 ("**Stage 1 Decision**") to support a proposition that the Commission has so concluded. In the ANMF's submission, the Commission has clearly not so concluded: the 15 per cent wage increases it has foreshadowed are expressly interim only. Further increases will be required before the Commission would conclude that gender-based undervaluation has been eliminated.

9. More or less the same is true in relation to **JS S2 [24]–[26]**: the process of "*addressing*" the gender pay gap is very much still a work in progress. **JS S2 [24]** might be read as suggesting that "*addressing*" gender pay gaps really amounts to "*considering*" gender pay gaps. If that is what the submission means, it would be rejected. The term "*addressing*" does not, in this context bear the meaning as in the phrase, "*that topic is addressed in part 2 of this document*"; it bears the meaning as in the phrase, "*I have addressed the problem of unlawful parking by installing bollards*." The phrase is concerned with material action, not reasoning (as appears from the obligation being in service of the achievement of gender equality).

10. **JE S2 [31]** is (with respect) oddly expressed (probably because of the inclusion of the word "*fair*" before "*minimum wages*" in each of lines 1 and 2. Clearly the Commission is concerned with the variation rather than the setting of minimum wages, as that distinction is drawn in (*e.g.*) section 284(2)(b). Rather than saying that this involves "*variation of fair minimum wages*," it is better to say that this involves variation of minimum wages to ensure that they are fair. Not much may turn on this.

11. In relation to **JE S2 [32]**, as has been submitted in relation to other issues, it is not (yet) correct to say that with the award of an interim increase "*the outcome the minimum*

wages objective is focussed on <u>is achieved</u>." The interim increase goes partway so to achieving. Further increases are, the ANMF submits, required in order to ensure that the relevant objective is achieved.

12. So far as, at **JE S2 [39]**, the Joint Employers pick up minimum-wages propositions in **JE S2 [17]–[28]** in order to address the modern awards objective, the ANMF repeats its submissions in regard to **JE S2 [17]–[28]**.

13. It is worthwhile to say here, as well, that both section 284(1)(aa) and section 134(1)(ab) refer to ensuring that there is "*equal remuneration for work of equal or comparable value*." Also relevant, then, is section 302(3A)–(3C). Despite that these sections appear in Part 2-7, Div 2 (dealing with "*Equal remuneration orders*"), section 302(3A) provides that it applies "*[f]or the purposes of <u>this Act</u>*" (emphasis added), rather than "*this Division*" or even "*this section*."

14. Section 302(3A)–(3C) are to the effect of providing that the Commission may take into account, in deciding whether there is equal remuneration for work of equal or comparable value:

    (1) "*[C]omparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender*." This is not limited to similar work, and does not need to involve comparison with a historically male-dominated occupation or industry (section 302(3B)). The Commission also need not find discrimination on the basis of gender in order to find that work has been undervalued (section 302(3C));

    (2) "*[W]hether historically the work has been undervalued on the basis of gender.*" Again, it is not necessary to find discrimination (section 302(3C));

    (3) "*[A]ny fair work instrument or State industrial instrument.*"

15. The Commission has clearly had regard, as permitted, to the second of these considerations. The relevance of the third is not immediately apparent. The first may well be of greater relevance in Stage 3—further submissions will, accordingly, be directed to this issue in submissions on that Stage.

16. At **JS S2 [71]–[73]**, the Joint Employers submit that the Commission does not need to venture into the depths of section 134(1)(aa), because the consideration operates "*at a*

macro level." This proposition is, the ANMF submits, partly right and partly wrong. The ANMF agrees that the consideration operates at a macro level in the sense that it is economy-wide. But, and this is (or may be) the area of disagreement, the macro level is a confluence of decisions at the micro level. And section 134(1)(aa) is still a mandatory relevant consideration.

17. If in every case the Commission declined to identify how section 134(1)(aa) bore on its decision, then the objective—improving access to secure work—would never be meaningfully achieved. The same would be true if (as might be suggested at **JS S2 [72]**) the consideration were only relevant where a variation had aggregate implications economy-wide.

18. The correct approach, in the ANMF's submission, is to identify that a particular variation will either enhance, detract from, or be neutral in regard to, the security of work. If the former, then this enhances (even if only minorly) the economy-wide position. The analysis is the same for micro detraction, or micro neutrality. Here, for reasons given at **ANMF S2 [22]–[26]**, the Commission is able to find that increasing minimum wages will enhance the security of the relevant work.

B.2 Section 134(1)(f) of the FW Act: "*likely impact … on business*"

19. As long ago as 22 April 2022, in its submissions of that date, the ANMF drew attention to the lack of probative evidential support for findings about the effect of wage increases on business (at [148]–[155]). Further such submissions were made in the ANMF's closing submissions date 22 July 2022, at [849]–[855], and again in the ANMF's reply submissions dated 17 August 2022 (at [200]). The effect of all of the ANMF's submissions was, to quote the 17 August 2022 submissions, that the Commission would not be satisfied that "*an increase to award minimum wages as sought by the union parties would have a detrimental impact on the viability of aged care providers*."

20. Despite this, the Joint Employers say that it is "*speculative*" whether any party would seek to have the interim increase apply prior to Commonwealth funding kicking in (**JE S2 [52]**). They seek to preserve a right to "*reply*" to any such proposed de-linking. So far as that "*reply*" is constituted by submission, the ANMF has no objection. But so far as the Joint Employers seek to rely on additional evidence concerning capacity to pay, the ANMF will object, for three reasons.

21. *First*, it was not speculative that the ANMF (and other unions) would seek to have wage increases effective from the earliest possible moment. The ANMF (in particular) has been saying since April 2022 that the Commission has no proper evidential basis for making findings about impact on business.

22. *Second*, it is the Joint Employers who seemingly want findings about capacity to pay. In that case, the time for putting on evidence about that was 20 January 2023.

23. *Third*, and relatedly, the Commission's order was that "*evidence in reply*" should be filed by 09 February 2023. Any evidence from the Joint Employers about capacity to pay would not be evidence in reply: there is no evidence to which it is a reply.

24. *Fourth*, and again relatedly, had the Joint Employers filed evidence on capacity to pay by 20 January 2023 (which they should have, if they wanted findings about it), that would have permitted the ANMF (and other unions) to consider whether to call responsive evidence, by 09 February 2023. As things now stand, there is no provision in the timetable for such evidence. The ANMF does now know whether it needs or wants to call such evidence, because it will not see any employer evidence until about the time that it files these submissions. This is unfairly prejudicial to the ANMF.

25. Returning now to **JE S2**, at **[44]** and **[82(a)]**, the Joint Employers say that it "*should be uncontroversial that the 'likely' impact on business is fundamentally conditioned by Commonwealth funding*." It is uncontroversial that funding has some bearing on business. How much bearing, however, is a matter for evidence, and the Commission has nothing probative. The ANMF has been clear about this since April 2022.

26. No finding can be made that varying the award before Commonwealth funding kicks in would be "*materially negative*" (**JE S2 [47]**), that the issue "*looms large*" (**JE S2 [50]**), that the impact on business "*weigh[s] heavily*" against that outcome (**JE S2 [51]**) or "*weighs heavily*" in favour of aligning Commonwealth funding and variation (**JE S2 [53]**, see also **[86]**).

27. Further, no findings can be made that any approach to funding "*may well introduce additional regulatory burden*" in home care settings (**JE S2 [55]–[61]**, **[82(e)]**). The submission seems to be that, even if funding were provided, home care providers could not charge clients more for services provided (and hence would be out of pocket). This depends on the terms of contracts with consumers, and there are none in evidence.

28. Further, the "*security of tenure*" issue identified in **JE S2 [58]** is either an issue or it is not (which is a matter for evidence, not submission): it is not clear how delaying a wage increase has a bearing on it, one way or the other.

29. And, submissions about how much "*lead time*" is required (**JE S2 [59]–[61])** are also unsupported by evidence. A submission that it would take three months (or any other period of time) for operators to plan for a 15 per cent wage increase requires evidence in order to be accepted (there being none). In any case, operators have known since 17 November 2020, when the HSU made its application, that a 25 per cent wage increase was sought. If they have not, over the past two and a bit years, engaged in planning, modelling, *etc.*, then that is—at the risk of sounding harsh—their problem, rather than their employees' problem. They will have to work quickly.

B.3 Phasing

30. There is perhaps little difference between the statement of principles set out in **JE S2 [88]–[89]**, and the statement in **HSU S2 [13]**. The HSU's submission is somewhat more comprehensive, and the Commission would (in the ANMF's submission) adopt the HSU's submission rather than the Joint Employers'. In making submissions in regard to phasing, the ANMF adopts the HSU's statement of principle at **HSU S2 [13]**.

31. *Contra* **JE S2 [90]**, aligning the increases with whatever the Commonwealth agrees to fund, whenever it agrees to fund it, would <u>not</u> be the preferable application of these principles. That is principally because the primary hypothesis on which the analysis must proceed is that the current wage settings do, and historically they have, very significantly undercompensated aged care employees for the work that they do (having regard to the work value of that work). And, the secondary hypothesis is that, given the interim nature of the wage increase, even <u>after</u> the interim increase employees will be undercompensated for the work that they do.

32. Putting that another way, for a long time, aged-care employees have been subsidising the profit margins of their employers, subsidising the Commonwealth's budget, subsidising the taxpayer, or some combination of these three. And, because the wage increase presently proposed is interim, they will continue to do so for some further time in to the future.

33. The submission of the Joint Employers is to the effect that this subsidy by employees should continue for a further time—by being undercompensated for the value of the work that they perform—even in relation to the interim increase, until the Joint Employers can be satisfied that proper compensation to aged-care employees will not detrimentally affect aged-care employers, at all (*i.e.*, Commonwealth funding meets all increased wages and on-costs).

34. That is not justice. That is inconsistent with equity, good conscience, and the merits of the matter. It is not fairness as assessed from the perspective of both the employees and employers. All of these considerations demand that aged-care employees, as soon as possible, be adequately compensated for the work that they do. The Joint Employers' approach would not "*reasonably balance*" the interests of employers and employees (*cf.* **JE S2 [90]**); it would subordinate the interests of aged-care employees to those of their employers—again.

35. And as to the three factors listed in **JE S2 [92]**, in the same order:

(1) The employers have known about these applications for more than two years, and therefore have had adequate time to prepare;

(2) The increase is moderate, in the context of the extent of historical undervaluation. That is why it is only an "*interim*" increase. The fact of it being an "*interim*" increase inherently, and by itself, phases the increase necessary to eliminate under-compensation; there is no need for any further phasing;

(3) There is no evidence from the employers as to what date is manageable.

36. In closing on this point, it is entirely unclear to the ANMF how the existing arrangements can be described as a "*careful balance*" (**JE S2 [91]**). The only available conclusion after reading the Stage 1 Decision is that the balance has, in the past, been decidedly uncareful, in that it has resulted in aged-care employees being very significantly undercompensated for their work. The "*balance*" struck in the past requires disturbing.

C. Submissions of the HSU, UWU, and the AWU

37. In regard to **HSU S2 [8]**, for reasons given above section 134(1)(aa) weighs in favour of variation, rather than being merely neutral.

38. The ANMF agrees with and adopts **HSU S2 [42]**. The ANMF, further, agrees with and adopts **HSU S2 [14]–[16]**, **[19]**, **[27]–[28]**, and **[43]–[48]** in answer to the Joint Employers' submissions in regard to capacity to pay and phrasing.

39. The ANMF also agrees with and adopts the proposition that the material identified at **UWU S2 [41]**, **[43]**–**[46]** is relevant in regard to phasing. These submissions militate in favour of immediate implementation of the interim increase. And, the ANMF agrees with and adopts the AWU's submissions at **AWU S2 [4]–[8]**.

40. Beyond this, the HSU, UWU, and AWU make persuasive submissions to the effect that the position adopted by the Commonwealth in its submissions dated 16 December 2022 amounts to a departure from its previous commitments. The ANMF agrees: it is a departure, and a lamentable one. But in any case, the Commonwealth's assertions that it cannot move quickly are just that: assertions. There is no evidence that the Commonwealth cannot move more quickly. This is a further reason for rejecting the Joint Employer's submissions that phasing-in should track with the Commonwealth's "*commitments*".

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9 February 2023

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