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Sent: Friday, 17 February 2023 3:59 PM

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Subject: AM2020/99, AM2021/63, AM2021/65 - Aged Care Work Value | Re: Joint Employers Submission and Note

Dear Associates,

We continue to act for ACCPA and ABI.

By way of filing, we **attach** the following:

- Submissions in relation to the weight to be given to reply evidence; and
- Note on home care employee evidence (the **Note**).

Paragraph 5 of the Note refers to “*Annexure G*” to the Joint Employer Submissions dated 22 July 2022 (previously filed on 22 July 2022). For ease of access and reference, Annexure G is also **attached** to this email.

The parties to the matters are copied into this email by way of service.

Yours faithfully,

Alana

Alana Rafter

Associate

Australian Business Lawyers & Advisors

FAIR WORK COMMISSION

AM2020/99; AM2021/63; AM2021/65

WORK VALUE CASE – AGED CARE INDUSTRY

SUBMISSIONS IN RELATION TO THE WEIGHT TO BE GIVEN TO REPLY EVIDENCE

**AGED & COMMUNITY CARE PROVIDERS ASSOCIATION LTD AND AUSTRALIAN BUSINESS
INDUSTRIAL – THE JOINT EMPLOYERS**

17 FEBRUARY 2023

SUBMISSIONS IN RELATION TO THE WEIGHT TO BE GIVEN TO REPLY EVIDENCE

Introduction

1. On 13 February 2023, the Joint Employers tendered the following evidence:
 - (a) Reply Witness Statement of Johannes Brockhaus dated 9 February 2023, CEO of Buckland Aged Care Services;
 - (b) Reply Witness Statement of Michelle Jenkins dated 9 February 2023, CEO Community Vision Australia (**CVA**);
 - (c) Reply Witness Statement of James Shaw dated 9 February 2023, Deputy CEO and CFO of Royal Freemasons' Benevolent Institution (**RFBI**); and
 - (d) Reply Witness Statement of Grant Corderoy dated 9 February 2023, Senior Partner with StewartBrown.

(Collectively, **the Reply Evidence**).
2. The evidence was admitted subject to the Commission granting leave to the parties to make submissions as to the weight the Commission should give to the Reply Evidence by Friday, 17 February 2023. The submission of the Joint Employers follows.

Generally

3. The Commission should not be enticed by the ANMF and HSU (collectively, the **Unions**) submissions that suggest the weight of the Reply Evidence should be adversely impacted by the conduct of the Joint Employers, namely, a purported non-compliance with the directions of the Commission and/or any resulting prejudice to the Unions. In support of that submission we advance the following:
 - (a) The Reply Evidence was filed in compliance with the timetable fixed by the Commission. On 23 November 2023, the Commission directed “[a]ll parties to file any submissions and evidence in reply by 5pm Thursday 9 February 2023 (AEDT)”.

The direction provided for simultaneous filing, such that all material filed would be directly responsive to matters raised in submissions and evidence filed on 20 January 2023.

- (b) The Reply Evidence is squarely in the nature of “reply”. It goes to the context and the consequence of the position of the Unions, which was expressed in written submissions filed on 20 January 2023, namely, that the 15% interim increase should be paid now irrespective of the Commonwealth’s funding commitments and/or limitations.
- (c) The primary purpose of the Reply Evidence was to ensure that the Commission has the benefit of the employer perspective – *in addition to the employee perspective* – when considering the modern awards objective, in particular, the provision of a minimum safety net of terms and conditions.¹ Section 134 of the *Fair Work Act 2009* (Cth) requires the Commission to take into account the impact on business, which in this case was an impact of driving operating losses and deficits and financially distressing operators. The modern awards objective does not require the Joint Employers to prove that providers would suffer bankruptcy or a complete incapacity to pay in this regard for the impact to be seen as materially negative as it is. The Reply Evidence highlights the aged care industry is in a state of financial distress and an unfunded increase will further materially increase this financial distress.
- (d) The ANMF contend it was prejudiced “*by not being able to challenge [the Reply Evidence] effectively and that prejudice is not something that can be cured by making an adjournment in circumstances where that would likely cause a delay to making a determination and the position taken by the ANMF is that the interim increase should proceed, as at the date of the determination*”.² The Commission should not entertain that position on the following bases:
 - (i) The Unions had 3-days to consider the Reply Evidence, which was short and confined in nature. By way of emphasis, it consisted of three lay witness statements (23 pages in total) and a singular expert witness statement (5 pages), which annexed a StewartBrown Survey Report dated September 2022 (23 pages).

¹ See *Four yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 (23 February 2017) at [37]; *Re 4 yearly review of modern awards* [2019] FWCFB 272 at [14]; *Re Annual Wage Review 2017-18* [2018] FWCFB 3500 at [17]; *Pharmacy Industry Award 2010* [2018] FWCFB 7621 at [126], citing *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [52]; see also by *Independent Education Union of Australia* [2021] FWCFB 2051 at [220].

² Transcript, 13 February 2023, PN109.

- (ii) The Unions had an equal opportunity to file any “*evidence in reply*” on 9 February 2023. Had the Unions done so, the Joint Employers would have been impacted by the same truncated timetable, namely, 3-days between filing of reply submissions and evidence and the hearing. The Unions were not unfairly or unduly prejudiced by the conduct of the Joint Employers.
- (iii) The ANMF was offered and declined the opportunity of any adjournment for the purpose of putting on additional evidence or preparing.³ This would have been the obvious solution to any prejudice and would not have been opposed by the Joint Employers.
- (iv) On Sunday, 12 February 2023, the ANMF advised the Commission that it “*does not propose to cross-examine Mr Corderoy, Mr Brockhaus, Ms Jenkins or Mr Shaw in the event that the Full Bench rules their evidence admissible*”⁴. It freely declined the opportunity to “*challenge*” the Reply Evidence in cross-examination following a consideration of the evidence.
- (v) On Monday, 13 February 2023, Mr Gibian SC for the HSU, demonstrated that the filing of Reply Evidence 3-days before the hearing did not create an insurmountable challenge to preparation for cross-examination. Rather, he showcased a capacity and preparedness to cross-examine Mr Corderoy for around 40 minutes, during which he also took the expert witness to a separate document (marked HSU 2).

Expert Evidence

- 4. The Commission should not be distracted by submissions based on the rules of evidence or, to the extent it is relied upon by the Unions, a suggestion that Mr Corderoy does not have sufficient “*specialised knowledge*” to give the evidence set out in his statement.
- 5. The Commission has previously recognised that Mr Corderoy has specialised knowledge within the context of the Aged Care Sector, that extends beyond “*accounting*”. Specifically, recognising his “*specific focus on financial sustainability at government, provider and*”

³ Transcript, 13 February 2023, PN115-PN120.

⁴ Email from the ANMF to the Commission, copying in all active parties, dated 12 February 2023 (at 5.47pm).

consumer levels as well as policy development including extensive stakeholder consultations”.⁵ The relevant observation is extracted in full below:

[99] Mr Corderoy is a Senior Partner with StewartBrown Chartered Accountants. He has particular experience and involvement in the Aged Care Sector including professional relationships with 190 aged care providers and consulting projects for the Department of Health, with specific focus on financial sustainability at government, provider and consumer levels as well as policy development including extensive stakeholder consultations.

6. Finally, at the hearing the HSU contended that little weight should be put on the figure of \$1.2 billion quoted by Mr Corderoy. In fairness to Mr Corderoy, the HSU should not have the benefit of relying upon that criticism in the absence of putting the point to the witness.⁶ The witness should have simply been asked how he calculated the figure if some challenge was to be taken to it; they declined this opportunity.

Provider Evidence

7. To the extent the Unions seek to challenge the weight to be attached to the lay witnesses, the Commission is reminded that the Unions declined the opportunity to cross-examine Mr Brockhaus, Ms Jenkins, and Mr Shaw (**the providers**). In these circumstances, the Commission would be hesitant to accept any submission that seeks to criticise or cast doubt on the accuracy or source of any opinion or calculation within the statements of the providers. Such questions should have been raised in cross-examination. It is entirely improper to seek to discredit the evidence under the guise of a submission as to weight. Especially, when all were available for cross-examination on 13 February 2023 and prepared to speak to that evidence under oath.
8. The opinions expressed by each provider should be understood in the context of that provider’s specific business. As a combination of CEO and CFOs, the providers were each well placed to provide evidence to the Commission about the financial status of their businesses. Each provider gave evidence based on their specific experience.
9. By way of example, Mr Brockhaus has over 10 years’ experience working in aged care in Australia. He is qualified as a Registered Nurse and is the current CEO of Buckland, a position he has held for around 3 years. Based on that experience, in particular his

⁵ *Health Sector Awards - Pandemic Leave* [2020] FWCFB 3561 (8 July 2020) at [99].

⁶ *Browne v Dunn* (1893) 6 R 67.

experience at Buckland, he provides his opinion on the impact of the 15% increase without funding. There is no rational basis to reduce the weight of his evidence, or any of the providers, when they are best placed to give evidence about their businesses.

Conclusion

10. In circumstances where the Reply Evidence was filed in compliance with the timetable fixed by the Commission and is directly assistive to the task before the Commission, the Commission should have full regard to the evidence.

For the Joint Employers

Nigel Ward

CEO + Director

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17 February 2023