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Sent: Monday, 29 August 2022 4:00 PM

To: AMOD <AMOD@fwc.gov.au>

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Subject: AM2020/99, AM2021/63 & AM2021/65 – Work value case – Aged Care Industry | Re: ABI, ACSA and LASA - Response to Background Document 6, 7 and 8

Dear AMOD team and Associates,

We refer to the abovementioned matters in which we continue to act for ABI, ACSA and LASA.

We refer to paragraph [10] of the Commission's Statement dated 22 August 2022 ([2022] FWCFB 159).

In accordance with the above, please find **attached** the Employer Interests Response to Background Document 6, 7 and 8 in both Word and PDF.

Yours faithfully,

Alana

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Associate

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IN THE FAIR WORK COMMISSION

RESPONSE TO BACKGROUND DOCUMENTS 6, 7 & 8

WORK VALUE CASE - AGED CARE INDUSTRY

(AM2020/99; AM2021/63; AM2021/65)

FILED ON BEHALF OF:

AGED & COMMUNITY SERVICES AUSTRALIA

LEADING AGE SERVICES AUSTRALIA

AUSTRALIAN BUSINESS INDUSTRIAL

29 AUGUST 2022

1. BACKGROUND

- 1.1 This submission is made on behalf of:
- (a) Aged & Community Services Australia (**ACSA**);
 - (b) Leading Age Services Australia (**LASA**); and
 - (c) Australian Business Industrial (**ABI**),
- (collectively, **the employer interests**).
- 1.2 On 22 August 2022, the Fair Work Commission (**the Commission**) published a Statement together with three further Background Documents:
- (a) **Background Document 6**, which summarises the Commonwealth’s submissions and the parties’ submissions in reply to the Commonwealth;
 - (b) **Background Document 7**, which sets out the parties’ submissions in relation to the modern awards objective; and
 - (c) **Background Document 8**, which summarises the closing submissions in reply and the answers to the questions posed in Background Document 5.
- 1.3 Background Documents 6, 7 and 8 posed a number of additional questions for the parties.
- 1.4 The employer interests were directed to respond to the additional questions, in writing, by no later than 4pm on Monday 29 August 2022.
- 1.5 Pursuant to that direction, we provide the following response.

2. RESPONSE TO QUESTIONS IN BACKGROUND DOCUMENT 6

Question 6 for all parties

Are there any corrections or additions to Background Document 6? Is it common ground that the material set out in Background Document 6 is uncontentious?

- 2.1 Background Document 6 for the most part excludes reference to the employer interests Reply Submissions to the Commonwealth dated 17 August 2022, as these submissions largely address the modern award objectives (and this is set out in Background Document 7).
- 2.2 In particular, the employer interests made submissions about enterprise agreement data relied upon by the Commonwealth at [3.2]-[3.6] of the employer interests' Reply Submissions. These concerns were raised with respect to the modern awards objective (specifically, s134(1)(b)) but are also applicable to the submissions of the Commonwealth extracted in Background Document 6. The employer interests consider that their submissions in this regard should be identified in Background Document 6.
- 2.3 Subject to the clarification sought above, the employer interests consider the material set out in Background Document 6 uncontentious.

3. RESPONSE TO QUESTIONS IN BACKGROUND DOCUMENT 8

Question 1 for all other parties:

The other parties are invited to comment on the HSU's response to question 1 of BD5

- 3.1 The employer interests maintain that the HSU has failed to establish that the concept of '*social utility of the work/social context of the work*' has previously been considered a relevant factor in work value considerations.
- 3.2 Whilst the employer interests agree that aged care work has a significant and important role to play to the broader societal context, in a work value matter, the concept of '*social utility of the work/social context of the work*' has limited relevance and should be approached with caution.
- 3.3 In this respect, the employer interests continue to rely upon our submissions in reply at [2.20]-[2.31], which are also set out at [320]-[324] of Background Document 8.

Question 3 for the Joint Employers:

The Joint Employers are invited to respond to the clarification provided by the ANMF.

- 3.4 The employer interests acknowledge the clarification provided by the ANMF and do not dispute the ANMF's characterisation of its application. The overview provided by the employer interests was not intended to characterise the application differently.
- 3.5 Regardless of the clarification provided by the ANMF, the propositions put forward by the employer interests remain relevant.

Question 4 for the Joint Employers:

The 3 step process for the determination of properly fixed minimum rates from the ACT Child Care Decision provides that the key classification is fixed by reference to the C10 framework and other rates in the award are set by applying internal relativities. The Joint Employers contend that the principles in the ACT Child Care Decision 'are still useful for work value considerations'. Is it proposed that we increase the RN rates by 35 per cent and then adjust the other relevant rates in the Nurses Award by applying the existing internal relativities?

- 3.6 In Annexure O at [3.1]-[3.10], the employer interests set out an analysis of the existing classification internal relativities in the *Nurses Award*, albeit with respect to minimum rates as set at July 2021. That analysis supports the following findings, namely, the:
- (a) RN aligns to C1;
 - (b) EN, being a diploma qualification, aligns to C5; and
 - (c) Nursing Assistant Experienced (Certificate III) is appropriately aligned to C10.
- 3.7 In properly aligning those three classifications, which appear to be self-evident, the Commission might have to accept some of the internal relativities are not properly aligned. This is because the award minimum rates are either properly set or they are not.
- 3.8 In circumstances where the RN needs to be properly aligned to C1 and the EN to C5, for reasons earlier explained, the internal relativities (including pay points and increments between classification levels) will need at least some adjustment. Noting all parties agree the award minimum rates were never properly set, this does not appear to be a controversial position.
- 3.9 There is no doubt in a classification structure that traverses post-secondary through to tertiary level education that the Commission will be required to properly set and align the degree, the diploma and the certificate III qualifications.

Question 4A for Joint Employers:

Do the Joint Employers agree with paragraph 40 of the ANMF submission?

- 3.10 The employer interests agree generally with paragraph 40 of the ANMF submissions, however, this general overview does not replace the submissions put forward by the employer interests in their closing submissions.

Question 5 for ABI:

ABI is invited to respond to the HSU submission as to the weight to be given to its submission.

3.11 At [4] of the HSU closing submissions in reply dated 19 August 2022, the HSU advanced the following submission:

“Despite the way they have purported to conduct themselves, [ABI] have not been appointed (and cannot assume a role as) counsel assisting the Commission; they are here to, apparently, resist the HSU’s applications being granted. To the extent that the position they take departs from that embraced by literally every actual participant in the sector – and the Royal Commission’s recommendations – the fact that it is being advanced by a body with no actual interest in the industry should be taken into account when considering what, if any, weight to give it.”

3.12 At the outset, ABI has members who are employers in the industries that are the subject of these proceedings. The suggestion that ABI has no actual interest in the proceedings is accordingly misplaced. ABI is also a federally registered organisation of employers that has participated in Fair Work Commission proceedings pertaining to the *Aged Care Award*, *SCHADS Award* and *Nurses Award* since the inception of the FW Act.

3.13 There is no foundation to contest the participation of ABI in these proceedings.

3.14 In any event, ABLA (and all submissions filed by ABLA in the proceedings) have been instructed by three clients (ACSA, LASA and ABI) in this matter under a common interest brief. The position advanced consistently through these proceedings has been a *joint* position made by ABLA on behalf of its three clients. At no stage has any part of the submissions been qualified or conditioned as only being made by one client, other than all three clients.

3.15 The HSU submission appears to stem from a view that certain aspects of the Consensus Statement are at odds with the joint position of the employer interests. However, for reasons entirely unclear to the employer interests, the HSU now contend that the entirety of submissions filed by ABLA (which are not the submissions of ABI, but of all three clients) should attach little or no weight. That submission is entirely unfounded and only serves to distract the Commission from issues under consideration.

3.16 ABI has never appointed itself as *“counsel assisting the Commission”*. However, as an interested party in the proceedings, ABI (along with ACSA and LASA) has at all times sought to assist the Commission with respect to legal principles and the statutory framework. It is surprising that a party would criticise such an approach.

- 3.17 The Commission is of course able to regard to the Consensus Statement. The employer interests simply state that the Consensus Statement does not represent a joint position of ACSA, LASA and ABI. Rather, it is a negotiated position between several stakeholders in the aged care industry, which did not include ABI. Further, the Consensus Statement cannot be relied upon as an “*admission*” such to impact the weight of the submissions filed by ACSA, LASA and ABI in the proceedings.
- 3.18 In any event, it is difficult to see how the limited areas of alleged inconsistency could materially impact the weight of submissions filed, especially in circumstances where the joint employers have had the benefit of testing evidence. Any perceived “*departure*” is made with reference to the evidence before the Commission.

Question 6 for the Joint Employers:

What do you say in reply to the Browne v Dunn point advanced by the ANMF?

- 3.19 The ANMF arguments relying upon *Browne v Dunn* are of limited utility.¹ The employer interests are not seeking the Commission make findings as to matters not put to the expert witnesses. Further, the employer interests do not seek adverse findings as to the credibility of the expert witnesses or their areas of expertise.
- 3.20 Both Annexure J [2]-[4] and, in particular, Reply Submissions dated 19 August 2022 [3.17]-[3.32], focus upon themes arising from the expert reports and were explored in cross-examination. The employer interests’ primary submission, in that respect, is that the expert evidence is of limited, if any, assistance to the Commission with its consideration of work values reasons and its relevance to the statutory framework has not been established by the ANMF. Hence, the Commission should be cautious with respect to this evidence.
- 3.21 That position is further supported by the agreement of the ANMF (and HSU) to the preliminary views expressed by the Commission, namely, that the minimum award rates were never properly set² and that the Commission is not required to make a finding as to *why* the minimum award rates were not properly set.³

¹ ANMF Closing Submissions in Reply, 17 August 2022, [321]-[445].

² ANMF Closing Submissions, 22 July 2022 [91(1)]; HSU email to the Commission, 2 August 2022 (uploaded to FWC website on 3 August 2022).

³ ANMF Closing Submissions, 22 July 2022 [91(2)]; HSU email to the Commission, 2 August 2022 (uploaded to FWC website on 3 August 2022). The employer interests note the position of the UUU with respect to the preliminary views was qualified during oral submission on 25 August 2022.

Question 8 for all parties:

Are there any corrections that should be made in respect of the summary of submissions in reply to closing written submissions?

3.22 At paragraph [324] of Background Document 8, there is a reference to “*care consideration*”, this should read “**careful** *consideration*”. No further corrections are sought.

For ACSA, LASA and ABI

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29 August 2022