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**Subject:** AM2020/99, AM2021/63, AM2021/65 - Aged Care Work Value Case [SEC=OFFICIAL] [AGSDMS-DMS.FID4330342]

**OFFICIAL**

Dear Modern Awards team,

We refer to the above matters and attach for filing the submissions of the Commonwealth.

We note the Joint Industry Statement which was filed by the HSU at around 2PM today. The Commonwealth is considering this Statement and will respond to it as necessary and appropriate in its reply submissions.

Regards,

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WORK VALUE CASE – AGED CARE INDUSTRY

SUBMISSIONS OF THE COMMONWEALTH

A. INTRODUCTION AND SUMMARY

Introduction

1. This submission is made on behalf of the Commonwealth of Australia in accordance with the Statements of the Full Bench of the Fair Work Commission (**Commission**) dated 17 November 2022 ([2022] FWCFB 208), 23 November 2022 ([2022] FWCFB 214) and amended directions of 6 December 2022.
2. Parts B – E of these submissions deal with the Commonwealth’s position in relation to the matters the parties have been directed to address, as follows:
  - 2.1. Part B — the details of the Commonwealth’s funding commitments in relation to the interim increase proposed in the Full Bench’s decision on 4 November 2022 ([2022] FWCFB 200) (the **Decision**), and the implications of these commitments for the Commission’s consideration of the modern awards objective in s 134(1)(f) of the *Fair Work Act 2009* (Cth) (**FW Act**).
  - 2.2. Part C — the Commonwealth’s position on the timing and phasing-in of the proposed interim increases.
  - 2.3. Part D — scope of the proposed interim increase.
  - 2.4. Part E — the amendments made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Amending Act**) to the FW Act, and the implications of these amendments on the provisional views expressed in the Decision regarding former ss 134(1)(e) and 284(1)(d) in [1041]–[1063].
3. The Commonwealth otherwise accepts and does not wish to make any further submissions in relation to the provisional views of the Commission set out in:
  - 3.1. [1001]–[1072] of the Decision as to whether the proposed interim increases are necessary to achieve the modern awards objective having regard to the factors set out in s 134(1) other than subsection (f); and

- 3.2. [1073]–[1083] of the Decision as to whether the proposed interim increases are necessary to achieve the minimum wages objective having regard to the factors set out in s 284(1).

### **The Commonwealth's position in summary**

4. The Commonwealth supports the proposed interim increase and is committed to funding the full interim 15 per cent increase to minimum award wages for direct care workers, including on-costs incurred by aged care providers in all Commonwealth funded aged care (as outlined in [14]–[18], below).
5. The Commonwealth commits to providing this funding in two phases with the following timing:
  - 5.1. an increase in funding corresponding with a 10 per cent increase in wages (including on-costs) from 1 July 2023; and
  - 5.2. a further increase in funding corresponding with the remaining 5 per cent increase in wages (including on-costs) from 1 July 2024.
6. The Commonwealth supports timing and phasing-in arrangements that reflect the timing of these increases in funding.
7. The Commonwealth submits that, so far as they are relevant to this matter, the amendments to the FW Act by the Amending Act further support the Commission granting the proposed interim increase.

### **B. FUNDING COMMITMENT AND IMPLICATIONS FOR SECTION 134(1)(F)**

#### **Funding commitment of the Commonwealth**

8. The Commonwealth supports the Commission's proposal for a 15 per cent interim increase for direct care workers, as justified by work value reasons, and is committed to funding the interim increase in relation to Commonwealth funded aged care.
9. The Commonwealth is committed to funding the interim increase from 1 July 2023, phased in over a twelve-month period commencing 1 July 2023 with the funding necessary to support a 10 per cent increase in wages applied on 1 July 2023 and the funding necessary to support the remaining 5 per cent increase in wages on 1 July 2024.
10. This timing will allow the Commonwealth to implement the proposed interim increase appropriately through its various aged care funding mechanisms. Commencement from 1 July 2023 will also allow implementation of the interim increase to align with the annual indexation of aged care programs, scheduled funding changes to aged care program arrangements and the minimum wage uplift flowing from the annual wage review.

### ***Mechanisms for funding wage increases***

11. The mechanisms the Commonwealth will likely use to fund the proposed interim increase for direct care workers are the following aged care program arrangements (**Programs**):
  - 11.1. Residential aged care — the Australian National Aged Care Classification (**AN-ACC**) price will be determined on an annual basis from 1 July 2023, based on advice from the Independent Health and Aged Care Pricing Authority (**IHACPA**). IHACPA's advice will include advice in relation to the cost (including the cost of any increase in wages) of providing specified care and services to care recipients. As such, the future AN-ACC price can incorporate the pricing impact of the proposed interim increase from 1 July 2023 onwards.
  - 11.2. Home Care Packages (**HCP**) program — annual subsidy indexation on 1 July 2023 to also factor in the additional cost of wages incurred by providers to deliver wage increases to home care workers and nurses. Indexation from 1 July 2023 will allow the necessary subordinate legislation to be drafted and registered.
  - 11.3. Commonwealth Home Support Programme (**CHSP**) — development and negotiation of a large volume of grant agreements ahead of a commencement date of 1 July 2023.
  - 11.4. There are also a number of other small aged care and related programs funded by grant agreements or contractual arrangements that involve direct care workers that will need to be adjusted.
12. It is not feasible for the Commonwealth to implement a funding increase prior to 1 July 2023 because:
  - 12.1. the Commonwealth does not provide funding to directly fund wages and associated on-costs in the aged care sector;
  - 12.2. given that the proposed interim increase applies only to direct care workers, it is difficult to calculate and apply a standard indexation uplift to funding across the various aged care programs, which is the usual method of implementing wage increases in this sector; and
  - 12.3. it is necessary to ensure that increased funding is distributed accurately and that there are appropriate accountability mechanisms in relation to the expenditure of additional funding, which takes time given the diverse Program arrangements.
13. The Commonwealth supports continuing to improve wages and conditions for aged care workers so that they properly reflect the value of the work performed by those workers. However, this must be balanced against the need to ensure these funds are properly targeted, so that they contribute to improving the quality and safety of the aged care system for older Australians.

### ***Mechanism for determining on-costs***

14. The Commonwealth recognises that on-costs are a significant proportion of the total wage bill for aged care providers. Accordingly, the Commonwealth's funding commitment includes funding for on-costs.
15. The Joint Employers raised the following potential on-costs in their submissions in reply to the Commonwealth:
  - superannuation
  - payroll tax
  - workers' compensation
  - allowances and entitlements which are based on a percentage of the standard rate and may be subject to an increase, and
  - any possible new entitlements arising out of this matter.<sup>1</sup>
16. At least in respect of the proposed interim increase, the final dot point does not arise. The Commonwealth accepts that the other on-costs identified by the Joint Employers are likely to increase with the proposed interim increase.
17. The Commonwealth's proposed approach to funding on-costs is as follows:
  - 17.1. Initially, funding increases may be determined by using sector average labour costs by Program (including both wages and on-costs) and making the corresponding upwards adjustment to the subsidy or grant relevant to that program to account for the proposed interim increase. For example, higher shift allowances and overtime in residential aged care will be accounted for in the setting of the AN-ACC price in the residential aged care funding model.
  - 17.2. Into the future, the costs of delivering care both in residential aged care and in-home care will be further investigated through the IHACPA. IHACPA will provide advice to Government regarding the costs of care, which will inform future price setting arrangements.
18. This approach is appropriate because:
  - 18.1. as indicated above, the Commonwealth does not fund aged care wage costs directly, so it is not possible to calculate the precise level of Commonwealth funding to be provided to the sector according to a specified list of on-costs;
  - 18.2. historically, Commonwealth funding has not been calculated from the 'ground up', so there is no prescribed list of labour input costs that can be separated and adjusted for the purposes of Commonwealth funding;
  - 18.3. expenditure on wages is variable both within and across Programs reflecting the diversity of job roles, different business and employment models, the

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<sup>1</sup> Decision [906], quoting Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.13]–[3.14].

number of awards setting minimum pay and conditions and the higher wages paid by some employers under Enterprise Agreements. However, the main variability is across different Programs. For example:

- 18.3.1. on-costs associated with the *Aged Care Award 2010* and the *Nurses Award 2020* are higher than for the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award**) employees delivering in-home care, mainly because of higher shift allowances and overtime in residential aged care given the 24/7 nature of residential aged care service delivery;
  - 18.3.2. in the HCP Program, the care recipient is able to spend their subsidy on a range of services, equipment and aids, and home modifications up to the level of their package. Expenditure on labour-related costs (wages and on-costs) is variable and is dependent to a certain extent on the preferences of the care recipient; and
  - 18.3.3. for CHSP, a wide range of service types are delivered under grant-based funding, only a proportion of which are delivered by home care workers employed under the SCHADS Award Schedule E who would be eligible to receive the proposed interim increase; and
- 18.4. in these circumstances, using sector average labour costs by Program as the initial basis for determining the funding necessary to fund on-costs would be an equitable approach across providers that factors in existing expenditure on labour costs (including on-costs).

#### **Implications for s 134(1)(f) of the modern awards objective**

19. The modern awards objective in s 134(1)(f) of the FW Act requires the Commission to take into account:
  - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
20. As to productivity, the Commonwealth agrees with the provisional view expressed at [1065] of the Decision. An increase in wages should not be regarded as affecting productivity. In that respect, s 134(1)(f) is a neutral consideration.
21. As to regulatory burden, the proposed interim increase itself would have no increased regulatory burden. The Commonwealth expects that the accountability mechanisms referred to in [12.3] above would involve minimal additional regulatory burden. As such, the Commonwealth submits that regulatory burden is overall a neutral consideration.
22. As to the impact on business and employment costs, the Commonwealth recognises and agrees with the Commission that, given the Commonwealth's funding role in the sector, the 'extent to which the Commonwealth funds any outcome from these

proceedings is plainly relevant to [the Commission's] consideration of the impact of any increase in employment costs on the employers in the aged care sector'.<sup>2</sup>

23. The Commonwealth submits that, given the funding commitment it sets out in these submissions, the Commission can be satisfied that granting an interim increase with timing and phasing in arrangements that are consistent with the timing of Commonwealth's funding commitments would have a non-material impact on business and employer costs. As such, on this premise, s 134(1)(f) would be a neutral consideration in whether such an increase was necessary to meet the modern awards objective.
24. If the Commission were to grant the proposed interim increase earlier or without the phase-in reflected in the Commonwealth's current funding commitment, this could have an impact on business. The Commonwealth recognises and accepts the observations from [911]–[916] of the Decision, including that there is no primacy to any of the s 134(1) considerations and so s 134(1)(f) should not be given 'determinative weight'.<sup>3</sup>

### C. TIMING AND PHASING IN OF THE INTERIM INCREASE

25. The relevant principles are set out at [976]–[990] of the Decision. The Commonwealth agrees with this summary of the relevant principles.

#### Timing

26. Section 166(1)(a) of the FW Act creates a 'presumption' that the proposed interim increase would commence on 1 July 2023. The Commonwealth accepts that this is not a difficult presumption to displace, and the Commission need only be satisfied it is 'appropriate' to specify a different day of operation.<sup>4</sup>
27. Consistent with its funding commitments, the Commonwealth would support a commencement date of 1 July 2023 in respect of the first phase of the proposed interim increase. The Commonwealth does not submit that an earlier commencement date would be 'appropriate' having regard to its funding commitments and administrative arrangements.

#### Phasing-in

28. In *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001<sup>5</sup> (***Penalty Rates – Transitional Arrangements case***) the Commission identified<sup>6</sup> three categories of

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<sup>2</sup> Decision, [904].

<sup>3</sup> Decision, [914], quoting *4 yearly review of modern awards – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive claims* [2019] FWCFB 6067 at [136]–[137].

<sup>4</sup> *Australian Workers' Union* [2022] FWCFB 4, [154], quoted at [980] of the Decision.

<sup>5</sup> Cited at [980] of the Decision.

<sup>6</sup> At [141].

considerations relevant to deciding on the transitional arrangements for a decision to apply a reduction in penalty rates:

- 28.1. the statutory framework;
  - 28.2. the *Penalty Rates decision*<sup>7</sup> (that is, the substantive decision as to the merits of the proposed variation of penalty rate provisions); and
  - 28.3. fairness.<sup>8</sup>
29. As regards the statutory framework, the Commission in the *Penalty Rates Transitional Arrangements case* noted<sup>9</sup> that the setting of any transitional arrangements requires a particular focus on:
- 29.1. relative living standards and the needs of the low paid (s 134(1)(a));
  - 29.2. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s 134(1)(f)); and
  - 29.3. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s 134(1)(g)).
30. The Commission also considered the observations of the Commission in *In Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)* (at [981]). The main factors considered by the Commission in that case were in determining whether transitional arrangements were appropriate:
- 30.1. how much time employers had to prepare;
  - 30.2. the extent of the increase; and
  - 30.3. whether there was reliable evidence from the employers as to what date was manageable.
31. Given the Commonwealth's funding commitment, and the central role of Commonwealth funding to the sector, the Commonwealth submits that a phasing-in approach that reflects the Commonwealth's funding commitment would be appropriate and consistent with the principles established in the cases set out above. That is:
- 31.1. a 10 per cent increase to wages for direct care workers from 1 July 2023, and

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<sup>7</sup> *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001. See too [145] of the *Penalty Rates Transitional Arrangements decision*.

<sup>8</sup> Referring at [144] to ss 577(a) and 588 of the FW Act at [144] and noting at [148] that regard should be had to fairness from the perspective of both the employees and the employers.

<sup>9</sup> At [143], cited in the AWU case at [157].



31.2. the remaining 5 per cent increase to wages for direct care workers from 1 July 2024.

32. Consistent with the submissions at [23]–[24] above, if the Commission adopts this phased-in approach, the impact on business and employer costs will be minimal. An approach which does not adopt this phasing-in may have impacts on business and employer costs which, if applicable, must be weighed and assessed against the benefits in providing an earlier uplift in wages.

#### **D. SCOPE OF THE PROPOSED INTERIM INCREASE**

##### **Definition of ‘direct care worker’**

33. In the interests of certainty, the Commonwealth submits that in implementing the proposed interim increase, there should be some further consideration given to clearly defining the scope of who is a ‘direct care’ worker.
34. The Decision defines ‘direct care worker’ as ‘employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs’. That is, the concept of a direct care worker is defined as a worker in a ‘caring role’ with a non-exhaustive list of specific roles included.
35. To provide certainty to employers and employees, and to support the accountability measures referred to at [12.3] above, the Commonwealth submits that final variations to the affected Awards will need to more precisely define which employees will receive the interim increase. This is particularly important in the home care sector under Schedule E of the SCHADS Award, where there is less of a clear delineation of caring and non-caring work than in the Aged Care Award.

#### **E. AMENDMENTS RELEVANT TO THE MODERN AWARDS OBJECTIVE AND MINIMUM WAGES OBJECTIVE REGARDING GENDER EQUALITY**

36. The relevant parts of the Amending Act (Part 4 – Objects of the Fair Work Act and Part 5 – Equal Remuneration) commenced on 7 December 2022, being the day after 6 December 2022 when the Amending Act received the Royal Assent.<sup>10</sup>

##### **Amendments to objects and objectives relating to gender equality**

###### ***Summary of amendments***

37. Part 4 of Schedule 1 to the Amending Act made the following amendments to the FW Act which are relevant to the Commission’s consideration of gender equality and gender-based undervaluation of wages in the context of considering the modern awards objective and the minimum wages objective. The Commonwealth agrees with

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<sup>10</sup> Amending Act, s 2(1), item 10.

the statement of Acting President Hatcher that these amendments apply to applications currently before the Commission, including these three applications.<sup>11</sup>

38. Item 346 amended the objects of the FW Act, such that s 3(a) now reads (addition underlined):

### 3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

...

39. Items 347 and 348 repealed s 134(1)(e) of the modern awards objective and replaced it with new s 134(1)(ab), which reads:

- (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and

40. Item 347 also introduced new s 134(1)(aa), which is addressed in [47]–[50] below.

41. Items 349 and 350 repealed s 284(1)(d) of the minimum wages objective, and replaced it with new s 284(1)(aa), which reads:

- (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and

### **Purpose of amendments**

42. The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) (**Explanatory Memorandum**) explains the purpose of the amendments in Part 4 of the Amending Act as follows:

330. This Part would introduce job security and gender equality into the object of the FW Act. It would place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay.

331. In accordance with established principles of statutory interpretation, the FW Act is required to be interpreted in a way that would best achieve the object of the FW Act wherever possible (see section 15AA of the AI Act). The FWC is also required under existing paragraph 578(a) of the FW Act to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act.

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<sup>11</sup> President's Statement, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, 8 December 2022, [6] (<https://www.fwc.gov.au/documents/documents/media/releases/presidents-statement-more-jobs-better-pay-2022-12-08.pdf>).

This includes, for example, the FWC performing functions or exercising powers in relation to dispute resolution, including arbitration, setting terms and conditions in modern awards and approving enterprise agreements.

43. The Explanatory Memorandum specifically describes the purpose of the amendment to the object in s 3(a) of the FW Act as follows:
- 333. The existing paragraph 3(a) sets out one of the means by which the object of the FW Act is achieved. This item would amend that means to add job security and gender equality as considerations.
  - 334. The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment. The reference to promoting gender equality recognises the importance of people of all genders having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay. The intention of the references to 'gender equality' in each of these provisions is to use language that is consistent with the Convention on the Elimination of All Forms of Discrimination against Women and ILO Convention concerning Discrimination in Respect of Employment and Occupation (No 111). It is also intended to reflect the policy objective of both formal and substantive gender equality.
  - 335. Job security and gender equality would sit alongside existing considerations in the object of the FW Act, such as providing workplace relations laws that are flexible for business, assisting employees to balance their work and family responsibilities, and achieving productivity and fairness (see existing paragraphs 3(a), (d) and (f)).

#### **Implications for provisional views on s 134(1)(e)**

44. At [1048] of the Decision, the Commission stated:

As discussed earlier, we accept that the aged care workforce is predominantly female and the expert evidence is that, as a general proposition, work in feminised industries including care work has historically been undervalued and the reason for that undervaluation is likely to be gender-based. We also accept the logic of the proposition in the expert evidence that gender based undervaluation of work is a driver of the gender pay gap and if all work was properly valued there would likely be a reduction in the gender pay gap. While it has not been necessary for the purposes of these proceedings for us to determine why the relevant minimum rates in the Awards have not been properly fixed we accept that varying the relevant awards to give effect to the interim increase we propose would be likely to have a beneficial effect on the gender pay gap and promote pay equity. The more contentious issue concerns the proper construction and application of ss.134(1)(e) and 284(1)(d).

45. The above amendments to the FW Act mean that the issue as to the proper construction and application of ss 134(1)(e) and 284(1)(d) raised in the above passage and then set out in [1049]–[1061] falls away. Unlike the phrase 'equal remuneration for work of equal or comparable value', the phrases 'gender equality', 'gender-based undervaluation of work' and 'gender pay gaps' are not defined in the FW Act (as amended) and take on their ordinary meaning. In particular, the breadth of those terms means it is unnecessary for the Commission to engage in the comparative exercise contemplated at [1057] of the Decision, or to limit the application of these objectives to situations where an award variation would equalise wages for men and women

workers performing work of equal or comparable value as contemplated at [1060] of the Decision.

46. As such, the amendments made by the Amending Act provide a clear basis for the Commission to consider that its provisional views set out at [1048] of the Decision (and its findings as to gender-based undervaluation and the gender pay gap at [740]-[758] and [859]-[866]) support implementing the proposed interim increases. Specifically:
  - 46.1. the Commission must take into account the object of the FW Act in amended s 3(a) to promote gender equality (s 578(a));
  - 46.2. the provisional views expressed at [1048] and the findings referred to above would lead the Commission to consider that new s 134(1)(ab) is a positive factor in terms of whether the proposed interim increases are necessary to achieve the modern awards objective, because they would support achieving gender equality in the workplace, including by reducing gender-based undervaluation of work; and
  - 46.3. those findings and provisional views would also lead the Commission to consider that new s 284(1)(aa) is a positive factor in terms of whether the proposed interim increases are necessary to achieve the minimum wages objective, because they would support achieving gender equality in the workplace, including by reducing gender-based undervaluation of work and addressing the gender pay gap.

#### **New s 134(1)(aa) of the modern awards objective**

47. Item 347 of the Amending Act also introduced new s 134(1)(aa), which reads:

(aa) the need to improve access to secure work across the economy; and
48. The reference to 'secure work' in s 134(1)(aa) is directed at a similar purpose to the new reference to 'job security' in the objects, referred to at [38] above. 'Secure work' is not defined and takes its ordinary meaning. Indicators of secure work may include (but are not limited to) the degree of certainty an employee has about the duration of their employment, the predictability of their pay, and the circumstances in which their employment may end. It follows that this objective is most likely to be engaged in relation to award terms that relate to matters such as the type of employment, arrangements for when work is performed, and notice of termination and redundancy, rather than terms that relate only to hourly rates of pay.
49. The applications before the Commission do not seek to vary any award terms that are directly relevant to secure work (including in implementing the proposed interim increase). Further, the Government's commitment to fully fund the interim wage increase means that the additional wage costs resulting from the decision will not affect employer incentives around such conditions.
50. The Commonwealth therefore submits that this factor should be assessed as neutral in relation to the proposed interim wage increase.

## Amendments to s 157

51. Item 352 of the Amending Act inserted new s 157(2B) into the FW Act, which provides:
- (2B) The FWC's consideration of work value reasons must:
- (a) be free of assumptions based on gender; and
  - (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.
52. The Explanatory Memorandum explains the purpose of new s 157(2B) as follows:
346. This item would introduce subclause 157(2B) to clarify that the FWC's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions. This item is modelled after subsection 248(3) and paragraph 248(4)(c) of the *Industrial Relations Act 2016* (Qld) and would ensure that the FWC's consideration of work value applications cannot be affected by gender-based assumptions about the value of work.
347. In the *Equal Remuneration Decision 2015*, the Full Bench of the FWC expressed a view that the definition of work value reasons would be sufficiently broad to allow a party to advance a claim that minimum rates of pay in a modern award undervalue work due to historical gender-related reasons [(2015) 256 IR 362, [292]]. This item would have the effect of confirming the Full Bench's view in the FW Act.
53. In circumstances where the Commission has not yet made a determination varying the relevant awards, it is necessary for the Commission to be satisfied that its consideration of work value reasons conforms with new s 157(2B). However, for the reasons below, the Commission can be satisfied that it has done so.

### **Paragraph (a) – free of assumptions based on gender**

54. New s 157(2B)(a) imposes a negative standard or requirement on the Commission in terms of how it considers work value reasons within the existing meaning in s 157(2A). That is, in considering work value reasons, the Commission must not make assumptions based on gender.
55. In these proceedings, the Commission has before it extensive expert evidence as to gendered assumptions which have historically been applied in the assessment of the work value of work in the aged care sector. As set out further below, the Commission has given close consideration to that evidence. Further, in conducting its assessment of work value, the Commission has relied on and applied the expert evidence of Associate Professor Junor which exposes 'invisible' skills that may have been given inadequate weight in previous work value assessments including because of gender-based assumptions. This demonstrates that the Commission's consideration of work value reasons in this proceeding to date has adhered to the requirements of new s 157(2B)(a).
56. Of course, s 157(2B)(a) imposes an ongoing obligation which will continue to apply to the Commission's consideration of work value reasons for the purposes of Stage 3 of these proceedings.

**Paragraph (b) – consideration of historical undervaluation due to gender-based assumptions**

57. Modern award minimum wages may be varied only if the Commission is satisfied that the variation is justified by work value reasons (s 157(2)), which, as was accepted in the Decision, are exhaustively defined in s 157(2A) (at [148]). Section 157(2B)(b) operates by requiring the Commission, in considering the work value reasons specified in subsection (2A) (for example, the level of skill or responsibility involved in doing the work), to consider whether gender-based assumptions have been made historically in relation to those matters which have resulted in the work being undervalued.
58. As [347] of the Explanatory Memorandum indicates, the principal mischief that new s 157(2B)(b) is intended to address is the Commission using minimum rates that were improperly fixed because of gender-based assumptions as a foundation or datum point for applying later changes in work value.<sup>12</sup> If minimum rates that have been set based on historical assumptions about gender are used as a reference point for future wage rises, gender-based undervaluation will be perpetuated, even if later assessments of changes in work value do not themselves make such assumptions. Section 157(2B)(b) requires the Commission considers whether this is a factor in each case.
59. New s 157(2B)(b) does not require that the Commission make a positive finding about historical undervaluation. Rather, the Commission must actively turn its mind to the question of historical undervaluation.
60. For the reasons below, the Commonwealth submits that the Commission's existing consideration of historical undervaluation due to gender-based assumptions in these proceedings is sufficient to satisfy s 157(2B)(b).

*The Commission has accepted that rates were not properly fixed*

61. In considering the role of a fixed datum point, the Commission stated that (at [175] of the Decision):
- While not mandatory, where work value has previously been properly taken into account it is likely the Commission would adopt an appropriate datum point from which to measure work value change, as a means of avoiding double counting.
62. However, the Commission also observed that (at [172] of the Decision):
- A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.
63. In the Decision, the Commission proceeded (noting broad agreement from the parties supporting this approach) on the basis that existing rates had not been properly fixed (at [353]). This means there is no risk of past undervaluations being carried forward into the minimum rates that the Commission will finally determine at Stage 3 of these proceedings. This will have the effect of addressing the issue of any historical

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<sup>12</sup> As discussed in *Re 4 yearly review of modern awards* (2018) 284 IR 121 at [148] and [156], the adoption of this approach by the Commission's predecessor tribunals significantly limited the capacity to undertake a full work value assessment of awards covering female-dominated areas of work.

undervaluation because of assumptions based on gender, which is the mischief to which new s 157(2B)(b) is directed.

*The Commission has considered, accepted and applied expert evidence on gendered undervaluation*

64. The Commission proceeded on the basis (consistent with the parties' submissions) that it 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 the minimum rates are affected by gender undervaluation (at [355]). However, it is apparent that the Commission gave consideration to whether work in the aged care sector had been undervalued because of gender-based assumptions.
65. *First*, the expert evidence before the Commission addressed historical gender-based undervaluation applicable to this case, including the Charlesworth Report at [42] and the Charlesworth Supplementary Report at [61], the Eagar Report at page 13, and the Meagher Report at page 27. The issue was addressed in submissions. The Decision comprehensively summarises this evidence and argument.
66. *Second*, the Commission accepted key propositions from the expert evidence as to there being historical undervaluation of care work for gendered reasons (at [356]; see also [1048]):

That being said, we accept 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. We also accept 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 proper assessment of the skills utilised in aged care work is considered in detail in Chapter 7.
67. *Third*, after giving close consideration to expert evidence on gender undervaluation in the aged care sector, the Commission accepted key propositions on gender-based undervaluation (at [758]). This included accepting that there were 'barriers and limitations to the proper assessment of work value in female dominated industries and occupations', and that 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'.
68. *Fourth*, the Commission drew on expert evidence to ensure that its assessment of work value was free of assumptions based on gender. In particular, the Commission accepted the evidence of Associate Professor Junor that the Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly characterised as skills, and should be brought to account in the assessment of work value (at [896]).

### *Conclusion*

69. These are clear indications that the Commission has turned its mind to the question of historical undervaluation because of gender-based assumptions as a key consideration in this matter. That is sufficient to discharge the obligation in s

157(2B)(b), especially given the Commission's finding that wages were never properly fixed. It is not a requirement of new s 157(2B)(b) for the Commission to reach a concluded view on the issue.

Date: 16 December 2022



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Solicitor for the Respondent

These submissions were settled by Yaseen Shariff SC and Dan Fuller, counsel for the Commonwealth of Australia.