

# Summary of Decision

4 November 2022



## Aged Care Work Value Case

(AM2020/99, AM2021/63 and AM2021/65)

[2022] FWCFB 200

President Justice Ross, Deputy President Asbury, Deputy President O'Neill

*This summary is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

### Background

[1] This decision deals with 3 applications to vary modern awards to increase the minimum wages of aged care sector workers:

1. [AM2020/99](#) – an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (Aged Care Award)
2. [AM2021/63](#) – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award),<sup>1</sup> and
3. [AM2021/65](#) – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] These proceedings arose out of Recommendation 84 of the Final Report of the Royal Commission into Aged Care Quality and Safety (the Royal Commission).

[3] The Final Report of the Royal Commission was tabled on 1 March 2021. The Royal Commission received 10,574 public submissions and heard evidence from more than 600

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<sup>1</sup> The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 per [2021] FWCFB 4504.

witnesses across 99 days of hearing.<sup>2</sup> Over 1,000 aged care providers were surveyed<sup>3</sup> and some 12 community forums and 13 expert roundtable discussions were conducted.

[4] Modelling prepared for the Royal Commission estimated that the number of direct care workers needed to maintain current staffing levels would be approximately 316,500 full-time equivalent workers by 2050, an increase of 70 per cent.<sup>4</sup>

[5] The Royal Commission concluded that the aged care workforce faces ‘systemic’ problems:

‘In a large number of residential aged care facilities there are not enough workers to provide high quality, person-centred care. In many cases the mix of staff who provide aged care is not appropriately matched to the care needs of older people. The staff in aged care are poorly paid for their difficult and important work.’<sup>5</sup>

[6] The Royal Commission found that aged care workers should have a ‘clear vision for career progression’ and recommended that ‘existing job classifications should be reviewed and new career pathways mapped to facilitate opportunities for nurses, personal care workers and other workers to advance in the aged care sector.’<sup>6</sup>

[7] The Royal Commission also found that a ‘wages gap’ exists between aged care workers and workers performing equivalent functions in the acute health sector and concluded that the ‘bulk of the aged care workforce does not receive wages and enjoy terms and conditions of employment that adequately reflect the important caring role they play.’<sup>7</sup> To address the inadequacies in pay for aged care workers, the Royal Commission made the following recommendation:

#### **Recommendation 84: Increases in award wages**

Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:

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<sup>2</sup> Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.181, 183.

<sup>3</sup> Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.182.

<sup>4</sup> Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.125.

<sup>5</sup> Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.124.

<sup>6</sup> Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.1245.

<sup>7</sup> Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 2 at p.214.

a. reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or

b. seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).

[8] The Applications seek a 25 per cent increase in minimum wage rates for all aged care employees covered by the Aged Care, Nurses and SCHADS awards.

[9] At the heart of the proceedings was the Applicants' contention that the variation they sought to modern award minimum wages were 'justified by work value reasons' as required by s.157(2).

[10] There was considerable common ground between the parties in respect of the relevant factual matrix. The Unions, ACSA and LASA are signatories to the Aged Care Sector Stakeholder Consensus Statement. The content of the Consensus Statement may be viewed as broadly supportive of the Applications. The Consensus Statement represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. The Full Bench concluded that the Consensus Statement was relevant to its determination of the Applications and took it into account.

[11] Some 16 broad factual contentions were also agreed between the parties and the Full Bench concluded:

'... we consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned. That said, we are satisfied there is a sound evidentiary basis for the 16 agreed contentions and we adopt them as findings.'<sup>8</sup>

[12] While there was a significant amount of agreement between the parties, the Joint Employers and the Unions disagreed on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

[13] Ultimately, the Joint Employers submitted that, based on the evidence, the work undertaken by the following classes of employee in residential aged care had significantly changed over the past 2 decades warranting consideration for work value reasons:

- RNs
- ENs
- Certificate (III) Care Workers, and
- Head Chefs/Cooks.<sup>9</sup>

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<sup>8</sup> At [739].

<sup>9</sup> Joint Employers closing submissions dated 22 July 2022 at [4.47].

[14] The Joint Employers also confirmed that they contended that an increase in minimum wages is justified on work value grounds in respect of RNs, ENs, Certificate III Care Workers and Head Chefs/Cooks in residential aged care.<sup>10</sup>

[15] The parties also agreed with a range of *provisional* views we expressed during the course of the proceedings.

[16] In a Statement dated 9 June 2022<sup>11</sup> the Full Bench expressed the following *provisional* views:

1. The relevant wages rates in the Aged Care Award 2010, the Nurses Award 2020 and the Social, Community, Home Care and Disability Services Industry Award 2010 have not been properly fixed.
2. It is not necessary for the Full Bench to form a view about why the rates have not been properly fixed.
3. The task of the Full Bench is to determine whether a variation of the relevant modern award rates of pay is justified by ‘work value reasons’ (and is necessary to achieve the modern awards objective), being reasons related to any of s.157(2A)(a)-(c) the nature of the employees’ work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.

[17] The parties broadly agreed with the *provisional* views<sup>12</sup> and in a Statement dated 5 August 2022<sup>13</sup> the Full Bench confirmed its *provisional* views.

[18] It was therefore accepted that, in these proceedings, the Full Bench was not required to form a view as to why the rates in the relevant awards have not been properly fixed, including by making a finding as to whether or not the minimum rates were affected by gender undervaluation.

[19] That being said, the Full Bench accepted the expert evidence that as a general proposition work in feminised industries, including care work, has been historically undervalued and that the reason for that undervaluation is likely to be gender based. The Full Bench also accepted that the evidence pertaining to gender undervaluation provides a useful context for the assessment of the work value and skills utilised in feminised industries, including in the aged care industry.

## **The Decision**

[20] Chapter 2 provides an outline of the decision and can be accessed [here](#).

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<sup>10</sup> Joint Employers closing submissions in reply dated 19 August 2022 at [5.20]

<sup>11</sup> [2022] FWCFB 94.

<sup>12</sup> ANMF closing submissions dated 22 July at [91]; HSU submissions dated 2 August 2022 at [1]–[3]; Joint Employers closing submissions dated 27 July 2022; Commonwealth submissions dated 8 August 2022 at [79]; Transcript, 25 August 2022, PN15385.

<sup>13</sup> [2022] FWCFB 150.

[21] The proper assessment of the skills utilised in aged care work is considered in detail in Chapter 7.

[22] The proposition that work in feminised industries is undervalued is addressed in the expert evidence of Assoc Prof Smith and Dr Lyons; Assoc Prof Junor; Prof Charlesworth and Prof Meagher.

[23] Based on the expert evidence the Full Bench accepted the followings propositions:

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.
2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.<sup>14</sup>
3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions<sup>15</sup> which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.<sup>16</sup>
4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value.<sup>17</sup> These assumptions are impacted by women's role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.<sup>18</sup>
5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:
  - changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.

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<sup>14</sup> Smith/Lyons Report at [62].

<sup>15</sup> Smith/Lyons Report at [47] citing A-F Bender and F Pigeys, 'Job evaluation and gender pay equity: a French example' (2016) 34(4) *Equality, Diversity and Inclusion: An International Journal* 267 at 268–270. Assoc Prof Smith and Dr Lyons also note at [52]: 'Peetz (D Peetz, 'Regulation distance, labour segmentation and gender gaps' (2015) 39(2) *Cambridge Journal of Economics* 345) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically "feminine" in nature. The tasks performed by, and skills applied in, female-dominated occupations – such as care-giving, manual dexterity, human relations skills, and working with children – are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations.'

<sup>16</sup> Smith/Lyons Report at [60].

<sup>17</sup> Smith/Lyons Report at [59].

<sup>18</sup> Smith/Lyons Report at [56].

- procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
  - conceptual considerations including the subjective notion of skill and the “invisibility” of skills when assessing work value in female-dominated industries and occupations.<sup>19</sup>
6. The approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations. In particular:
- (i) The requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of tribunals to properly value the work arise because any potential errors in the valuation of the work may have predated the last assessment of the work by the tribunals.
  - (ii) Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work. The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.<sup>20</sup>
  - (iii) The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.<sup>21</sup>

**[24]** As noted in point 6 above, the constraints in historical wage fixing principles have created barriers to the proper assessment of work value in female dominated industries and occupations. Those constraints are addressed in Chapter 3, dealing with the legislative framework, and in the Full Bench’s findings in respect of ‘invisible skills’. The following propositions are among those distilled from the discussion in Chapter 3:

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<sup>19</sup> Smith/Lyons Report at [93].

<sup>20</sup> Smith/Lyons Report at [90].

<sup>21</sup> Smith/Lyons Report at [92].

1. The reasons which justify the amount employees should be paid for doing a particular kind of work must be ‘related to’ any one or more of the 3 matters in s.157(2A)(a) to (c). There is nothing in the statutory context to suggest that the expression ‘related to’ in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes. The expression ‘related to’ is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.
2. Section 157(2A) does not contain any requirement that the ‘work value reasons’ consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no ‘double counting’, it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.
3. Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.
4. Section 157(2A) does not incorporate the test which operated under wage fixing principles of the past that the change in the nature of work should constitute ‘such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.’ There is simply no basis for introducing such an additional requirement to the exercise of the discretion in s.157(2), which might have been, but which has not been, enacted.
5. Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission’s statutory task in s.157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:
  - alignment with external relativities is not determinative of work value
  - while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including ‘invisible skills’ as discussed in Chapter 7.2.6

- the expert evidence supports the proposition that the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations (see Chapter 7.2.5), and
  - alignment with external relativities is not a substitute for the Commission’s statutory task of determining whether a variation of the relevant modern award rates of pay is justified by ‘work value reasons’ (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).
6. Statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist are likely to be of only limited assistance in the Commission’s statutory task under s.157(2). Some of those statements of principle have no relevance at all, given they are grounded in wage fixing principles which required a change in work value to constitute a significant net addition to work requirements. The adoption of the observations such as those at [190] in the *ACT Child Care Decision* runs the risk of obfuscating the Commission’s statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A)(a)–(c). To adopt such an approach may also be said to be adding to the text of s.157(2A) in circumstances where it is not necessary to do so in order to achieve the legislative purpose, and may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision.
7. It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes ‘work value reasons’ divorced from a particular context. In our view the meaning of ‘work value reasons’ should focus on the text of s.157(2A). Any elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise.

**[25]** Chapter 8 sets out the Full Bench’s consideration of the Applications in light of the evidence and submissions.

**[26]** Chapter 8.2 considers the appropriate way forward in light of the extent of agreement between the parties, the evidentiary findings and the range of complex issues that arise for determination. The Full Bench concluded that 3 broad considerations weigh in favour of an interim decision providing an increase in minimum wages for discrete categories of aged care workers:

1. It is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such as to justify an increase in minimum wages for these classifications. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.



2. Accordingly, in respect of direct care workers (including RNs, ENs, AIN/PCW/HCWs) the evidence establishes that the existing minimum rates do not properly compensate employees for the value of the work performed by these classifications of employees. The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.

3. A number of complex issues require further submissions (and potentially further evidence) before they can be determined and we see no reason to delay an increase in minimum wages for direct care workers while that process takes place.

[27] The decision published today constitutes the first stage in that process. In this decision the Full Bench determined the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to the Applications and have decided that an interim increase in the modern award minimum wages applicable to direct care workers is justified by work value reasons.

[28] In Stage 2 the parties will have the opportunity to make submissions and address evidence in relation to the timing and phasing-in of wage increases. The timing of the interim increase will be the subject of a subsequent decision in Stage 2.

[29] Stage 3 will include a more detailed consideration of the classification definitions and structures in the relevant Awards. Interested parties may wish to make further submissions and call additional evidence in relation to these matters in this stage of the proceedings. A further decision will then be issued finalising the classification definitions and structures in the relevant Awards.

[30] Stage 3 will also determine wage adjustments that are justified on work value grounds for employees not dealt with in Stage 1, and determine any further wage adjustments that are justified on work value grounds for direct care employees granted interim wage increases in Stages 1 and 2.

### **An Interim Increase**

[31] As to form and quantum of the interim increase the Full Bench concluded that it was satisfied that a 15 per cent interim increase in minimum wages of the direct care classifications in the Aged Care and SCHADS Awards and for nurses working in aged care covered by the Nurses Award is 'plainly justified by work value reasons'.

[32] The Full Bench made it clear that the interim increase does not conclude its consideration of the Unions' claim for a 25 per cent increase for other employees, namely administrative and support aged care employees. Nor was the Full Bench suggesting that the 15 per cent interim increase necessarily exhausts the extent of the increase justified by work value reasons in respect of direct care aged care employees. Whether any further increase is justified will be the subject of submissions in Stage 3 of these proceedings.

[33] Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the

implementation of any minimum wages increases arising from these proceedings. The Full Bench concluded that the course proposed is a reasonable one and is comprehended within the staged approach adopted.

**[34]** A Mention will be listed for **9:30am on Tuesday 22 November 2022** for the purpose of issuing directions in respect of Stage 2 of these proceedings.

- ENDS