



# REASONS FOR DECISION

*Fair Work Act 2009*

s.158—Application to vary or revoke a modern award

## **Aged Care Award 2010**

(AM2020/99 and AM2021/63)

## **Nurses Award 2020**

(AM2021/63)

## **Social, Community, Home Care and Disability Services Industry Award 2010**

(AM2021/65)

VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT O'NEILL  
COMMISSIONER BISSETT

BRISBANE, 18 MAY 2023

*Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Stage 2 – interim increase – Reasons for Decision.*

## **INDEX**

<b>Chapter</b>	<b>Paragraph</b>
1. Introduction	[1]
2. Background	[6]
2.1 The Stage 1 Decision	[6]
2.2 Stage 2 proceedings	[15]
2.3 Submissions overview	[25]
2.4 The Joint Statement	[32]
3. Scope of the interim increase	[33]
3.1 Submissions	[36]
3.2 Consideration	[69]

4.	The Secure Jobs, Better Pay Act	[76]
4.1	Submissions	[93]
4.2	Consideration	[171]
5.	Timing and phasing-in of the interim increase	[188]
5.1	Submissions	[188]
5.2	Witness evidence submitted by the Joint Employers	[373]
5.3	Consideration	[405]
6.	The modern awards objective	[426]
7.	The minimum wages objective	[482]
	Abbreviations	Page 7979

## 1. Introduction

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

- AM2020/99 – an application by the Health Services Union (HSU) and a number of individuals to vary the *Aged Care Award 2010* (Aged Care Award)
- 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), and
- AM2021/65 – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] Throughout this decision the Aged Care Award, Nurses Award and SCHADS Award will be collectively referred to as the Awards.

[3] On 21 February 2023 we issued a decision<sup>1</sup> (the *Stage 2 decision*) stating that an interim increase of 15 per cent to modern award minimum wages applying to the following employees is necessary to achieve the modern awards objective and the minimum wages objective:

- direct care workers under the Awards and;
- Head Chefs/Cooks under the Aged Care Award (Aged care employee levels 4-7 provided the employee is the most senior chef or cook engaged in a facility); and
- Recreational Activities Officers/Lifestyle Officers under the Aged Care Award.

[4] We determined that the interim increase will take effect from 30 June 2023.

[5] What follows are our reasons for that decision.

## 2. Background

### 2.1 The Stage 1 Decision

[6] On 4 November 2022, a previously constituted Full Bench published a Decision (the *Stage 1 decision*) in these matters.<sup>2</sup>

[7] The Full Bench concluded that the evidence established that the existing minimum wage rates in the Awards do not properly compensate direct care workers, in either residential or in-home aged care settings, for the value of the work performed.<sup>3</sup> These workers, termed ‘direct aged care workers’, included personal care workers under the Aged Care Award (PCWs), home care workers who work in aged care under the SCHADS Award (HCWs), and Registered Nurses (RNs), Enrolled Nurses (ENs), Assistants in Nursing (AINs) and Nurse Practitioners who work in aged care under the Nurses Award.

**[8]** The Full Bench considered that the proceedings had raised a number of complex issues for determination which required close examination and would benefit from further submissions and, potentially, further evidence, from the parties.<sup>4</sup> The Full Bench concluded that the following 3 broad considerations weighed in favour of an interim decision providing an increase in minimum wages for discrete categories of aged care workers and stated as follows:

- “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.”<sup>5</sup>

**[9]** The Full Bench was satisfied that the interim increase should apply to PCWs and HCWs at all levels at and below the Certificate III level, along with RNs, ENs, AINs and Nurse Practitioners working in aged care.<sup>6</sup>

**[10]** The Full Bench did not propose to provide an interim increase for Head Chefs/Cooks and directed the parties to confer in respect of this issue. The Full Bench advised that, should the parties be able to agree upon the quantum of an interim increase and the classification(s) to which it would apply, the Full Bench would give further consideration to determining an interim increase for these employees during the next stage of proceedings. Absent agreement between the parties, the Full Bench indicated that any increase applicable to Head Chefs/Cooks would be dealt with in a later stage of the proceedings.<sup>7</sup>

**[11]** Further, the Full Bench did not propose to provide an interim increase in the minimum wages of Recreational Activities Officers/Lifestyle Officers (RAOs) and stated that the extent of agreement between the parties about whether work value considerations justify an increase for these workers required further clarification. Parties were directed to confer in respect of this issue and the Full Bench indicated that should the parties be able to agree on the quantum of an interim increase and the classification(s) to which it would apply, the Full Bench would give further consideration to determining an interim increase for RAOs in the next stage of the proceedings. As in the issue of Head Chefs/Cooks, absent agreement between the parties, any increase applicable to RAOs would be dealt with in a later stage of the proceedings.<sup>8</sup>

**[12]** The Full Bench concluded that an interim increase of 15 per cent to modern award minimum wages applying to direct aged care workers was ‘plainly justified by work value reasons’.<sup>9</sup> The Full Bench clarified that the interim increase did 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 did it necessarily exhaust the extent of the increase justified by work value reasons in respect of direct care workers.<sup>10</sup>

**[13]** The Full Bench concluded that the Applications would be determined in 3 stages, with the *Stage 1 decision* constituting the first stage in the process. Stage 2 would consider submissions and evidence in relation to:

1. The timing and phasing of the interim increase to modern award minimum wages applicable to direct care workers, including the appropriateness and application of the principles canvassed at paragraphs [974]–[990] in the *Stage 1 decision*;
2. Whether making the interim increases to modern award minimum wages applicable to direct care aged care employees in these proceedings is necessary to achieve the modern awards objective and the *provisional views* outlined at [1001]–[1072] in the *Stage 1 decision*; and
3. Whether the interim increases to modern award minimum wages applicable to direct care aged care employees are necessary to achieve the minimum wages objective and the *provisional views* outlined at [1073]–[1083] in the *Stage 1 decision*.<sup>11</sup>

**[14]** Stage 3 will consider submissions and evidence related to the classification definitions and structures in the Awards and submissions and evidence in relation to whether wage adjustments are justified by work value reasons for employees not dealt with in Stage 1. Stage 3 will also consider whether further wage adjustments are justified by work value reasons for direct care workers granted interim increases in Stages 1 and 2.

## **2.2 Stage 2 proceedings**

**[15]** On 7 November 2022, Justice Ross, President wrote to the Governor General resigning as President of the Fair Work Commission and as a Judge of the Federal Court, effective midnight 18 November 2022. Justice Ross was the presiding member of these proceedings and as a result the Full Bench was reconstituted.

**[16]** On 17 November 2022, we issued a Statement in which we expressed a *provisional view* as to the programming of Stage 2 and invited parties to provide comments at a mention held on 22 November 2022.<sup>12</sup> Following that mention the directions for Stage 2 were amended in terms of the dates by which submissions and evidence were to be filed.<sup>13</sup>

**[17]** On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act) received Royal Assent. A number of the amendments to the *Fair Work Act 2009* (FW Act) made by the Secure Jobs, Better Pay Act are relevant to these proceedings including:

1. Amendments to the object of the FW Act in s.3(a) to include reference to the promotion of job security and gender equality<sup>14</sup>

2. Amendment to s.134(1) to repeal s.134(1)(e) of the modern awards objective and replace it with new s.134(1)(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<sup>15</sup>
3. Amendment to s.134(1) to introduce new s.134(1)(aa): the need to improve access to secure work across the economy<sup>16</sup>
4. Amendment to s.284(1) to repeal s.284(1)(d) of the minimum wages objective and replace it with new s.284(1)(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<sup>17</sup>
5. Amendment to s.157 to insert new subsection 157(2B) which provides that the Commission'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.<sup>18</sup>

**[18]** On 5 December 2022, the ANMF [wrote](#) to the Commission and applied to vary the Directions to provide that the Commonwealth, the Unions and the Joint Employers make submissions and provide evidence in respect of the relevant amendments to the FW Act.

**[19]** On 6 December 2022, we issued [Amended directions](#) requiring parties to file submissions or evidence regarding the relevant amendments to the FW Act, Stage 2 matters set out at paragraph [13] above and, if relevant, consultation in respect of increases to minimum wages for Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers by 16 December 2022 or 20 January 2023. All parties were required to file submissions and evidence in reply by 9 February 2023 and the matter was listed for hearing in Melbourne at 10:00am on Monday, 13 February 2023.

**[20]** On 10 February 2023 we issued a Statement and Directions<sup>19</sup> in which, to facilitate the efficient conduct of the Hearing, we requested parties to address various questions.

**[21]** At the outset of the Hearing before us on 13 February 2023, the Joint Employers advised formally that, due to the merger of bodies LASA and ACSA, the Joint Employers are now comprised of the Aged and Community Care Providers Association Ltd (ACCPA) and Australian Business Industrial (ABI).<sup>20</sup>

**[22]** During the Hearing, the Joint Employers and the HSU were granted leave to provide written responses to a number of the questions we posed, as well as address a further question raised in relation to Home care employees engaged in domestic assistance and home maintenance.<sup>21</sup> The parties were also granted leave to file written submissions as to the weight that should be accorded to evidence filed by the Joint Employers on 9 February 2023. The parties were asked to file the additional material by no later than Friday, 17 February 2023.

[23] On 21 February 2023, we published our *Stage 2 decision* together with draft determinations and tracked versions of each of the Awards to illustrate the proposed changes. Interested parties were directed to file any comments in relation to the draft determinations by no later than Wednesday, 1 March 2023.

[24] Final determinations effecting the interim increase to modern award minimum wages in line with the *Stage 2 decision* were issued on Friday, 3 March 2023.<sup>22</sup>

### 2.3 Submissions overview

[25] This section sets out the written submissions received in Stage 2.

[26] In November 2022, the Commonwealth convened meetings of industry stakeholders representing the aged care workforce, aged care providers and consumers. Arising from these meetings, on 16 December 2022, a [Joint Statement](#) was received from the following stakeholders:

- ACCPA
- Anglicare Australia
- ANMF
- Baptist Care Australia
- Catholic Health Australia
- Council of the Aged
- HSU
- Older Persons Advocacy Network
- Australian Workers' Union (AWU) Queensland Branch
- UnitingCare Australia
- UWU

[27] The Commonwealth made a submission on 16 December 2022.

[28] On 20 January 2023, submissions were received from the following parties:

- UWU
- AWU
- Joint Employers
- ANMF
- HSU (including a second supplementary report by Prof Kathleen Eagar)

[29] On 9 February 2023 (or, in the case of the Commonwealth, 10 February 2023), the following parties made submissions in reply:

- HSU
- Joint Employers
- ANMF
- The Commonwealth

[30] On 9 February 2023 the UWU also filed as submissions over one thousand messages from aged care workers addressed to the Fair Work Commission in support of an immediate increase to their wages.

[31] Following the Hearing on 13 February 2023, the following further submissions were received:

- on 15 February 2023, the Joint Employers made a submission in response to questions by the Full Bench;
- on 16 and 17 of February 2023, the ANMF, the Joint Employers and the HSU made a submissions as to the weight to be given to the Joint Employers' reply evidence; and
- on 17 February 2023 the Joint Employers provided a note on the Home care employee evidence.

## 2.4 The Joint Statement

[32] Parties to the Joint Statement reached agreement on 6 matters in relation to the interim increase,<sup>23</sup> summarised as follows:

1. The interim increase should be fully funded by the Commonwealth, including on costs, and the increase should extend to both award-reliant employees and those covered by enterprise agreements.
2. The interim increase should commence operation as soon as possible, should not be phased in over time and should instead occur from the first full pay period on or after a single specific date. Funding from the Commonwealth should be provided in full as soon as possible. ACCPA, Anglicare Australia, Baptist Care Australia, Catholic Health Australia and UnitingCare Australia maintain that the funding must be provided to aged care employers by the Commonwealth on and from the operative date of any increase.
3. RAOs and Head Chefs/Cooks (the latter being Aged care employees levels 4 to 7 in the food services stream of the Aged Care Award) should receive a 15 per cent interim increase at the same time as direct care workers.
4. Measures to ensure transparency and accountability with respect to payment of the interim increase and any future payments should be put in place within 3 months of the first payment. Implementation of transparency measures should not delay



payment of funding for interim increases to direct care workers, RAOs and Head Chefs/Cooks.

5. Stage 3 of the proceedings should commence as soon as possible at the Commission's earliest convenience.
6. The interim increase be implemented based on the principle that services to older Australians are not to be negatively impacted as a result of the increase in costs. The Commonwealth should explore all options to operationalise the funding of the increase in order to fulfil this principle.

### **3. Scope of the interim increase**

[33] This section summarises the submissions of the parties in respect of which classifications in the Awards should be subject to the interim increase to minimum wages. This includes whether the interim increase should apply to Head Chefs/Cooks and RAOs in the Aged Care Award and Home care employees levels 4 and 5 in the SCHADS Award.

[34] Included in this section are responses to the questions posed to all parties in our Statement and Directions<sup>24</sup> of 10 February 2023 that relate to the scope of the interim increase, being the following:

3. Whether the interim increase should be applied to all employees in Schedule E of the SCHADS Award, or whether it should exclude Home Care Employee Level 4 and/or Level 5, noting the implications for internal relativities in the Award if increases are not applied to supervisory workers who are not providing direct care.
4. In relation to the interim increase for 'Head Chef/Cooks' how are the positions eligible for the increase identified within the Aged Care Award given the range of classification levels applicable to the roles?

[35] The Commonwealth and the Joint Employers were also requested to address the following question:

5. Noting the Joint Employers submission that the interim increase for head chefs/cooks and RAOs/lifestyle officers is supported 'on the basis that the increase is to be funded by the Commonwealth', has the Commonwealth agreed to fund the increase in relation to these employees?

#### **3.1 Submissions**

##### ***Commonwealth submissions***

[36] The Commonwealth submitted that further consideration should be given to 'clearly defining the scope of who is a 'direct care worker' and noted that the *Stage 1 decision* defined '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.'<sup>25</sup>

[37] The Commonwealth submitted that in order to provide certainty to employers and employees and support any required accountability measures, the final variations to the Awards will require a more precise definition of which employees will receive the interim increase. The Commonwealth maintained this was particularly important in the home care sector under Schedule E of the SCHADS Award as there is ‘less of a clear delineation of caring and non-caring work than in the Aged Care Award’.<sup>26</sup>

*Commonwealth submissions in response to questions 3, 4 and 5*

[38] The Commonwealth addressed questions 3, 4 and 5 of our Statement and Directions<sup>27</sup> of 10 February 2023 in its oral submissions during the hearing of 13 February 2023.

[39] In relation to questions 3 and 4, the Commonwealth made no submissions on either issue, stating only that it is open to the Commission to determine whether the interim increase should apply to Home care employees levels 4 and 5 under the SCHADS Award and the issue in respect of Head Chefs/Cooks.<sup>28</sup>

[40] In response to question 5, the Commonwealth referred to its position as stated in its reply submissions, confirming that its funding commitment extends to any decision of the Commission regarding funding increases for Head Chefs/Cooks and RAOs.<sup>29</sup>

*HSU submissions*

[41] The HSU reiterated the position from the Joint Statement that the interim increase of 15 per cent applicable to direct care workers should additionally be applied to the classifications of ‘head chefs and head cooks’ (being employees in the food services stream of the Aged Care Award at Aged care employee level 4 to level 7) and RAOs (to the extent that RAOs were not already entitled to any increase by virtue of being paid and/or classified as a ‘direct care worker’).<sup>30</sup>

[42] In response to the Commonwealth’s submissions of 16 December 2022 that further consideration was required regarding whether employees working in the home care sector, as defined in the SCHADS Award, fall within the scope of ‘direct care worker’, the HSU submitted that the *Stage 1 decision* is clear and that such employees are direct care workers. Accordingly, the HSU submitted that the proposed interim increase would apply to all classifications of Home care employee from levels 1 to 5 under the SCHADS Award.

*HSU submissions in response to questions 3 and 4*

[43] The HSU provided written responses to questions 3 and 4 posed in our Statement and Directions issued on 10 February 2023.

[44] In relation to question 3, the HSU submitted that the interim increase should apply to all levels of Home care employee in Schedule E from level 1 to level 5. The HSU submitted this is consistent with the Joint Statement regarding Stage 2 and 3 of the proceedings.<sup>31</sup>

[45] The HSU submitted that employees engaged at level 4 and level 5 are involved in direct care work by way of mentoring, supervising and providing advice in relation to direct care work, and dealing with incidents or emergencies in relation to direct care work.<sup>32</sup>

[46] The HSU submitted that applying the increase at level 1 to level 3 but not at level 4 and level 5 would disrupt the relativities in the classification scale in Schedule E of the SCHADS Award. It would have the effect of employees at level 2 and level 3 receiving higher rates of pay than all level 3 employees and level 3.2 would receive higher rate of pay than level 5 employees. The HSU submitted that the relativities should be maintained as those rates have been previously set on the basis of comparable work value between the different roles.<sup>33</sup>

[47] In relation to question 4, the HSU noted that in previous submissions<sup>34</sup> and in the Joint Statement<sup>35</sup> the Joint Employers indicated their support that the interim increase should apply to Head Chefs/Cooks. In their submission dated 15 February 2023, the Joint Employers submitted that the increase should apply to employees from level 4 to level 7 but qualified that their perspective was the increase would apply to ‘the most senior chef/cook in the facility with ultimate menu and nutrition responsibility, not a series of chefs or cooks within the catering team’.<sup>36</sup>

[48] The HSU submitted this was a departure from the position settled in the Joint Statement.<sup>37</sup> The position agreed by relevant stakeholders, pursuant to the request of the Full Bench in the *Stage 1 decision*,<sup>38</sup> should be given effect by the Full Bench.<sup>39</sup>

[49] The HSU submitted that the evidence does not suggest that there are facilities at which multiple chefs/cooks are employed at level 4 or above under the Aged Care Award. Accordingly, there is not an evidentiary basis for not extending the interim increase to all food service stream employees from level 4 to level 7.<sup>40</sup>

[50] The HSU submitted that the proposal that the classification structure in the Aged Care Award be reviewed in order to separate out the ‘most senior’ chef/cook at a facility is likely to cause uncertainty, confusion and delay. If the interim increase were to be limited to the ‘most senior’ chef/cook at a facility, there is no utility in limiting the increase to levels 4 to 7. Instead, determining the interim increase to apply to all employees in the food services stream from level 4 to level 7 is easier for employers to implement and for employees to understand.<sup>41</sup>

[51] The HSU noted that during the hearing on 13 February 2023, a further question was raised in relation to the application of the interim increase to Home care employees where those employees are engaged in domestic work. The question posed was as follows:

“It’s also on the Schedule E question. There’s two other dimensions which one is that the home care sector isn’t confined to the provision of personal care, but also domestic assistance and home maintenance. Given that the interim increase is only in respect of personal care, any determination, I presume, would have to separate out that part of home care from the balance.”<sup>42</sup>

[52] In response to this question, the HSU submitted that delineating between personal care, domestic assistance and maintenance services within a home care setting is inappropriate and would be impossible based on the evidence before the Full Bench. The HSU noted there is

substantial evidence to suggest HCWs perform a mixture of personal care work and other duties.<sup>43</sup> Home care duties that are domestic or social are not divorced from the direct provision of care.<sup>44</sup>

### *ANMF submissions*

[53] The ANMF agreed with and endorsed the position of the Joint Statement, to which it is a party, that RAOs and Head Chefs/Cooks (the latter being employees in the food services stream of the Aged Care Award at Aged care employee level 4 to 7) should also have a 15 per cent interim increase applied to their pay rates at the same time as direct aged care workers.<sup>45</sup> Accordingly, they submitted the Full Bench should give consideration to determining the increase for RAOs and Head Chefs/Cooks in Stage 2.<sup>46</sup>

[54] In response to the Joint Employers' position consenting to the interim increase for Head Chefs/Cooks and RAOs on the basis it is funded by the Commonwealth,<sup>47</sup> insofar as this suggests that to the extent it is unfunded it is not consented to, the ANMF submitted that this is inconsistent with the position taken by the Joint Employers in the Joint Statement.<sup>48</sup> The ANMF submitted that the Joint Employers should be held to this position and in any case the increase is justified by work value reasons.<sup>49</sup>

### *ANMF submissions in response to questions 3 and 4*

[55] The ANMF submitted that questions 3 and 4 concern matters outside of the scope of its application.<sup>50</sup>

### *UWU submissions*

[56] The UWU reiterated the view of the Joint Statement of 16 December 2022<sup>51</sup> that RAOs and Head Chefs/Cooks should also have the 15 per cent interim increase applied to their pay rates at the same time as direct care workers.<sup>52</sup>

[57] Given parties have agreed, the UWU submitted that the decision regarding Head Chefs/Cooks and RAOs should be dealt with prior to Stage 3.<sup>53</sup> The UWU submitted that this would be consistent with the modern awards and minimum wages objective.<sup>54</sup>

### *UWU submissions in response to questions 3 and 4*

[58] In relation to question 3, the UWU endorsed the submissions of the HSU and AMNF, and added that it makes little sense for the interim increase not to apply to Home care employees levels 4 and 5 and that doing so would not have a significant impact on funding.<sup>55</sup>

[59] In relation to question 4, the UWU again endorsed the submissions of the HSU and ANMF and submitted that the interim increase should be applied to levels 4 to 7 of the Aged Care Award.<sup>56</sup>

### *Joint Employer submissions*

**[60]** The Joint Employers reiterated their support of applying the interim increase to Head Chefs/Cooks and RAOs provided the increase is funded by the Commonwealth, noting RAOs ‘are a very small cohort of the employee base’ and ‘are firmly aligned to direct care employees in how they work directly with consumers.’<sup>57</sup>

*Joint Employer submissions in response to questions 3, 4 and 5*

**[61]** On 15 February 2023, the Joint Employers provided a written response to questions 3, 4 and 5 posed by the Full Bench.

**[62]** In respect of question 3, the Joint Employers submitted the interim increase should apply to all employees in Schedule E of the SCHADS Award. This prevents an anomaly where levels 2 and 3 will have a wage rate higher than level 4 pay point 1 and level 3 pay point 2 will have a wage rate higher than level 5 pay point 1. The Joint Employers submitted that applying the increase to all the employees ensures a fair and relevant minimum safety net of terms and conditions and that the Full Bench should return to the question of appropriateness of existing classification structure in Stage 3.<sup>58</sup>

**[63]** In respect of question 4, the Joint Employers consented to the interim increase extending to Head Chefs/Cooks under the Aged Care Award provided it will be funded by the Commonwealth.<sup>59</sup> The Joint Employers submitted that the increase should apply from Senior cook (trade) (level 4) through to Chef/Food services supervisor (level 7). This implementation will require the classification structure of the Aged Care Award to be reviewed. From the perspective of the Joint Employers, the increase was to apply to the most senior chef/cook in the facility with responsibility for the menu and nutrition, not a series of chefs or cooks within a catering team.<sup>60</sup>

**[64]** In respect of question 5, the Joint Employers submitted that the Commonwealth have confirmed funding to award the interim increase to Head Chefs/Cooks and RAOs.<sup>61</sup>

*Joint Employer note on Home care employee evidence*

**[65]** In their submissions on 17 February 2023, the Joint Employers noted that the Full Bench has before it the evidence of 21 Home care employees, excluding team leaders and coordinators.<sup>62</sup> The Joint Employers referred to analysis of this evidence that they undertook during Stage 1 of these proceedings, which outlined the primary duties of each worker.<sup>63</sup>

**[66]** The primary duties fell into the categories of personal or direct care work, domestic care work, social support and medication prompts.<sup>64</sup>

**[67]** The Joint Employers observed that:

- 15 of the Home care employees provide personal care, with the majority also providing additional services.<sup>65</sup>
- 6 of the Home care employees exclusively provide domestic assistance and/or social support.<sup>66</sup>

- Some of the Home care employees that did not provide personal care, received training to provide a medication prompt.<sup>67</sup>

[68] The Joint Employers submitted that further consideration may be required in Stage 3 as to whether Home care employees that do not provide personal care should have separate classifications.<sup>68</sup>

### 3.2 Consideration

[69] In the *Stage 1 decision* the Full Bench said that they did not propose to provide an interim increase to RAOs at this time but directed the parties to confer as to the issue and, if they could agree on the increase and to the classifications to which it should apply, we would give the matter further consideration. If agreement could not be reached the Full Bench said they would determine the issue in Stage 3.

[70] In the Joint Statement the stakeholders agreed that the interim increase should be applied the classifications of RAOs at the same time as the interim increase for direct care workers. We accept that this is a ‘small cohort’ of employees and that the work performed by them is aligned to the work of direct care workers.

[71] We are satisfied that the increase is justified on work value grounds. We emphasise that our decision with respect to these employees is not based on a commitment or otherwise with respect to funding the increase.

[72] In the *Stage 1 decision*, the Full Bench said, with respect to Head Chefs/Cooks:

“we note the submission by the Joint Employers that an increase in minimum wages for Head Chefs/Cooks is justified by work value reasons. We do not propose to provide an interim increase in respect of this classification, at this time. The parties are directed to confer in respect of this issue and if they are able to agree upon the quantum of an interim increase and the classification(s) to which it applies, we will give further consideration to determining an interim increase for these employees.”<sup>69</sup>

[73] In the Joint Statement there was no dissent that ‘head chefs and head cooks’ should have the full 15 per cent interim increase applied to their pay rates at the same time as direct aged care workers.

[74] We are satisfied that the interim increase should apply to Head Chefs/Cooks in levels 4 to 7 or as Food services supervisors engaged at level 7, but only to the extent that the individual employee is the most senior food services employee engaged in the facility. To be clear we do not make this decision based on any submissions as to funding or otherwise of the interim increase but rather we are satisfied that the increase for Head Chefs/Cooks is justified on work value grounds.

[75] We are satisfied that the interim increase should apply to all employees in Schedule E of the SCHADS Award. We accept that employees at Home care employee level 4 and/or level 5 are direct care workers, regardless of the level of supervisory responsibility they may hold. Further, to not provide the increase to such employees would create anomalies in the

classification structure whereby employees at level 2 and level 3 would be paid more than those at level 4 and/or level 5.

#### **4. The Secure Jobs, Better Pay Act**

**[76]** This section concerns amendments to the FW Act arising from the Secure Jobs, Better Pay Act relevant to Stage 2 of these proceedings, namely:

- Amendments to the object of the FW Act to include reference to the promotion of job security and gender equality (s.3)
- Amendments to the modern awards objective to include secure work and gender equality considerations, including 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, (ss.134(1)(aa), (ab))
- Amendments to the minimum wages objective to include gender equality considerations including ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps (s.284(1)(aa))
- The addition of a provision specifying that the Commission’s consideration of work value must be free of assumptions based on gender and include consideration of whether historically the work has been undervalued because of assumptions based on gender (s.157(2B)).

**[77]** The Secure Jobs, Better Pay Act amended the modern awards objective to include 2 new considerations, ss.134(1)(aa) and 134(1)(ab) referring to improving access to secure work and to 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.

**[78]** Sections 134(1)(e) and 284(1)(d) of the modern awards objective and minimum wages objective respectively, were repealed.

**[79]** In the *Stage 1 decision* the Full Bench made the following observations about gender undervaluation in the context of ss.134(1)(e) and 284(1)(d):

“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.”<sup>70</sup>

**[80]** The Full Bench considered that the ‘more contentious issue’ is the proper construction and application of ss.134(1)(e) and 284(1)(d)<sup>71</sup> and noted that, consistent with authority, the definition of ‘equal remuneration for work of equal or comparable value’ contained in s.302(2) is to be read into ss.134(1)(e) and 284(1)(d) such that the relevant consideration is ‘the principle of equal remuneration for men and women workers for work of equal or comparable value’.<sup>72</sup> The Full Bench set out the Expert Panel’s approach to ss.134(1)(e) and 284(1)(d) in the *Annual Wage Review 2017-18*, including the meaning to be attributed to the principle:

“As explained in the Equal Remuneration Decision 2015, the principle of equal remuneration for work of equal or comparable value is enlivened when an employee or group of employees of one gender do not enjoy remuneration equal to that of another employee or group of employees of the other gender who perform work of equal or comparable value. Further, as the Full Bench observed:

“This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees.”<sup>73</sup>

**[81]** Further, the Full Bench noted that in the *Teachers Decision*, the Full Bench held that even where an award variation would significantly improve the remuneration of a female-dominated area of the workforce, unless its purpose was to equalise the remuneration of workers in the sector with a group of male workers performing work of equal or comparable value, the principle in ss.134(1)(e) and 284(1)(d) is not a relevant consideration.<sup>74</sup>

**[82]** The Full Bench went on to state:

“this approach essentially imports the statutory test for satisfying the jurisdictional prerequisite for the making of an equal remuneration order – that the Commission is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for men and women workers for work of equal or comparable value – into the *principle* of equal remuneration. On reflection, it may not be necessary to do this.”<sup>75</sup>

**[83]** The Full Bench then made a number of observations about the application of ss.134(1)(e) and 284(1)(d):

- “1. Equal remuneration for work of equal or comparable value’ is expressed as a principle that the Commission must take into account as part of an evaluative exercise; it is not a matter about which the Commission must be satisfied in order to meet a statutory test.<sup>76</sup>
2. The principle is one of several broad social and economic considerations in s.134(1) and 284(1), which are applied on a case-by-case basis. The ss.134(1) and 284(1) considerations do not, in themselves, set a standard against which a modern award could be evaluated.<sup>77</sup>



3. If the approach to ss.134(1)(e) and 284(1) in the *Teachers Decision* is adopted, the principle ‘would seem to have very little work to do’:

“[Sections 134(1) and 284(1)] have no application to Part 2-7. If so limited, the principle would only appear to be relevant if it could be shown, through a comparator group of the opposite gender, that work covered by the award was undervalued or that the variation would otherwise address the discriminatory effect of an award term on the male or female-dominant workforce covered by the award. This restrictive reading seems inconsistent with the nature of the considerations in ss.134(1) and 284(1), which comprise broad social and economic objectives.”<sup>78</sup>

4. In the context of the equal remuneration provisions in Part 2-7, the Commission has observed that these provisions are remedial or beneficial, with the general purpose being ‘to remedy gender wage inequality and promote pay equity.’<sup>79</sup>

**[84]** The Full Bench went on to observe:

“if increasing minimum wages in an award would be likely to remedy historical gender based undervaluation of the subject work or have a beneficial effect on the gender pay gap or gender pay equity, then it might be said to be consistent with, or ‘promote’ or ‘further’ ‘the principle of equal remuneration for men and women workers for work of equal or comparable value’ and be a factor weighing in favour of the award variation.

If this were correct, then the principle’s relevance would not be confined to where an award variation would equalise wage rates for men and women workers performing work of equal or comparable value.”<sup>80</sup>

**[85]** The Secure Jobs, Better Pay Act amended s.134 to remove subsection 134(1)(e) – the principle of equal remuneration for work of equal or comparable value and insert new subsection 134(1)(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”

**[86]** The Secure Jobs, Better Pay Act also amended the equal remuneration provisions in Part 2–7 of the FW Act. Relevantly, the amendments introduced new subclauses 302(3A)–(3C):

(3A) For the purposes of this Act, in deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account:

- (a) comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender; or
- (b) whether historically the work has been undervalued on the basis of gender; or
- (c) any fair work instrument or State industrial instrument.

(3B) If the FWC takes into account a comparison for the purposes of paragraph (3A)(a), the comparison:

- (a) is not limited to similar work; and
- (b) does not need to be a comparison with an historically male-dominated occupation or industry.

(3C) If the FWC takes into account a matter referred to in paragraph (3A)(a) or (b), the FWC is not required to find discrimination on the basis of gender to establish the work has been undervalued as referred to in that paragraph.

**[87]** The Explanatory Memorandum notes that prior to the amendments, the FW Act was ‘silent as to how equal remuneration should be assessed’ with the amendments providing further guidance to the Commission.<sup>81</sup> The Explanatory Memorandum notes that the amendments are intended to clarify the relevance of a ‘male comparator’:

“The FWC has interpreted the current equal remuneration provisions of the FW Act as requiring that it must be satisfied that a group of employees covered by an equal remuneration application do not receive equal remuneration for work of equal or comparable value compared to another group of employees of the opposite gender. This requirement for a reliable ‘male comparator’ group has been interpreted as a necessary threshold test which parties must satisfy before the FWC will determine an application for an ERO. The combined effect of new paragraph 302(3A)(a) and subclause 302(3B) would be to remove this requirement to establish a reliable ‘male comparator’ as a jurisdictional prerequisite to making an ERO. The FWC would still have the discretion to take into account comparisons within and between occupations and industries in order to establish whether work has been undervalued on the basis of gender.”<sup>82</sup> [emphasis added]

**[88]** In the *Stage 1 decision*, the Full Bench noted that the consideration in s.284(1)(d) is in the same terms as s.134(1)(e) and invited further submissions on the proper construction and relevance of the principle, having regard to the discussion about s.134(1)(e).<sup>83</sup>

**[89]** The Secure Jobs, Better Pay Act amended s.284(1) to remove s.284(1)(d) – the principle of equal remuneration for work of equal or comparable value – and introduce new s.284(1)(aa).

**[90]** Section 284(1)(aa) is expressed in similar terms to s.134(1)(ab) however rather than the consideration of ‘providing working conditions that facilitate women’s full economic participation’, s.284(1)(aa) requires a consideration of the need to achieve gender equality ‘by addressing gender pay gaps’.

**[91]** The Secure Jobs, Better Pay Act inserted 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.

[92] The Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 describes 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.”<sup>84</sup>

#### 4.1 Submissions

##### *Commonwealth submissions*

[93] The Commonwealth submitted that the reference to ‘secure work’ in s.134(1)(aa) is directed to a similar purpose as the reference to ‘job security’ in the object of the Act, is not defined and takes its ordinary meaning. The Commonwealth offered that 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. The Commonwealth submitted that as a result, s.134(1)(aa) 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.’<sup>85</sup>

[94] The Commonwealth argued that the Applications do not seek to vary any award terms that are directly relevant to secure work and, in any event, the Government’s commitment to fully fund the interim increase means that any additional costs associated with the *Stage 1 decision* will not affect employer incentives around secure work. Consequently, the Commonwealth submitted that s.134(1)(aa) is a neutral consideration.

[95] The Commonwealth submitted that the introduction of s.134(1)(ab) means that the issue as to the proper construction and application of s.134(1)(e) falls away. The Commonwealth noted that ‘gender equality’, ‘gender-based undervaluation of work’ and ‘gender pay gaps’ are not defined in the FW Act and so take on their ordinary meaning. The Commonwealth submitted that the breadth and depth of these terms means the Commission need not engage in the comparative exercise contemplated at [1057] of the *Stage 1 decision*, nor limit the application of the 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 *Stage 1 decision*.<sup>86</sup>

**[96]** The Commonwealth submitted the amendments provide a clear basis for the Commission to consider that its provisional views set out at [1048] of the *Stage 1 decision* and its findings as to gender-based undervaluation and the gender pay gap at [740]–[758] and [859]–[866] support implementing the interim increase, specifically:<sup>87</sup>

- the Commission must take into account the object of the FW Act in amended s.3(a) to promote gender equality (s.578(a))
- the provisional views expressed at [1048] and the findings as to gender-based undervaluation and the gender pay gap at [740]–[758] and [859]–[866] would lead the Commission to consider that new s.284(1)(aa) is a positive factor in terms of whether the interim increase is necessary to achieve the modern awards objective, as it would support achieving gender equality in the workplace, including by reducing gender-based undervaluation of work and addressing the gender pay gap.

**[97]** The Commonwealth submitted that as the Commission has not yet made a determination varying the Awards, it is necessary for the Commission to be satisfied that its consideration of work value reasons conforms with s.157(2B).

**[98]** The Commonwealth maintained that s.157(2B)(a) imposes a negative standard or requirement on how the Commission 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.<sup>88</sup>

**[99]** The Commonwealth submitted that the Commission has extensive expert evidence before it about the ‘gendered assumptions which have historically been applied in the assessment of the work value of work in the aged care sector’ and has given ‘close consideration to that evidence’. The Commonwealth further submitted that in conducting its assessment of work value, the Commission has relied on and applied the expert evidence of Assoc Professor Junor ‘which exposes invisible skills that may have been given inadequate weight in previous work value assessments including because of gender-based assumptions’. The Commonwealth submitted that consequently the Commission’s consideration of work value has met the requirements of s.157(2B)(a).<sup>89</sup>

**[100]** The Commonwealth submitted that the ‘principal mischief’ that s.157(2B)(b) is intended to address is the use of minimum rates that were improperly fixed because of gender-based assumptions as a foundation or datum point for applying later changes in work value:

“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.”<sup>90</sup>

[101] The Commonwealth submitted that s.157(2B)(b) does not require the Commission to make a positive finding about historical undervaluation but rather the Commission ‘must actively turn its mind to the question of historical undervaluation.’<sup>91</sup> The Commonwealth submitted that the Commission’s consideration of historical undervaluation due to gender-based assumptions in the *Stage 1 decision* is sufficient to satisfy s.157(2B)(b).<sup>92</sup>

[102] The Commonwealth noted that in the *Stage 1 decision* the Commission observed that ‘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’ but that ‘a past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.’<sup>93</sup>

[103] The Commonwealth further noted that in the *Stage 1 decision* the Commission proceeded on the basis that the existing rates in the Awards have not been properly fixed and submitted:

“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 undervaluation because of assumptions based on gender, which is the mischief to which new s 157(2B)(b) is directed.”<sup>94</sup>

[104] The Commonwealth argued that even though the Commission was not required to make a finding as to whether the minimum rates were affected by gender undervaluation, ‘it is apparent that the Commission gave consideration to whether work in the aged care sector had been undervalued because of gender-based assumptions’ for the following reasons:<sup>95</sup>

1. The expert evidence before the Commission and the submissions addressed historical gender-based undervaluation. The *Stage 1 decision* ‘comprehensively summarises this evidence and argument.’<sup>96</sup>
2. The Commission accepted key propositions from the expert evidence that there is historical undervaluation of care work for gendered reasons.<sup>97</sup>
3. After giving close consideration to expert evidence on gender undervaluation in the aged care sector, the Commission accepted key propositions on gender-based undervaluation, including 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.’<sup>98</sup>
4. The Commission drew on expert evidence to ensure that its assessment of work value was free of assumptions based on gender, including accepting the evidence of Associate Professor Junor that 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.<sup>99</sup>

[105] The Commonwealth concluded that there are ‘clear indications’ that the Commission has turned its mind to historical gender-based undervaluation and that is ‘sufficient to discharge the obligation in s.157(2B)(b), especially given the Commission’s finding that wages were never properly fixed.’<sup>100</sup>

### *HSU submissions*

[106] In respect of the new amendments to the modern awards objective, the HSU submitted that only s.134(1)(ab) is of real significance to the present case, with s.134(1)(aa) presenting a neutral consideration.<sup>101</sup>

[107] The HSU submitted that the new section s.134(1)(ab) requires the Commission to take into account three distinct matters:

(a) equal remuneration for work of equal or comparable value, which arguably contemplates a comparator-based exercise;

(b) *separately*, the elimination of gender-based undervaluation, that is, an obligation to, where undervaluation is detected, increase wages to correct it; and

(c) the need to provide workplace conditions that facilitate women’s full economic participation which does not appear to be directly relevant here.<sup>102</sup>

[108] The HSU submitted that s.284(1)(aa) also requires the Full Bench take into account three elements for the purpose of establishing and maintaining a safety net for minimum wages, the first two being the same as in s.134(1)(ab) with the third imposing a direct requirement to take into account the need to address gender pay gaps.<sup>103</sup>

[109] Concerning the inserting of the new s.157(2B), the HSU submitted that the obligations imposed by s.157(2B)(b) are not arid and that the subsection’s purpose is to ensure that where any such historical gender-based undervaluation is detected that it is corrected, that is, by sufficiently increasing wages.<sup>104</sup>

[110] The HSU noted that the *Stage 1 decision* established that the statutory task before the Full Bench did not require them to form a view as to why the rates in the relevant awards have not then properly fixed.<sup>105</sup> In light of the amendments, the HSU submitted that this task has expanded.<sup>106</sup>

[111] The HSU refers to the following findings of the *Stage 1 decision*:

“(a) at [758](6), that historical wage fixing approaches have not properly recognised and corrected for undervaluation based on gendered assumptions;

(b) at [785]-[857], that the roles require skills which, because of assumptions about gender, were traditionally ‘hidden’ and thus not compensated for within current wage levels; and

(c) at [865], that the proper valuation of the work and corresponding wage increases would likely reduce the gender wage gap.”<sup>107</sup>

[112] The HSU submitted that, in the new statutory context, these findings ‘not only strongly weigh in favour of a conclusion that the interim increase is necessary to meet both the modern award and minimum wage objectives as now amended’ but ‘indicate that a more significant increase is likely warranted.’ Further, the HSU submitted that the factors now required to be taken into account by s.134(1)(ab) and s.284(1)(aa) also favour the interim increase commencing immediately or as soon as practicable.<sup>108</sup>

[113] The HSU submitted that the interim increases are necessary to achieve the modern awards objective and the minimum wages objective having regard to the findings of the Full Bench that the work of direct care workers is significantly undervalued and that work in feminised industries like care work has been historically undervalued. The HSU submitted that the new ss.134(1)(ab) and 284(1)(aa) support this conclusion.<sup>109</sup>

[114] The HSU noted ss.134(1)(e) and 284(1)(d) have been repealed and replaced with ss.134(1)(ab) and 284(1)(aa) respectively and that both those new subsections require the Full Bench to consider the need to eliminate gender-based undervaluation and, in the case of s.284(1)(aa), address gender pay gaps.<sup>110</sup> The HSU submitted that, in light of the findings set out at paragraph [1048] of the *Stage 1 decision*, these considerations strongly weigh in favour of the variations being necessary to achieve the modern awards objective.<sup>111</sup>

### ***ANMF submissions***

[115] The ANMF noted that the explanatory memorandum and second reading speech to the Secure Jobs, Better Pay Bill refer to the legislative amendments putting gender equity at the ‘heart’ of the Commission’s decision making and the Fair Work system.<sup>112</sup>

[116] In respect of the amendment to the object of the FW Act at s.3(a), the ANMF identified that the explanatory memorandum notes that s.15AA of the *Acts Interpretation Act 1901* (Cth) requires that the FW Act be interpreted in a way that would best achieve the object of the FW Act, and that s.578(a) of the FW Act requires that the Commission take into account the objects of the FW Act when performing its functions or exercising its powers under the Act.<sup>113</sup>

[117] The ANMF submitted that the amendment to the object of the FW Act will be relevant to the proper interpretation of s.166, providing the Commission’s powers regarding when determinations varying modern awards minimum wages come into operation, s.157 including the meaning of ‘work value reasons’ for the purposes of s.157(2A) as well as both the modern awards objective at s.134 and the minimum wages objective at s.284.<sup>114</sup>

[118] In respect of s.134(1)(aa), the ANMF agreed with the Commonwealth that the applications before the Commission do not seek to vary any award terms that are directly relevant to secure work, however, it submitted that the interim increase is likely to contribute

to increased security of work, and would not prejudice the objective.<sup>115</sup> The ANMF noted the Full Bench has before it substantial evidence and material going to the high rates of staff turnover in the industry and the financial difficulties faced by aged care workers.<sup>116</sup>

[119] The ANMF submitted that granting the interim increase would make a contribution to countering the exploitative use of the ‘many faces’ of job insecurity such as casual employment, labour hire arrangements, part-time employment and rolling fixed-term contracts, in line with the purpose of s.134(1)(aa), and would also contribute to the retention of direct aged care workers in the sector.<sup>117</sup>

[120] The ANMF further submitted the interim increase would not have a significant negative impact upon the business of aged care providers or have a negative impact upon need to improve access to secure work across the economy.<sup>118</sup>

[121] In respect of the need to achieve gender equality, the ANMF noted that s.134(1)(ab) introduces new elements, which involve a substantial re-casting of this aspect of the objective. The ANMF submitted that the use of ‘the need to achieve’, as well as the words ‘ensuring’, ‘eliminating’ and ‘providing’ in this context highlights that the necessary goal is achieving gender equality, rather than merely aspiring to gender equality.<sup>119</sup>

[122] The ANMF submitted that the amendments to ss.3(a) and 134(1)(ab), which now include references to promoting gender equality, are a significant change to the legislation applied by the Full Bench in Stage 1 of this proceeding.<sup>120</sup>

[123] The ANMF submitted that the primary task for the Full Bench remains to determine the actual value of the work in aged care and whether a variation is justified by ‘work value reasons’. However, the ANMF submitted that in light of the amendments the Full Bench must now take into account whether the work of direct aged care workers is undervalued for gender-based reasons.<sup>121</sup>

[124] The ANMF noted the Full Bench has already found that care work has been historically undervalued and further submitted that in the context of legislative amendments, the Full Bench would now further find that the work of direct aged care workers has been historically undervalued for gender-based reasons, a finding which may be comfortably made based on the evidence, in particular that of Assoc Professor Junor.<sup>122</sup>

[125] The ANMF noted the Full Bench previously found Assoc Prof Junor’s evidence ‘cogent, probative and relevant to our assessment of whether a variation of modern award minimum wages in the relevant awards is ‘justified by work value reasons’ (s.157(2)(a)).’ The ANMF submitted that in its consideration of s.134(1)(ab), the Full Bench will retain this view of Assoc Prof Junor’s evidence.<sup>123</sup>

[126] The ANMF submitted that the minimum award rates applicable to direct aged care workers undervalue the work for gender-based reasons, is a natural conclusion to be drawn, based upon:

1. The propositions accepted by the Commission at [758] of the *Stage 1 decision*;



2. Assoc Prof Junor's application of the Spotlight Tool;
3. The additional evidence of Assoc Prof Junor, Assoc Prof Smith and Dr Lyons and Prof Charlesworth;
4. The evidence of Kristen Wischer (ANMF Senior Federal Industrial Officer) as to the industrial history of the Nurses Award, and the evidence of Leigh Svendsen (HSU Senior Industrial and Compliance Officer) in relation to the industrial history of the Aged Care Award;
5. The gendered nature of the aged care workforce.<sup>124</sup>

**[127]** After reaching such a conclusion, the ANMF submitted that the Full Bench must then take into account the need to achieve gender equality in the workplace as provided for in s.134(1)(ab).

**[128]** The ANMF submitted that s.134(1)(ab) weighs in favour of awarding the interim increase, and that failure to grant the interim increase would fail to ensure the provision of a fair and relevant safety net of minimum terms and conditions, having regard to the need to achieve gender equality in the workplace.<sup>125</sup>

**[129]** The ANMF submitted that there is a substantial overlap between the terms of the modern awards objective at s.134(1)(ab) and the minimum wages objective at s.284(1)(aa). Accordingly, the ANMF reiterated its submissions regarding the modern awards objective which apply equally to the minimum wages objective. However, the ANMF noted the minimum wages objective also directs the Commission to the need to achieve gender equality by 'addressing gender pay gaps'.<sup>126</sup>

**[130]** The ANMF submitted that addressing gender pay gaps is an apt reference to the practical consequence of gender-based undervaluation and<sup>127</sup> refers to the variety of evidence provided by Assoc Prof Smith and Dr Lyons that identify contributing factors to the gender pay gap.<sup>128</sup>

**[131]** The ANMF submitted that, while it remains true that these proceedings are not a general inquiry into the drivers of the gender pay gap, the terms of s.284(1)(aa) invite the Commission to further develop the findings made in the *Stage 1 decision*, namely that:

1. The gender pay gap manifests in the gender-based undervaluation of the work of direct aged care workers; and
2. Eliminating that gender-based undervaluation would address the gender pay gap and facilitate achieving gender equality and a safety net of fair minimum wages.<sup>129</sup>

**[132]** In respect of the addition of s.157(2B), the ANMF submitted that, as identified by the explanatory memorandum to the Secure Jobs, Better Pay Bill,<sup>130</sup> one consequence will be to confirm that a party may advance a work value claim on the basis that minimum rates of pay in a modern award undervalue work due to historical gender-related reasons.<sup>131</sup> The use of work value assessments designed to recognise skills otherwise hidden for gender-based reasons will

also assist to allow considerations of work value reasons that are free of assumptions based on gender.<sup>132</sup>

[133] The ANMF submitted that it appears that the insertion of s.157(2B) requires the Full Bench to revisit paragraph [866] of the *Stage 1 decision*, and others, where it held that it is not necessary to decide why the relevant minimum rates have not been properly fixed given that the Commission must now to consider whether historically aged care work has been undervalued because of assumptions based on gender.<sup>133</sup>

[134] The ANMF submitted that the Full Bench has already undertaken substantial consideration of the kind contemplated by s.157(2B), notably in its acceptance of Assoc Prof Junor's evidence both that skills utilised by aged care workers are 'invisible' due to gender-based assumptions about the work, and similar evidence from Assoc Prof Smith and Dr Lyons.<sup>134</sup> The ANMF submitted that because of s.157(2B)(b), it is now necessary for the Full Bench to expressly make a finding that the historical undervaluation of work in feminised industries, including care work, is gender-based.

### *UWU submissions*

[135] The UWU submitted that the amendments arising from the Secure Jobs, Better Pay Act have the effect of making the *Stage 1 decision* even more compelling and its implementation more urgent.<sup>135</sup> The UWU agreed with the Commonwealth's submissions generally, regarding the operation of the Secure Jobs Better Pay Act, except in so far as they are relevant to the timing of the implementation of the interim increase.<sup>136</sup>

[136] The UWU agreed with the provisional views of the Full Bench expressed at paragraphs [1053] to [1063] of the *Stage 1 decision* concerning consideration s.134(1)(e), the principle of equal remuneration, noting that this decision was made prior to the amendments of the Secure Jobs, Better Pay Act.<sup>137</sup>

[137] The UWU submitted that, to the extent it is necessary to satisfy the modern awards objective, the Full Bench should depart from earlier decisions in respect to the proper construction of ss.134(1)(e) and 284(1)(d) of the Act.<sup>138</sup> Further, UWU submitted that in light of the Secure Jobs Better Pay Act, the continued application of *Teachers Decision*, the *Equal Remuneration Decision 2015* and the *Annual Wage Review 2021-22* (and similar) would be inconsistent with the new ss.134(1)(aa) and 134(1)(ab) and s.284(1)(aa).<sup>139</sup>

[138] The UWU submitted that if the Full Bench was to perform the 'comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees' per the *Equal Remuneration Case 2015*,<sup>140</sup> the Full Bench would fall into error.<sup>141</sup> The UWU submitted that such a comparison would not be comparing like with like and would have the effect of perpetuating the gender pay gap because of the historical undervaluation of work in aged care.<sup>142</sup>

[139] The UWU submitted that the Full Bench should instead adopt a broader interpretation of ss.134(1)(e) and 284(1)(d) that would be consistent with, or 'promote' the 'the principle of equal remuneration for men and women workers for work of equal or comparable value'.<sup>143</sup>

[140] The UWU submitted that a timely implementation of the interim increase would reduce the gender pay gap sooner and in this respect be consistent with the repealed considerations of s.134(1)(e) of the modern awards objective and s.284(1)(d) of the minimum wages objective, as well as benefit female participation.<sup>144</sup>

[141] The UWU submitted that the new ss.134(1)(ab) and 284(1)(aa) support this approach as they require the Full Bench to consider ‘the need to achieve gender equity 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’.<sup>145</sup>

[142] The UWU agreed with the submission of the HSU in respect of the operation of ss.134(1)(ab) and 284(1)(aa).<sup>146</sup>

[143] The UWU submitted the new s.284(1)(aa) operates similarly to the new s.134(1)(ab) and reiterated its submissions relating to that consideration in respect of s.284(1)(aa).<sup>147</sup>

### ***Joint Employer submissions***

[144] The Joint Employers supported the Commonwealth’s conclusion that the Full Bench can be satisfied that its consideration of work value reasons conforms with the new s.157(2B).

[145] In respect of the new s.284(1)(aa) the Joint Employers submitted that the *Stage 1 decision* provides clear indications that the Commission has taken into account and properly considered the need to achieve gender equity, having exhaustively considered the question of historical undervaluation due to gender-based assumptions and addressed gender pay gaps.<sup>148</sup>

[146] The Joint Employers submitted that s.134(1)(ab) is similar to s.284(1)(aa), the former being more specific and exhaustive than the latter, and including a reference to ‘workplace conditions’. The Joint Employers submit that the Full Bench have taken s.134(1)(ab) into account, and rely on their submissions made in respect of s.284(1)(aa), which apply to those parts of s.134(1)(ab) that concern minimum wages.

[147] Regarding the new s.134(1)(aa) requiring the Commission to take into account the need to improve access to secure work across the economy, the Joint Employers submitted that this introduces a positive obligation similar to ‘encourage collective bargaining’ in s.134(1)(b), and operates similarly to s.134(1)(h).<sup>149</sup>

[148] Noting the Full Bench’s observations in the *Stage 1 decision* in relation to s.134(1)(h),<sup>150</sup> the Joint Employers submitted that this matter is unlikely to have implications for secure work ‘across the economy’ as distinct from a sectoral or employer by employer consideration. Accordingly, the Joint Employers submitted that like s.134(1)(h), s.134(1)(aa) should be a neutral consideration.<sup>151</sup>

### ***Commonwealth submissions in reply***

[149] The Commonwealth submitted that the consideration in s.134(1)(aa) is neutral as to whether and when the interim increase should be made and the Full Bench should not take into account issues of attraction and retention under s.134(1)(aa). The Commonwealth added that issues of attraction and retention are an individual's choice to become or remain employed, whereas secure work is determined by factors outside of an individual's control, namely the security of an individual's position.<sup>152</sup>

[150] The Commonwealth submitted that the Secure Jobs, Better Pay amendments place gender equality at the 'heart' of the Commissions' decision making.<sup>153</sup> However, this does not displace the existing objects of the FW Act or the modern awards and minimum wages objectives.

[151] The Commonwealth accepted the amendments to s.3(a) and new ss.134(1)(ab) and 284(1)(aa) are relevant to the timing and implementation of the interim increase. The Commonwealth did not accept however that these new provisions mandate the interim increase commencing immediately, or that any other decision would fail to achieve these objectives.<sup>154</sup> The Commonwealth added that the new provisions do not displace the well-established principle that there is no primacy to any of either the ss.134(1) or 284(1) considerations. Similarly, the Commission's obligation under s.578(a) is to take into account all of the objects of the FW Act.<sup>155</sup>

### *HSU submissions in reply*

[152] In respect of the Joint Employers' submissions on 20 January 2023, the HSU submitted that the Joint Employers appear to assume the tasks of considering the new ss.157(2B), 134(1)(ab) and 284(1)(aa) have been exhausted by the consideration of the Full Bench in the *Stage 1 decision*.<sup>156</sup>

[153] The HSU does not fully accept the Joint Employers' submission that the requirement to eliminate gender-based undervaluation has been achieved by the Commission in the *Stage 1 decision* or that the Commission has completed the task of setting the rates in the relevant awards. The HSU stated that the Full Bench has made clear the interim increase does not exhaust the extent of the increase and has not completed consideration of the modern awards and minimum wages objectives.

[154] The HSU also submitted that the considerations in s.284(1)(aa) are not only relevant in the assessment of work value reasons contemplated by s.157(2A), now supplemented by s.157(2B), but that ss.134(1)(ab) and 284(1)(aa) make clear the need to achieve gender equality must be taken into account in providing a fair and relevant minimum safety net and establishing and maintaining fair minimum wages. The HSU submitted that these considerations are particularly relevant to submission of the Commonwealth as to the phasing of the interim increase, and is a factor militating against delay in giving effect to the interim increase.<sup>157</sup>

[155] The HSU contested the Joint Employers' submission that addressing the gender pay gap has already been fully achieved by the Commission or that the Full Bench has reached a view that the gender pay gap would be eliminated by the 15 per cent interim increase.<sup>158</sup>

[156] In respect of the Joint Employers’ submission that the ‘some care’ should be applied to how a statistical concept derived from aggregate level of pay should be translated into a jurisdiction concerned with setting fair minimum rates, the HSU submitted that this ignores the express requirement in s.284(1)(aa) for the Commission to take into account ‘the need’ to address gender pay gaps in establishing and maintaining a safety net of fair minimum wages. The HSU further submitted that although it can be measured in various ways, the ‘gender pay gap’ refers to the difference between average earnings of men and women, and this is consistent with how it is understood in the Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.<sup>159</sup>

[157] In response to the submissions of the ANMF, the HSU submitted that in respect of s. 134(1)(aa), the submissions of the ANMF appear to go beyond the object of improving access to secure work across the economy. The ANMF suggested that the interim increase would improve the attraction and retention of employees in the aged care sector, and would thereby have a positive impact on secure work.<sup>160</sup> The HSU submitted that the fact that s.134(1)(aa) refers to the need to ‘improve access to secure work’ suggests that it is directed at security from the perspective of the employee and that the objective is to ensure that modern awards provide security to employees in relation to matters such as certainty of ongoing engagement and predictability of duties, hours of work and pay. The HSU added however that the findings of the Full Bench with respect to attraction and retention, and the ample evidence before the Full Bench, are otherwise relevant to the task of providing a fair and relevant minimum safety net of terms and conditions of employment and, at least to the factors in ss.134(1)(c) and 134(1)(f).

#### *ANMF submissions in reply*

[158] In response to the Joint Employers’ submissions regarding s.157(2B), the ANMF submitted that the new obligations are not yet met and revisiting some findings will be required.<sup>161</sup>

[159] In response to the Joint Employers’ submission, the ANMF submitted that the Full Bench should:

“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.”<sup>162</sup>

[160] The ANMF submitted that despite the submissions of the Joint Employers, it was not concluded by the Full Bench in the *Stage 1 decision* that the elimination of gender undervaluation has been achieved in awarding the interim increase.<sup>163</sup> The ANMF submitted that the increase foreshadowed is expressly interim only and further increases will be required before the Commission would conclude that gender-based undervaluation has been eliminated.<sup>164</sup>

[161] Similarly, the ANMF disagreed with the Joint Employers and submitted the process of addressing gender pay gaps is still a work in progress. The ANMF submitted the Joint Employers may have suggested ‘addressing’ gender pay gaps is synonymous with ‘considering’ gender pay gaps.<sup>165</sup> The ANMF submitted that this should be rejected, and state that ‘addressing

gender pay gaps' relates to material action, not reasoning and is in service of the achievement of gender equality.<sup>166</sup>

[162] Responding to the Joint Employers, the ANMF submitted that it is not accurate to say that with the award of the interim increase the minimum wages objective is achieved. The ANMF submitted that further increases are required in order to ensure the relevant objective is achieved.<sup>167</sup>

[163] So far as the Joint Employers utilised minimum-wages propositions in addressing the modern awards objective, the ANMF repeated its submissions in regard to the Joint Employer's minimum wages submissions.<sup>168</sup>

[164] The ANMF referred to the submission of the Joint Employers that the Full Bench does not need to consider s.134(1)(aa) at length because it operates at 'a macro level'. The ANMF agreed this consideration operates at a macro level in the sense that it is economy-wide, but further submitted that the macro level is a confluence of decisions at the micro level and that s.134(1)(aa) is a mandatory relevant consideration.<sup>169</sup>

[165] The ANMF submitted that the Full Bench should analyse whether the variation will either 'enhance, detract from, or be neutral in regard to, the security of work'. If it enhances security of work, then this enhances the economy-wide position. The analysis is mirrored for micro detraction, or micro neutrality. In this matter, the ANMF submitted, the Full Bench is able to find that increasing minimum wages will enhance the security of the relevant work.<sup>170</sup>

[166] For reasons given above, the ANMF submitted that s.134(1)(aa) weighs in favour of the variation, rather than being neutral as submitted by the HSU.<sup>171</sup> The ANMF agreed with and adopted the positions of the HSU that the considerations under ss.134(1)(ab) and 284(1)(aa) strongly weigh in favour of the interim increase.<sup>172</sup>

### *Joint Employer submissions in reply*

[167] The Joint Employers submitted that the Full Bench needs to be cautious of the amplification of s.134(1)(ab) above the other considerations noting that no consideration has primacy and all need to be evaluated and weighed.<sup>173</sup>

[168] Additionally, the Joint Employers submitted that the Full Bench ought not become overly focused on the contest between the considerations of s.134(1) but ultimately exercise broad discretion in establishing a fair and relevant minimum safety net for both employers and employees subject to the constraints of s.138.<sup>174</sup>

[169] The Joint Employers reiterated that the current proceedings do not appear to require the Full Bench 'to say too much' about the introduction of the notion of secure work in s.134(1)(aa) and the objects of the Act.<sup>175</sup>

[170] The Joint Employers submitted that in its simplest form secure work can only be achieved in the context of financially stable business operations and a decision which undermines the ordinary financial stability of business operations will not improve access to secure work.<sup>176</sup>

## 4.2 Consideration

### *Amendments to the modern awards objective*

[171] The inclusion of s.134(1)(aa) in the modern awards objective requires the Commission to take into account the need to improve access to secure work across the economy. We consider that this is a neutral consideration in the current context. Whilst ‘secure work’ is undefined, we consider that it is directed at a similar purpose to the new reference to ‘job security’ in the objects of the Act. We agree with the Commonwealth’s submission that secure work is concerned with the security of a person’s position while employed. The consideration of s.134(1)(aa) would be most directly engaged in relation to considering terms such as those relating to the forms of employment, the conditions of engagement and termination of employment, and terms relating to levels of certainty and predictability of when work is performed, from the perspective of an employee. Increases to the minimum rate of pay may increase the attractiveness of the work and in doing so positively impact recruitment and retention in the aged care industry. They may encourage an employee to seek employment in and remain employed in the industry, however the rate of pay itself does not provide either lower or higher levels of secure work or job security from an employee perspective. The issues of attraction and retention of employees are more relevantly considered, and in the *Stage 1 decision* have been, in relation to s.134(1)(c).

[172] In the *Stage 1 decision* the Full Bench invited further submissions as to the proper construction and relevance of s.134(1)(e), specifically, whether the approach taken in the *Teachers Decision* of requiring a male comparator ought to be reconsidered. The repeal of s.134(1)(e) and insertion of new s.134(1)(ab) resolves that issue.

[173] The new s.134(1)(ab) requires consideration of the principle of 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. In the *Stage 1 decision* the Full Bench found that the aged care workforce is predominantly female and that work in feminised industries has historically been undervalued, likely for gender-based reasons.<sup>177</sup> The Full Bench also accepted the proposition that gender undervaluation of work is a driver of the gender pay gap and Assoc Prof Junor’s evidence that the skill, responsibility and effort required in the RN, EN and AIN/PCW classifications is under-recognised in the current award rates.<sup>178</sup>

[174] In light of the Full Bench’s findings we consider that the consideration in s.134(1)(ab) weighs in favour of the interim increase, and note that no party contended otherwise. We also reaffirm that the *Stage 1 decision* provides for an interim increase and does not conclude consideration of the Unions’ claim for a 25% increase for all employees.<sup>179</sup> Accordingly, the requirements in s.157, including consideration of whether any further increases are necessary to achieve the modern awards objective and the minimum wages objective, will be further dealt with in Stage 3.

### *Amendments to the minimum wages objective*

[175] In the *Stage 1 decision*, the Full Bench noted that the consideration in s.284(1)(d) is in the same terms as s.134(1)(e) and invited further submissions on the proper construction and relevance of the principle, having regard to the discussion about s.134(1)(e).<sup>180</sup>

[176] The Secure Jobs, Better Pay Act amended s.284(1) to remove s.284(1)(d) – the principle of equal remuneration for work of equal or comparable value – and introduce new s.284(1)(aa).

[177] As set out in paragraph [172] in relation to s.134(1)(e) which is in the same terms, the proper construction and relevance of s.284(1)(d) falls away.

[178] Section 284(1)(aa) is expressed in similar terms to s.134(1)(ab). However rather than the consideration of ‘providing working conditions that facilitate women’s full economic participation’, the clause requires a consideration of the need to achieve gender equality ‘by addressing gender pay gaps’.

[179] The findings of the Full Bench in the *Stage 1 decision* set out at paragraph [173] similarly lead us to conclude that the consideration in s.284(1)(aa) weighs in favour of the interim increase, and note that no party contended otherwise.

### ***Section 157(2B)***

[180] The new s.157(2B) requires that the Commission’s consideration of work value reasons must be free of assumptions based on gender; and include consideration of whether historically the work has been undervalued because of assumptions based on gender.

[181] Whilst not directed at that particular statutory requirement, the Full Bench in the *Stage 1 decision* gave detailed consideration to the evidence, including extensive expert evidence, about gendered assumptions in the work value of work in the aged care industry, including evidence of ‘invisible skills that may have been given inadequate weight in previous work value assessments including because of gender-based assumptions.’

[182] We are satisfied that the Commission’s consideration of the work value reasons justifying the interim increase is free of gender-based assumptions, noting that no party contends otherwise. In relation to the need to include consideration of whether historically the work has been undervalued because of gender-based assumptions, the ANMF contends that s.157(2A)(b) requires an express finding to be made. We consider that whilst it may often be appropriate to make such a formal finding, we do not consider that the provision imposes an obligation to do so. The language of the provision is to ‘include consideration of’ rather than require the Commission to reach a state of satisfaction that historically the work has been undervalued because of gender-based assumptions. In this regard we accept the Commonwealth’s submission that the obligation imposed by the provision is for the Commission to actively turn its mind to the question of historical undervaluation and does not require the making of a positive finding.

[183] We are satisfied that the Full Bench in the *Stage 1 decision* actively considered the question of historical undervaluation because of gender-based assumptions, as required by s.157(2A)(b). In addition to the matters in paragraph [173], the Full Bench closely considered expert evidence on gender undervaluation in the aged care industry and historical gender-based



undervaluation for example in the Charlesworth Report, the Charlesworth Supplementary Report, the Eagar Report and the Meagher Report, and comprehensively summarised the evidence and submissions.

## **5. Timing and phasing-in of the interim increase**

### **5.1 Submissions**

[184] This section summarises the submissions of the parties in respect of the question of timing and phasing-in of the interim increase.

[185] Included in this section are responses from the parties to the questions posed in our Statement and Directions<sup>181</sup> of 10 February 2023 which relate to timing and phasing-in of the interim increase, as below.

[186] The Commonwealth was requested to address the following question:

1. The basis and/or rationale for splitting the 15% interim increase into two instalments of 10% from 1 July 2023 and 5% from 1 July 2024.

[187] All parties were requested to address the following question:

2. If the Bench was to accept the Commonwealth's submission that it is not feasible for the increase to apply before 1 July 2023, the Bench's provisional view is that the interim increase should operate on and from a date other than 1 July 2023, having regard to the timing of any increase from the Annual Wage Review. The Bench's provisional view is that the interim increase should apply from 30 June. The parties' views on the provisional view are sought (noting the submissions filed as to the appropriate timing and phasing of the interim increase).

### ***Commonwealth submissions***

[188] The Commonwealth supports the interim increase and submitted that it is committed to funding the full increase, including on-costs incurred by aged care providers, in all Commonwealth funded aged care.<sup>182</sup>

[189] The Commonwealth submitted that it will provide funding for the increase in the following phases:<sup>183</sup>

- An increase in funding corresponding with a 10 per cent increase in wages (including on-costs) from 1 July 2023; and
- A further increase in funding corresponding with the remaining 5 per cent increase in wages (including on-costs) from 1 July 2024.

[190] The Commonwealth submitted that its proposed timing will allow it to implement the interim increase appropriately through its various funding mechanisms, while commencement from 1 July 2023 will 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.<sup>184</sup>

[191] The Commonwealth submitted that the following mechanisms will likely be used to implement the interim increase:<sup>185</sup>

- **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.
- **Home Care Packages Program (HCPP)** — 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.
- **Commonwealth Home Support Programme (CHSP)** — development and negotiation of a large volume of grant agreements ahead of a commencement date of 1 July 2023.
- A number of other small aged care and related programs funded by grant agreements or contractual arrangements that involve direct care workers will need to be adjusted.

[192] The Commonwealth maintained that it is ‘not feasible’ to implement a funding increase prior to 1 July 2023 for the following reasons:

- the Commonwealth does not provide funding to directly fund wages and associated on-costs in the aged care sector;
- 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
- 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.<sup>186</sup>

[193] The Commonwealth further noted that while it supports continuing to improve wages and conditions for aged care workers to properly reflect the value of work performed, this must be balanced against the need to ensure that funding is properly targeted so that it contributes to improving the quality and safety of the aged care system for older Australians.<sup>187</sup>

**[194]** The Commonwealth noted that on-costs are ‘a significant proportion of the total wage bill for aged care providers’ and submitted that the following on-costs are likely to increase as a result of the interim increase:<sup>188</sup>

- Superannuation
- Payroll tax
- Workers’ compensation
- Allowances and entitlements which are based on a percentage of the standard rate.

**[195]** The Commonwealth proposed a 2-stage approach to funding on-costs:<sup>189</sup>

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.
2. In the future, the costs of delivering both residential and home aged care will be further investigated through the IHACPA, which will provide advice to Government regarding the costs of care, informing future price setting arrangements.

**[196]** The Commonwealth submitted that its proposed 2-stage approach is appropriate because:<sup>190</sup>

- The Commonwealth does not fund aged care wage costs directly, so it is not possible to calculate the precise level of Commonwealth funding needed according to a specified list of on-costs;
- Historically, Commonwealth funding has not been calculated ‘from the ground up’ so there is not a prescribed list of labour input costs that can be separated and adjusted for the purposes of Commonwealth funding;
- Expenditure on wages varies in and across aged care programs, due to the diversity of roles, business and employment models, the number of awards and higher wages paid by some employers under Enterprise Agreements. Examples of variability across aged care programs include:
  - On-costs associated with the Aged Care and Nurses Award are higher than those for the SCHADS Award, mainly due to higher shift allowances and overtime in residential aged care due to the 24/7 nature of residential aged care service delivery;
  - In the HCPP, the care recipient may spend their subsidy on a range of services, equipment, aids and home modifications and as a result expenditure on labour-related costs is variable and, to an extent, dependent on the preferences of the care recipient, and

- In the CHSP, services are delivered under grant-based funding, only a proportion of which are delivered by HCWs employed under Schedule E in the SCHADS Award who are eligible for the interim increase.
- Using sector by sector average labour costs by aged care program as the basis for determining the funding necessary to fund on-costs is an equitable approach across providers that factors in existing labour costs, including on-costs.

[197] The Commonwealth agreed with the summary of relevant principles set out at [976]–[990] of the *Stage 1 decision* in respect of the approach to timing and phasing-in taken by the Commission in previous decisions.

[198] The Commonwealth noted that s.166(1)(a) of the FW Act creates a ‘presumption’ that the interim increase would commence on 1 July 2023 and accepts that this presumption may be displaced if the Commission is satisfied that it is ‘appropriate’ to specify a different day of operation.<sup>191</sup>

[199] The Commonwealth submitted, consistent with its funding commitment, that a commencement date of 1 July 2023 should be adopted in respect of the first phase of the interim increase. The Commonwealth further submitted that an earlier commencement date would not be appropriate, having regard to its funding commitments and administrative arrangements.<sup>192</sup>

[200] The Commonwealth noted the principles set out in the Penalty Rates – Transitional Decision and Application by Independent Education Union of Australia – New South Wales/Australian Capital Territory Branch (130N-NSW)<sup>193</sup> as considered in the Stage 1 decision at [986] and [981] respectively.<sup>194</sup> The Commonwealth submitted that given its funding commitment and the central role it plays in funding the sector, a phasing-in approach that reflects its funding commitment would be appropriate and consistent with the principles established in the aforementioned cases.<sup>195</sup> The Commonwealth’s proposed phasing-in is set out in paragraph [189] above.

[201] The Commonwealth submitted that if the Commission adopts its proposed phasing the impact on business and employment costs will be ‘minimal’ but if another approach is adopted it may have impacts on business and employment costs which ‘must be weighed and assessed against the benefits in providing an earlier uplift in wages.’<sup>196</sup>

[202] In respect of productivity, the Commonwealth agrees with the view expressed at [1065] of the *Stage 1 decision* that an increase in wages should not be regarded as affecting productivity. In this respect, the Commonwealth submitted that s.134(1)(f) is a neutral consideration.<sup>197</sup>

[203] In relation to regulatory burden, the Commonwealth submitted that the interim increase would have no increased regulatory burden and any accountability mechanisms introduced with the implementation of the funding increase would result in ‘minimal’ regulatory burden. In this respect, the Commonwealth submitted that s.134(1)(f) is a neutral consideration.<sup>198</sup>

[204] Regarding the impact on business and employment costs, the Commonwealth agreed with the Commission that 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>199</sup>

[205] The Commonwealth submitted that, as a result of its funding commitment, the Commission can be satisfied that granting the interim increase with timing and phasing arrangements consistent with the timing of the Commonwealth's funding commitments 'would have a non-material impact' on business and employer costs. On this basis, the Commonwealth submitted that s.134(1)(f) would be a neutral consideration.<sup>200</sup>

[206] In the event the Commission decides to grant the interim increase earlier, or without the phase-in reflected in the Commonwealth's funding commitment, the Commonwealth conceded that this could have an impact on business. The Commonwealth recognised and accepted the observations from [911]–[916] of the *Stage 1 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>201</sup>

### *HSU submissions*

[207] The HSU noted that while the default position under s.166 is that a decision varying modern award minimum wages comes into effect on 1 July in the next financial year, this may be varied if the Commission considers it appropriate, and that the earliest time such a determination could take effect is that the day that the determination is issued.<sup>202</sup>

[208] The HSU noted that the approach to timing and implementation of variations to modern award minimum wages has been explored in several past decisions, and broadly agreed with the summary provided in the *Stage 1 decision*, at paragraphs [976]–[990].<sup>203</sup>

[209] The HSU submitted that there are compelling reasons why the interim increase for direct care workers determined by the Full Bench should be implemented immediately or as soon as practicable.<sup>204</sup> The HSU also noted the following background matters of relevance:

- 2018 Aged Care Workforce Strategy Taskforce - *A Matter of Care – Australia's Aged Care Workforce Strategy* proposed that the sector develop a strategy to support the transition of personal care workers and nurses to pay rates that better reflect their value and contribution to delivering care outcomes;
- the Royal Commission into Aged Care Quality and Safety (Royal Commission) Interim Report issued on 31 October 2019 and its Final Report, issued on 1 March 2021<sup>205</sup> which recommended that the industry unions, Commonwealth and employers collaborate to vary the award rates;
- general community consensus that urgent action is required and has been for some time, which is reflected in the factual findings made by the *Stage 1 decision*; and
- that the relevant employers and the Commonwealth would have appreciated the likely prospect of a substantial increase following the Royal Commission's Final Report, and have been on notice since the interim increase was proposed by the *Stage 1 decision* in November 2022.

**[210]** The HSU submitted that various findings of the Full Bench demonstrate the necessity for the interim increase to commence operations immediately or as soon as practicable, in particular:<sup>206</sup>

- The extensive evidential findings that the work of at least direct care workers in residential aged care homes and home care settings has changed very substantially;
- The evidence establishing that the existing minimum wages for direct care workers in the aged care sector do not properly compensate employees and ‘significantly undervalue the work performed by these employees’;
- That the Full Bench made clear that the 15 per cent interim increase does not exhaust the extent of the wage increases justified by work value reasons;
- That the Full Bench observed that most of the award classifications the subject of the interim increase are ‘low paid’ for the purposes of s.134(1)(a) and the evidence of financial challenges faced by the workers;
- The finding of the Full Bench that the evidence painted a picture of chronic understaffing, and that it was common ground that attracting and retaining aged care employees is a significant issue that increasing minimum wages will help to alleviate;
- The Full Bench’s conclusion that varying the relevant awards to give effect to the interim increase will have a beneficial effect on the gender pay gap and promote gender pay equity; and
- That the Full Bench indicated it was not persuaded that varying the relevant awards to give effect to the interim increase would have any material effect on the national economy.<sup>207</sup>

**[211]** The HSU submitted that due regard to the factors arising with respect to the modern awards and minimum wages objectives and considerations of fairness demands a conclusion the interim increase commence operation immediately or as soon as possible. The HSU provided the following reasons:<sup>208</sup>

- (a) Applying ss.134(1) and 284(1), any delay will result in direct care workers continuing to receive wages significantly below the true value of work they perform;
- (b) the Full Bench set the interim increase ‘comfortably below’ the increase the Full Bench may determine on a final basis, meaning even after the commencement of the interim increase, direct care employees will continue to receive wages less than the true value of their work;
- (c) it is inherent in the interim nature of the increase determined by the Full Bench that it was intended to commence operation within a short period and, the reasoning of the Full Bench (at [922]) was that there is no reason to delay an increase in minimum wages at least for direct care employees whilst further complex issues are being determined;<sup>209</sup>

- (d) most of the classifications to which the interim increase will apply are ‘low paid’ for the purposes of s 134(1)(a). The interests of employees on low rates of pay receiving the increase determined by the Commission to be warranted are strong and the consideration in s.134(1)(a) favours a conclusion that the interim increase should commence at the earliest possible date;<sup>210</sup>
- (e) for the purposes of s.134(1)(f) any delay in the implementation of the interim increase is likely to perpetuate the industry’s attraction and retention difficulties and, in turn, have a negative impact on business and the standard of care able to be provided to elderly persons;
- (f) for the purposes of s.134(1)(g) there is no reason to conclude that any period of adjustment is needed to permit employers to give effect to the interim increase which has been determined by the Full Bench, and no evidence has been provided demonstrating any particular difficulty in carrying out such an adjustment.<sup>211</sup>
- (g) the new considerations in ss.134(1)(ab) and 284(1)(aa) and, in particular, the requirement to take into account the need to eliminate gender-based undervaluation of work and address gender pay gaps further supports the early commencement of the interim increase. As the Full Bench found, the interim increase will go some way towards addressing the gender-based undervaluation of work ; and
- (h) There are no other reasons which warrant any delay. The HSU notes the finding of the Full Bench that the increase is not likely to have any relevant impact on the national economy for the purposes of ss.134(1)(h) and 284(1)(a).

**[212]** The HSU submitted that the Commonwealth’s preference for phasing-in does not provide a proper basis for delay, and the Full Bench should not accept the propositions advanced by the Commonwealth in relation to the practicability of implementing the interim increase.<sup>212</sup>

**[213]** The HSU submitted that the Full Bench should determine that the relevant awards be varied to give effect to the interim increase with effect immediately from the date of the Full Bench’s determination. It submitted that ‘any further delay would not give effect to the modern awards and the minimum wages objectives and would perpetuate the profound unfairness in direct care workers receiving wages which do not reflect the value of their work.’<sup>213</sup>

**[214]** If the Full Bench finds some practical difficulty with the interim increase commencing immediately from the date of the determination as a result of the nature of Commonwealth funding mechanisms, the HSU submitted that this should be addressed by the variations providing for back payment to employees at least to the date of the determination. The HSU submitted that this could be achieved through a number of mechanisms, including:

“(a)the awards being varied with immediate effect, but for the liability to make payment of the higher rates of pay being deferred for a short transitional period such that employers are not required to actually make payments reflecting the increased rates of pay until the conclusion of the transitional period, but that the payments then required include backpay to the date of the determination; or

(b)the award being varied with effect from a future date, but for the award variations to require the payment, as wages, of a one-off lump sum calculated based on the difference between what the employee was actually paid and what they would have been paid had the rates been set properly at an earlier time...”<sup>214</sup>

**[215]** In respect of the Commonwealth’s proposal to phase in the increases in two stages, the HSU submitted that proposal is ‘effectively an argument for the Commission to determine a 10 per cent interim increase for some classifications only, as it might reasonably be thought that the final increases will be determined well in advance of 1 July 2024.’<sup>215</sup> Further, the HSU submitted that the Commonwealth has not filed any evidence why or how it devised this approach or any economic basis for it, nor has it addressed the fact the increases are interim, rather than final. Further the Commonwealth does not explain, or provide any rationale for, the phasing-in nature of its proposal.<sup>216</sup>

**[216]** The HSU submitted that the Full Bench should not accept the unsupported assertions of the Commonwealth that it is not feasible to provide funding with respect to the interim increase prior to 1 July 2023. If the Commission were to accept the assertions of the Commonwealth, then the award rates should be varied as soon as possible and any delay in payments occasioned by delays in funding should be dealt with via a suitable backpay arrangement.<sup>217</sup>

**[217]** The HSU submitted that although the Commonwealth may prefer a staged increase, it has not explicitly withdrawn the commitment made in its submission of 8 August 2022.<sup>218</sup>The HSU stated that:

“If the Commission determines that the increases are to take effect in advance of the Commonwealth’s proposed timeline, and if the Commonwealth then departs from its commitment above, there will be some, rather than no, financial impact on employers. This is true of any variation to award minimum wages. It is not itself a justification for phasing. The position of the Commonwealth should not be accepted. Fundamentally, it would involve the Commission abdicating its powers to the Commonwealth; allowing the Commonwealth to control wage fixation in the industry rather than the Commission. Funding should react to the needs of the industry including wages, rather than the other way around.”<sup>219</sup>

**[218]** The HSU noted that the Full Bench’s observations that the impact of business is only one of the considerations that must be taken into account,<sup>220</sup> whereas countervailing considerations in ss.134(1) and 284(1) militate strongly in favour of the entire increase taking effect from when the determination is issued.<sup>221</sup>

**[219]** Additionally, the HSU submitted the approach proposed by the Commonwealth ‘gives no weight to the needs of the employees who have, as the Commission has found, been unfairly remunerated since the inception of the relevant awards.’<sup>222</sup>

**[220]** Regarding s.134(1)(f) the HSU acknowledged increases may have a cost on business in the event there is a gap between the timing of the Commonwealth funding and the commencement of the interim increase.<sup>223</sup> The HSU noted that the Commission has previously made clear that decisions of government cannot be treated as determinative to the quantum or



timing of increases in award minimum rates<sup>224</sup> and submitted that consideration of s.134(1)(f) is not confined to an examination of the costs incurred by business. The HSU submitted that any increase will assist in attracting and retaining workers in the sector and have a positive impact on business.<sup>225</sup>

[221] The HSU submitted the impact on business should be regarded as a minor factor weighing against the increase if there is a gap between the timing of the Commonwealth funding and the commencement of the interim increase determined by the Full Bench. It is outweighed by the countervailing considerations including the need for these workers to be paid amounts reflecting the true value of the work they perform, and to remove gender-based undervaluation.<sup>226</sup>

### *Second Supplementary Report of Prof Eagar*

[222] The HSU engaged Prof Kathleen Eagar to prepare a Second Supplementary Report,<sup>227</sup> which was provided alongside its submissions of 20 January 2023.

[223] The report addressed the following issues:

- the nature of funding mechanisms for aged care including for residential aged care, Home Care and the Commonwealth Home Support Programme (including pricing methodology, how current prices have been set and what entity set those prices; transitional arrangements; payment distribution methods and frequency of payments);
- the role (if any) of IHACPA in setting pricing and funding amounts in the aged care industry;
- what changes to legislation and subordinate legislation would be required in order to change pricing and/or funding in aged care;
- whether, having regard to the current funding mechanisms, it is feasible for the Commonwealth to fund any increase awarded by Commission prior to 1 July 2023;
- any examples of any prior occasions in which the Commonwealth has changed funding or payments to providers before the end of a financial year and what mechanisms were used for enacting the funding changes;
- whether there any administrative or procedural funding impediment that would prevent a full 15 per cent increase being paid prior to 1 July 2023;
- whether it would be administratively or procedurally simpler to administer funding of a one off 15 per cent increase, or to administer funding of two instalments of 10 per cent and 5 per cent as proposed by the Commonwealth in the submissions;
- whether the Commonwealth has access to data on the mix of staff and staffing profile of employees in the aged care industry and whether this is relied upon to conduct budget forecasts and budgeting; and

- whether the Professor considers that there would be any adverse impacts on the aged care industry, if the payment of the 15 per cent interim increase is delayed.

[224] Prof Eagar stated that following the introduction of the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*, IHACPA has the role of providing costing and pricing advice on aged care to the Commonwealth Government. IHACPA's advice is to inform Commonwealth Government decisions on the pricing of residential aged care and respite care using the AN-ACC from 1 July 2023. This role is an advisory role only. Responsibility for pricing and funding rests with the Commonwealth government. In relation to aged care, IHACPA has an advisory role only. It is not a determination body.<sup>228</sup>

[225] Prof Eagar addressed which, if any, changes to legislation and subordinate legislation would be required in order to change pricing and/or funding in aged care. Prof Eagar stated no changes would be required for government to increase payments to providers to cover pay increases. Prof Eagar noted the administrative matter of recording price changes in relevant determinations and outlined the relevant legislation.

[226] Having regard to the current finding mechanisms, Prof Eagar found an award increase is feasible for the Commonwealth to fund prior to 1 July 2023.<sup>229</sup> Prof Eagar outlined two options of mechanisms that could be used to fund the increase prior to 1 July 2023.<sup>230</sup>

[227] Option One was to incorporate award increases into existing payment systems:

- (a) In relation to residential care, one option available to Government is to incorporate award increases into the 'AN-ACC starting price' and include these in an updated schedule of subsidies and supplements as well as into their automated payment systems. The IHACPA need have no role in this as IHACPA has an advisory role only.
- (b) In relation to Home Care Packages, one option available to Government is to incorporate award increases into the subsidy paid for each of the Home Care Subsidy Rates and include these in an updated schedule of subsidies and supplements as well as into their automated payment systems.
- (c) This same option is not available for CHSP as the Government grant is awarded to each organisation individually. Thus any increase for changes in award payments would need to be calculated for each organisation individually.<sup>231</sup>

[228] Option Two was to reimburse providers from the date they begin paying the increase:

- (a) Department of Health advises aged care organisations to begin paying increased award rates to eligible staff from the earliest possible date and that they will be reimbursed for eligible expenses from the date those expenses are incurred. This will give providers an incentive to begin pay increases as soon as they can do so.
- (b) Aged care providers apply for reimbursement and provide the necessary documentation.

(c) Aged care providers are reimbursed for eligible costs.<sup>232</sup>

[229] Prof Eagar addressed prior examples where the Commonwealth has changed funding or payments to providers before the end of financial year. Prof Eagar stated the reimbursement method has been used in the past and is currently being used. As a result, systems are already in place to allow it to be used for the purpose of paying for award increases outside of the usual funding cycle. Prof Eagar gave the example of the COVID-19 Aged Care Support Program.<sup>233</sup>

[230] Prof Eagar stated that although it would be easier and administratively tidier for the Commonwealth if the 15 per cent increase took effect from 1 July 2023, there is no administrative or procedural impediment if the pay increase took effect before that date.<sup>234</sup>

[231] Prof Eagar addressed whether the Commonwealth has access to data on the mix of staff and staffing profile of employees in the aged care industry and whether this is relied upon to conduct budget forecasts and budgeting. Prof Eagar stated the staff profile of each organisation is subject to frequent changes as staff come and go and thus staff profile data are never entirely accurate for purposes such as budget forecasts. Nevertheless, the Commonwealth prepares budget forecasts every year with the best available data and this is the case whether or not a pay increase occurs.<sup>235</sup>

[232] Finally, Prof Eagar addressed whether there would be any adverse impacts on the aged care industry if the payment of the interim increase is delayed.

[233] Prof Eagar reiterated that the pay rise is urgently required to help improve attraction and retention in the aged care sector. Prof Eagar stated the sector is in immediate crisis in terms of its ability to staff existing aged care services and deliver necessary services to people in their homes. Prof Eagar claimed she has been informed by public hospital informants that an increasing number of aged care residents are being transferred to emergency departments for conditions that would normally be managed within the home. The reason for these additional emergency department attendances is reportedly because the home cannot provide adequate care due to staff shortages.

[234] Further, Prof Eagar stated that although the two instalments will save the Commonwealth funding in the short term, it will exacerbate existing staff shortages and service deficiencies. Prof Eagar stated that residents receiving inadequate care are more likely to become seriously unwell and be admitted to hospital, at a greater cost to government (Commonwealth, States and Territories). Prof Eagar stated that those receiving inadequate care at home are more likely to require premature residential care, at a greater cost to the Commonwealth and ultimately to taxpayers.<sup>236</sup>

### ***ANMF submissions***

[235] The ANMF submitted that the principles canvassed by the Full Bench at paragraphs [974]–[990] of the *Stage 1 decision* are ‘generally appropriate’. The ANMF however stated that aspects of the decisions extracted by the Full Bench relate to the specific facts and evidence of their respective matters, and the principles identified are not necessarily applicable ‘in the same way or to the same end’ in these proceedings.<sup>237</sup>

[236] In respect of *Australian Workers Union* [2022] FWCFB 4 at [163] and [169], extracted in the *Stage 1 decision* at [980], the ANMF submitted that the variation concerned in that matter was substantially different to a percentage increase to minimum award rates. Further, the ANMF submitted that unlike that decision, there is no material before the Full Bench in these proceedings establishing that the regulatory burden of an interim increase is such that employers would require any particular time to adjust after a determination is made. If such material were adduced it would be open to the Commission to order that the interim increase come into effect from the date of determination, but that implementation be deferred for a period. Following this, the increase could be payable to employees retrospectively. Such an approach, the ANMF submitted, would prevent further delays in awarding the increase to direct care workers and allow their employers a reasonable period to make arrangements for the increase.<sup>238</sup>

[237] The ANMF submitted the principles canvassed by the Full Bench at [974]–[990] predate the amendments to ss.3(a), 134(1)(ab) and 284(1)(aa) and must therefore be revised. In particular, the ANMF submitted that regard must be had to the amendment to the object of the FW Act in the proper interpretation of s.166 and the need to achieve gender equality in respect of matters relevant to phasing-in variations, as set out in the *Penalty Rates Decision* and others.<sup>239</sup>

[238] The ANMF noted that the Full Bench has recognised that the interim increase is justified by work value reasons and current award minimum rates, ‘significantly undervalue’ the work of direct care workers.<sup>240</sup> The ANMF submitted the relevant awards do not provide a safety net of fair minimum wages or a fair and relevant minimum safety net of terms and conditions.

[239] Given this, the ANMF claimed the phasing-in proposed by the Commonwealth fails to meet the statutory objectives<sup>241</sup> and that direct care workers in aged care should receive the interim increase without further delay. It highlighted also that the initial applications have been on foot since November 2020, in respect of the initial application to vary the Aged Care Award, and May 2021 and June 2021 in respect of the further applications.<sup>242</sup>

[240] The ANMF submitted direct care workers should not have to wait until 1 July 2024 to receive the full interim increase that was plainly justified by work value reasons. It submitted that it would be appropriate for the Full Bench to order the interim increase was to come into operation immediately and that would be consistent with the revised object of the FW Act in putting gender equity at the ‘heart’ of Commission’s decision making.<sup>243</sup>

[241] The ANMF submitted the Full Bench may find a transitional arrangement that applies the increase retrospectively may be appropriate if it is satisfied the regulatory burden of the interim increase was such that employers would require a reasonable time to adjust after a determination was made.<sup>244</sup> However at present, the ANMF submitted there is no such evidence before the Commission. Upon being satisfied such an arrangement is appropriate, the ANMF submitted the Full Bench may specify the interim increase is deferred for a period of a number of weeks but must apply retrospectively from the date of the Stage 1 determination.<sup>245</sup> Such an arrangement would satisfy the requirements of s.157(2).<sup>246</sup>

[242] Regarding s.134(1)(f), the ANMF submitted that the interim increases would not have any negative effect on productivity. The ANMF accepts granting the interim increase prior to those increases being fully funded by the Commonwealth may have some impact on business, given the increased employment costs. However, even having regard to this, the ANMF submitted that the application of the interim increase in its entirety upon the making of the determination is necessary to ensure that the modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account all of the factors in s.134(1).<sup>247</sup>

[243] The ANMF noted the only material currently before the Full Bench regarding the likely impact on business of any increase to award minimum wages are analyses conducted by StewartBrown. The ANMF reiterated its submissions of 22 July 2022 that this analysis has not been adequately proven or verified and therefore the report should not carry any significant weight.<sup>248</sup>

[244] The ANMF contested that the ‘accountability mechanisms’ referred to by the Commonwealth would be a relevant consideration in respect of the regulatory burden on business, as they relate to funding arrangements and are not a consequence of the proposed award variations. Accordingly, the ANMF submitted the regulatory burden of varying the award rates would be a neutral consideration, and the additional regulatory burden associated with the variation would be limited to ensuring employees are paid the increased minimum award rates.<sup>249</sup>

### *UWU submissions*

[245] The UWU submitted that the interim increase in the Aged Care Award and SCHADS Award should be implemented as soon as possible. The UWU opposes the Commonwealth’s proposal that the interim increase be phased in over two instalments and instead submitted that the variations to the relevant awards should be made effective from the first pay period on or after the date of the determination.<sup>250</sup>

[246] If the Full Bench were of the view that there are practical difficulties with immediate implementation, then the UWU would support the HSU’s proposal for a back payment mechanism from the date of the determinations.<sup>251</sup>

[247] The UWU claimed the Commonwealth has not explained the need to phase in the interim increase, and why remaining 5 per cent should not be paid until 1 July 2024. The UWU submitted the Full Bench should not be satisfied there is a need to phase in the interim increase, especially factoring in both the modern award and the minimum wages objectives.<sup>252</sup>

[248] The UWU submitted that s.166 of the Act provides that determinations varying modern awards generally come into operation on 1 July in the next financial year, unless Commission considers it appropriate to specify another day.<sup>253</sup> If considering the appropriateness of another day, ‘fairness’ is a key factor.<sup>254</sup> UWU submitted particular focus should be had to the considerations at s.134(1)(a) – the needs of the low paid; s.134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and s.134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern

awards.<sup>255</sup> Consideration should also be given to the new provisions, s.134(1)(aa) – the need to improve access to secure work – and s.134(1)(ab) the need to achieve gender equity.<sup>256</sup>

[249] The UWU acknowledged that the determination of transitional arrangements is a broad judgement, but claimed that, in relation to the consideration of whether it is appropriate to deviate from the presumption in s.166, the Commonwealth appears to give no weight to the needs of the low paid, to job security or to gender equity.<sup>257</sup>

[250] In respect to the objectives of gender equity, UWU submitted it is appropriate to deviate from the presumption of s.166 to implement the interim increase as soon as possible.<sup>258</sup>

[251] In respect of the needs of the low paid and the need to improve access to secure work across the economy, UWU submitted the Full Bench should have regard to the considerable evidence before it demonstrating retention and workforce issues in the industry.<sup>259</sup> and cited in particular a report by the Committee for Economic Development of Australia<sup>260</sup> and the Royal Commission's Final Report.<sup>261</sup>

[252] The UWU submitted that applying the interim increase no earlier than 1 July 2023 gives no weight to the needs of the low paid, job security and pay equity and is not consistent with fairness.<sup>262</sup>

[253] The UWU submitted the approach in *ALHMWU re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates 5 (the ACT Child Care Decision)* is apposite, as there is significant material before the Full Bench demonstrating a significant workforce crisis in the sector caused in part by low wages.<sup>263</sup>

[254] The UWU further submitted the approach in the *Penalty Rates Transitional Decision* is apposite, where the Full Bench has determined that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed.<sup>264</sup> If the variation to the awards is not made until 1 July 2023, the UWU submitted that direct care workers in the aged care sector will continue to perform work for compensation less than the value of the work performed for a period of more than six months.<sup>265</sup>

[255] In relation to s.134(1)(f) – the impact of any exercise of modern award powers on businesses, including productivity, employment costs and regulatory burden the UWU submitted this impact is negligible given the Commonwealth's commitment to funding the interim increase.<sup>266</sup> The UWU therefore concluded s.134(1)(f) is a neutral consideration.<sup>267</sup>

#### *UWU submissions in response to question 2*

[256] In response to question 2, the UWU endorsed the submissions of HSU, ANMF and AWU in respect of the interim increase being implemented as soon as possible, but did not raise any concerns in respect of a 30 June 2023 implementation date.<sup>268</sup>

#### *AWU submissions*

[257] The AWU did not support the timing and phasing-in arrangements proposed by the Commonwealth.<sup>269</sup>

[258] The AWU submitted that enterprise bargaining in the industry has already stalled whilst employers wait for the Commission to confirm the quantum and timing of the wage increases.<sup>270</sup>

[259] The AWU submitted a number of considerations of the modern awards objective will be undermined by unnecessarily delaying the wage increase. In particular, the need to take into account relative living standards and the needs of the low paid, the need to promote social inclusion through increased workplace participation, the need to achieve gender equality in the workplace and the need to encourage collective bargaining.<sup>271</sup>

[260] The AWU submitted that the object of promoting collective bargaining has already been significantly undermined by the Commonwealth's proposed timing of the wage increases, with the last of the increases proposed to be implemented nearly 18 months from the date of these submissions. The AWU provided correspondence indicating an employer is delaying bargaining pending further details of these proceedings being known, including government funding arrangements.<sup>272</sup> The AWU submitted that stalled collective bargaining in the aged care industry, an industry where bargaining is already extremely difficult, means the need to encourage collective bargaining should be given significant weight, and on this basis the Commonwealth's suggested timing and phasing-in should be rejected.<sup>273</sup>

[261] The AWU submitted that the need to encourage collective bargaining would be best satisfied by a single interim increase of 15 per cent, earlier than that proposed by the Commonwealth.<sup>274</sup>

[262] The AWU claimed the Commonwealth's submissions of 16 December 2022 modifies the position set out in their submissions of 29 August 2022, whereby the Commonwealth committed 'to provide funding to support any increase to award wages made by the Commission.' The AWU supports this earlier position and submitted the Commonwealth's 16 December 2022 submission regarding the proposed timing and phasing-in of the increases should be given no weight.<sup>275</sup>

[263] The AWU further submitted that given the Commonwealth's earlier commitment to fund any increase awarded by the Commission, it is difficult to see how its concern about the impact to business were the interim increase to be implemented earlier than it proposes, can be sustained. The AWU submitted that the consideration of the likely impact of the exercise of modern award powers on business (s.134(1)(h)) is a neutral consideration in respect of the timing and phasing-in of the interim increase.<sup>276</sup>

[264] The AWU submitted that the principles arising from the *Penalty Rates Transitional Decision* do not lead to a conclusion that the phasing-in of the proposed interim increase is appropriate, instead submitting that the statutory framework and modern awards objective supports awarding the interim increased without any phasing-in arrangements.<sup>277</sup>

[265] Regarding 'fairness', the AWU submitted that regard should be had to both employers and employees, and pointed to the Joint Statement, where representatives of employers and employees concurred that there should not be phasing-in of the proposed interim increase.<sup>278</sup> The AWU submitted that awarding the proposed increase in full without phasing-in would result in fairness to both employers and employees.<sup>279</sup>

**[266]** The AWU submitted that the Commonwealth's submissions in respect of *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory (130N-NSW)*,<sup>280</sup> do not establish that the phasing-in proposed by the Commonwealth is warranted.<sup>281</sup> The AWU submitted that the Commonwealth has had ample time to prepare for the outcome of these proceedings, and further, the extent of the proposed increase is less than the 25 per cent utilised in the economic modelling undertaken by Treasury, contained in the Commonwealth's submissions of 29 August 2022.<sup>282</sup>

**[267]** The AWU submitted the Commonwealth has not provided cogent evidence as to why its proposed phasing-in of the increase is manageable, but awarding the full increase without phasing-in is not.<sup>283</sup>

*AWU submissions in response to question 2*

**[268]** In response to question 2, the AWU submit there are difficulties associated with 2 pay increases applying closely together and consideration should be had toward ss.134(1)(f) and 134(1)(g) of the modern awards objective in this regard.<sup>284</sup>

*Joint Employer submissions*

**[269]** In concurring with the Full Bench,<sup>285</sup> the Joint Employers submitted that a 'careful balance' must be established in the exercise of Commission's discretion regarding the timing and implementation of the increases.<sup>286</sup> In particular, this balance is conditioned by the following:

1. It should be uncontroversial that as the Sector is reliant on government funding to operate, the capacity of the Sector to 'fund' the interim increases (absent Commonwealth funding) is negligible.
2. The interim increases for direct care workers will apply to the majority of employees in the Sector.
3. The interim increases are sizable.
4. Elements of the Commonwealth's funding are yet to be finalised (on-cost calculations, etc).
5. The approach to funding for Home Care will require home care package recipients to consent to new pricing before the funding can flow to employers to fund the interim increases.<sup>287</sup>

**[270]** The Joint Employer's noted that the Commission's discretion to depart the default operative date set by s.166(1)(a).<sup>288</sup>

**[271]** The Joint Employers submitted the sector has little capacity to pay the interim increases in the absence of Commonwealth funding. It is therefore fair and necessary for the operation of the interim increases to be aligned to the Commonwealth's funding commitment timetable.<sup>289</sup>



[272] The Joint Employers submitted phasing-in is an accepted approach to introducing increases to wages where appropriate to carefully balance the application of the modern awards objective.<sup>290</sup>

[273] The Joint Employers cited *Penalty Rates Transitional Decision*<sup>291</sup> in which the Commission identified 3 categories of considerations relevant to deciding on transitional arrangements, being, the statutory a framework provided (in particular ss.134(1)(a), 134(1)(f) and 134(1)(g)), the substantive decision itself as to the proposed variation, and fairness.<sup>292</sup> The Joint Employers submitted that aligning the operation of the interim increases to the Commonwealth's funding fairly and reasonably balances the tension within these considerations.<sup>293</sup>

[274] The Joint Employers submitted de-linking operation and funding would disturb the careful balance the Full Bench should seek as it would materially weigh against s.134(1)(f) by materially and detrimentally impacting business in the sector.<sup>294</sup>

[275] Further, the Joint Employers submitted that, although it will disappoint employers and employees, they 'cannot oppose' the Commonwealth's phasing-in approach, and such an approach would be appropriate and consistent with the summary of the relevant principles set out at [976]–[990] of the *Stage 1 decision*.<sup>295</sup> Whilst an earlier single stage funding commitment would have been welcome, the contribution of the Commonwealth must be acknowledged especially in the current economic and budgetary environment.<sup>296</sup>

[276] In respect of s.134(1)(f) the Joint Employers submitted the 'likely' impact on business is fundamentally conditioned by Commonwealth funding.

[277] The Joint Employers restated their position, as summarised by the Full Bench at paragraph [1066] of the *Stage 1 decision*:

“...there is a direct correlation between employment cost and funding:

- the funding is not sufficient to support the provision of necessary care services and sufficient staff numbers to provide those services
- the regulations dictating the provision of consumer centred care require the provider to meet the gap, and
- the gap being met by providers to ensure that compliant and quality care services are provided to consumers has left major providers within the aged care sector to operate at a deficit.”<sup>297</sup>

[278] The Joint Employers submitted that, with full (direct costs and *all* 'on-costs') and on-going funding, the consideration of s 134(1)(f) becomes neutralised. They submitted that the following on-costs need to be funded by the Commonwealth:

- the increased hourly wage rates plus any applicable penalty rates;
- the increased hourly rate of overtime;
- the increased rate applicable when various types of leave is taken;

- the increased rate applicable with accrued leave is paid out on termination;
- increased superannuation;
- increased payroll tax; and
- increased workers' compensation contributions.<sup>298</sup>

[279] The Joint Employers submitted that this accords with the Commission's observations that the extent of Commonwealth funding is plainly relevant to the impact of any increase in employment costs on the employers.<sup>299</sup>

[280] The Joint Employers submitted that this issue 'looms large' in the context of the operation of the interim increase and that if the increases are introduced without funding, the impact on business will be materially negative and would weigh heavily against them.<sup>300</sup>

[281] As such the Joint Employers submitted s.134(1)(f) 'weighs heavily in favour of aligning the operation of the interim increase with the Commonwealth's funding timetable.'<sup>301</sup>

[282] Regarding regulatory burden, the Joint Employers submitted the funding approach may introduce additional regulatory burden even with full and on-going funding, at least initially in home care settings, as any change in service pricing will require the client to agree to the change. This may result in significant risk of operators being unable to recover the increased costs arising from the rise in wages.<sup>302</sup>

[283] The Joint Employers noted that security of tenure provisions in the User Rights Principles 2014 mean home care operators cannot simply bring their home care package agreement to an end if the client does not agree to a change in prices under the package. The Joint Employers submitted that these circumstances result in significant risk of operators being unable to recover the increased costs arising from the rise in wages and stress the importance of communication and lead-up time should the Commonwealth remain with the approach of paying the additional funding into home care packages rather than directly to operators.<sup>303</sup>

[284] Assuming a 1 July 2023 operative date, the Joint Employers submitted that operators would require information regarding the actual increase in funding to home care packages and the new pay rates for employees by 1 April 2023.<sup>304</sup>

[285] Were the Commonwealth to commence communications to operators by this date, the Joint Employers submitted the financial risks for operators relating to clients not agreeing to changes would be mitigated, but not removed.<sup>305</sup>

### *Commonwealth submissions in reply*

[286] The Commonwealth reiterated its commitment to provide funding for any increases to award wages made by the Full Bench in this matter.<sup>306</sup>

[287] The Commonwealth submitted that the timing of the Commonwealth's funding commitment is the result of a decision of the Commonwealth Government and that rationale and merits of the Commonwealth's proposed funding commitment are not relevant to the issues

before the Full Bench. The Commonwealth submitted that the Full Bench does not need to consider whether it would theoretically be possible for the Commonwealth to fund the full interim increase sooner than proposed, but instead needs to consider what, if any, timing and phasing arrangements are appropriate, given Commonwealth's decision and the statutory considerations.<sup>307</sup>

**[288]** The Commonwealth submitted that the timing of its funding is not determinative of the Full Bench's decision as to the timing or phasing of the interim increase but does affect the Full Bench's assessment of s.134(1)(f) considering the impact on business.<sup>308</sup>

**[289]** The Commonwealth reiterated its overall position that it remains committed to providing funding to support any increases to award wages made by the Commission in this matter, including in Stage 3. The details of the Commonwealth's funding commitments in respect of final wage increases determined in Stage 3 would be subject of a further decision of Government.<sup>309</sup>

**[290]** The Commonwealth reiterated its funding commitment of the interim increase extends to on-costs. The extent to which the specific costs will be covered will be determined through the approach taken.<sup>310</sup>

**[291]** The Commonwealth confirmed that its funding commitment extends to any decision of the Full Bench regarding increases for Head Chefs/Cooks and RAOs. However, given no decision has yet been made by the Full Bench, the timing of the Commonwealth's funding commitment and any applicable phasing is subject to a future decision of Government.<sup>311</sup>

**[292]** In response to a proposal from the union parties<sup>312</sup>, the Commonwealth reiterated its funding proposal commences on 1 July 2023 and would not extend to funding any backpay.<sup>313</sup>

**[293]** In an Annexure to the Commonwealth's reply submissions of 10 February 2023, the Commonwealth responded to issues raised regarding Commonwealth's funding decision, in particular those by Prof Eagar in her second supplementary report.<sup>314</sup>

**[294]** The Commonwealth agreed that, in theory, it may be possible to provide additional funding to the sector relatively quickly.<sup>315</sup> However, the Commonwealth reiterated that it has a responsibility to ensure funding is distributed accurately and appropriately.<sup>316</sup>

**[295]** The Commonwealth agreed with Prof Eagar that it would be possible to incorporate award increases into the AN-ACC price and states this option is being considered by the Department of Health and Aged Care in consultation with the IHACPA.<sup>317</sup> However, the Commonwealth submitted that it does not follow that this can or should be done immediately.<sup>318</sup>

**[296]** The Commonwealth agreed with Prof Eagar that, if a change to the AN-ACC set price is used as a funding mechanism, updating the set price would only involve changes to subordinate legislation. However, the Commonwealth submitted there is a significant amount of work required to ensure accuracy if the Commonwealth were to use this funding mechanism.<sup>319</sup>

[297] The Commonwealth made reference to the recently implemented AN-ACC casemix funding model for residential aged care in response to recommendation 120 of the Royal Commission. The Commonwealth submitted this funding model is underpinned by independent pricing and costing advice developed for the Commonwealth Government by IHACPA.<sup>320</sup>

[298] The Commonwealth submitted the IHACPA advice on the interim increase may take several months following a final decision by the Commission in respect of the interim increase. The Commonwealth does not intend to implement an AN-ACC price increase without independent pricing advice from the IHACPA and to do so would be contrary to the design of the new funding model implemented in response to the Royal Commission's Final Report.<sup>321</sup>

[299] The Commonwealth does not agree with Prof Eagar's statement that a reimbursement funding model would be a feasible option for all providers.<sup>322</sup> The Commonwealth submitted that under a reimbursement model residential aged care providers would be required to pay increased wages in advance of receiving the additional funding which may threaten their viability.<sup>323</sup>

[300] The Commonwealth noted Prof Eagar's reference to the COVID-19 Aged Care Support Program as an example of a current reimbursement model being used to deliver aged care funding.<sup>324</sup> The Commonwealth submitted there would be greater administrative complexity for the Commonwealth and providers in operating a similar reimbursement model in the context of increasing wages for existing direct care workers, where additional costs are not easily identifiable and verifiable through receipts and other evidence such as test results, and where the increased wages will be an ongoing cost for an indefinite period of time.<sup>325</sup>

[301] In respect to Prof Eagar's statement regarding timing and other issues for funding wage increase in the home care sector the Commonwealth submitted:

- subsidy payments for approved providers of home care packages are authorised by or under relevant provisions in the Aged Care Act. Commencement on 1 July 2023 should allow for appropriate indexation to occur and the necessary changes to subordinate legislation after a final decision of the Commission on Stage 2.<sup>326</sup>
- the Commonwealth Home Support Programme (CHSP) is largely governed and operated through funding agreements between the Commonwealth and providers, rather than under the Aged Care Act and associated subordinate legislation. Changes to funding provided under the CHSP would need to be facilitated through changes to a large volume of grant agreements.<sup>327</sup> Commencement of 1 July 2023 would allow for these agreements to be re-negotiated.<sup>328</sup>

*Commonwealth submissions in response to questions 1 and 2*

[302] The Commonwealth addressed questions 1 and 2 in its oral submissions during the Hearing on 13 February 2023.

[303] In response to question 1, the basis and/or rationale for splitting the 15 per cent interim increase into two instalments of 10 per cent from 1 July 2023 and 5 per cent from 1 July 2024,

the Commonwealth stated that it cannot add more than already stated in its written submissions.<sup>329</sup>

[304] In response to question 2, the Commonwealth stated that this issue is a matter for the Commission.<sup>330</sup>

*HSU submissions in reply*

[305] The HSU referred to the Joint Employers position that the factor in s.134(1)(f)- the likely impact of any exercise of modern award powers on business could be negative, neutral or positive.<sup>331</sup> The HSU submitted that s.134(1)(f) itself, in providing a non-exhaustive list of possible impacts, acknowledges that employment costs are not the only type of impact that the Commission must take into account.<sup>332</sup>

[306] In respect of the Joint Employers submission that, without full and ongoing funding, there will be a materially negative impact on the capacity of operators to viably operate and provide critical services, the HSU submitted that while the suggestion that operators will be unable to provide critical services is a serious one, no evidence has been provided supporting these allegations.<sup>333</sup>

[307] The HSU further submitted there is no suggestion that the interim increase will be unfunded, noting the Commonwealth affirmed its commitment to provide funding for any increases determined by the Full Bench and expressed support for timing and phasing-in the increases.<sup>334</sup>

[308] The HSU submitted that given the commitment from the Commonwealth, the Full Bench should not be persuaded the Commonwealth will refrain from providing funding support for any determination of the Commission.<sup>335</sup>

[309] The HSU submitted that, in the event the Commonwealth were to decline to provide funding in advance of the timeframe it identifies (being that corresponding with a 10 per cent increase from 1 July 2023 and the remaining 5 per cent from 1 July 2024),<sup>336</sup> it does not follow that the impact on business of implementing the interim increases will be *materially* negative and certainly not universally so. In that event, employers would be required to meet increased costs for about a 3-month period before receiving substantial funding support from the Commonwealth. Thereafter, they would have to accommodate for a gap between the level of funding and wage increase for a 12-month period.<sup>337</sup> As a result, the HSU submitted the Full Bench would not conclude any gap between the interim increase and funding support from the Commonwealth would be materially negative for employers and the Joint Employers have filed no evidence analysing this impact.<sup>338</sup>

[310] Given the absence of such evidence, the HSU submitted the Full Bench should not accept the submission that s.134(1)(f) weighs *heavily* against an immediate implementation of the interim increase. The HSU further submitted that in any event this consideration does not outweigh the other considerations supporting the immediate implementation of the interim increase, adding that any possible impact of funding decisions upon providers or service provision is a political consideration and not the exercise of the arbitral functions of the Commission.<sup>339</sup>

[311] The HSU notes also the Commonwealth has, in its submissions of 16 December 2022, explained its funding commitment includes funding on-costs<sup>340</sup> and submitted that on the material available, no additional issue arises with respect to the adequacy of the Commonwealth's commitment to fund on-costs.<sup>341</sup>

[312] The HSU submitted that the Joint Employers' apparent suggestion that the HSU, in contending an increase be effective immediately, 'might catch it by surprise' ought not be accepted. The HSU submitted that throughout the proceedings the union parties have advanced their position to have increases implemented in full as soon as possible.<sup>342</sup> The HSU noted this position was also reflected in the Joint Statement, in which both union and employer parties agreed.<sup>343</sup>

[313] The HSU submitted that although various employers have made clear their position is that the Commonwealth must provide funding to aged care employers from the operative date of any increase, all relevant parties agree the interim increase should commence as soon as possible and should not be phased in over time.<sup>344</sup>

[314] In respect of the Joint Employers' submission that the interim increase may introduce additional regulatory burden in the home care sector,<sup>345</sup> the HSU submitted there is no evidence before the Full Bench that demonstrates that any increase in award wages will require a change to the pricing of services to home care clients.<sup>346</sup> The HSU submitted that the Joint Employer's description of a circumstance where clients would be unwilling to agree to price increases despite an increase in funding to packages is speculative and unsupported by evidence as to the terms of existing packages.<sup>347</sup>

[315] The HSU submitted home care operators would have some experience in managing the implementation of increases to award wages, given it ordinarily occurs annually. Furthermore, the HSU submitted it is unclear what 'regulatory burden' is said to arise which would be relevant to s.134(1)(f).<sup>348</sup>

[316] The HSU referred to the second supplementary Eagar report, filed by the HSU on 20 January 2023. The HSU noted that Prof Eagar expresses her expert opinion that it is feasible to fund any increases prior to 1 July 2023,<sup>349</sup> explains the mechanisms by which such funding may be distributed<sup>350</sup> and provides a description of previous Commonwealth experience implementing additional payments before the end of financial year.<sup>351</sup>

[317] The HSU submitted that the Full Bench should accept Prof Eagar's evidence and should not accept the Joint Employers' submissions in this respect. The HSU submitted that implementing the reimbursement approach described by Prof Eagar does not necessarily require an increase in the price paid by consumers, nor would employers incur an additional regulatory burden.<sup>352</sup>

[318] The HSU submitted a variation to award rates of pay would not, in and of itself, give rise to the regulatory burden foreseen by the Joint Employers. Any burden imposed is as a result of any separate funding arrangements, contractual arrangements and accountability measures that might exist. The HSU submitted that the regulatory burdens to which s.134(1)(f) is directed are those which are a consequence of the exercise of modern award powers, rather than

regulatory burdens that arise from the implementation of government funding or regulatory arrangements.<sup>353</sup>

[319] The HSU submitted that the Joint Employers do not bring any evidence in relation to the proportion of service prices that wages represent, or the profitability of home care employers, that illustrates the degree to which the interim increase would impact upon the employers were it to be unfunded for a short period, then partially funded for a period, and therefore the Full Bench should give little weight to this submission.

[320] The HSU submitted that the Joint Employers' submission that without Commonwealth funding the aged care sector would have very little capacity to pay the interim increase is not supported by cogent evidence and should not be accepted.<sup>354</sup> The HSU noted that the Commonwealth has committed to provide funding support, that any period where there is a gap between that support and the level of increase will be finite, and that without evidence there is no basis to understanding the extent to which such a period would impact the operations of employees across the entire industry.<sup>355</sup>

[321] The HSU submitted that there is little evidence before the Full Bench in relation to the adequacy of funding beyond general statements to the effect that the industry relies on Government funding.<sup>356</sup> With reference to the StewartBrown's *Aged Care Financial Performance Survey Industry Report* (StewartBrown Survey Report) the HSU noted the data in the report is drawn from aged care providers who nominate themselves as participants in the survey and the report does not purport to be a comprehensive or representative survey of providers.<sup>357</sup> The HSU submitted that the StewartBrown Survey Report should be given little weight, particularly in the absence of evidence from its authors as to the methodology and purposes of the report or method of verifying its information.<sup>358</sup>

[322] The HSU referred to the suggestion from ANMF that the Full Bench might order that the interim increase come into effect at the date of determination, but order that the operation of the variation be deferred for a period of weeks, after which the variation would apply retrospectively.<sup>359</sup> The HSU submitted its primary position is that such a deferral is not necessary or appropriate and that the interim increase can be applied from the date of the determination.<sup>360</sup> Presently, it is unclear why a period of adjustment would be required in the case of a variation providing for a simple increase of pay. The HSU distinguished the present matter to that in *Re Australian Workers' Union*<sup>361</sup> in which a period of adjustment of three months (6 months from the original decision) was found to be appropriate. The HSU noted that that decision concerned the imposition of a floor of minimum earnings for piece rates workers. The effect of that variation required changes to work practices and working arrangements for some employers at least who did not have appropriate processes in place for recording hours of work and supervising pieceworkers.<sup>362</sup>

[323] The HSU agreed with the submissions of ANMF,<sup>363</sup> that the regulatory burden referred to by the Commonwealth, which is said to arise from accountability mechanisms it proposes to implement in association with the additional funding, is not relevant for the purposes of s.134(1)(f). The HSU submitted that if the Commonwealth proposes to change or enhance accountability processes in association with the provision of additional funding, that is a matter which arises from those funding mechanisms not the interim increase, and any such burden is

not therefore an impact of the exercise of modern award powers by the Commission for the purposes of s.134(1)(f).<sup>364</sup>

*HSU submissions during the Hearing of 13 February 2023*

[324] During the course of oral submissions, the HSU made further submissions in respect of the timing and phasing-in of the interim increase.

[325] The HSU submitted that the Commonwealth adduces no evidence as to why there is a practical difficulty in providing funds earlier than 1 July 2023. The HSU further submitted that no challenge was raised against Prof Eagar's evidence regarding the mechanisms available to the Commonwealth to provide the funding earlier, should it choose to.<sup>365</sup>

[326] In response to the Commonwealth's proposition, stated in its submissions in reply, that the Commission should not or is not required to review the Commonwealth's rationale for the timing of its funding commitment, the HSU submitted that the Commission can and should accept the evidence of Prof Eagar that the Commonwealth could provide the funding for at least a 15 per cent increase earlier than 1 July 2023.<sup>366</sup>

[327] The HSU accepted that if the Commission decides to implement the increase earlier than the Commonwealth's funding proposal as it stands is applied, there will be some impact on employers, but submitted that this impact will be a consequence of a policy decision that the government has taken.<sup>367</sup> The HSU further submitted that the impact on employers as a factor of a policy decision taken by government should not be significant, much less determinative, of the timing of the interim increase the Commission has found is justified by work value reasons. The HSU submitted that this approach is consistent with that taken by the Full Bench in *Social, Community, Home Care and Disability Services Industry Award 2010* ([\[2019\] FWCFB 6067](#)).<sup>368</sup>

[328] The HSU submitted that the consequence of any delay is that employees would continue to perform work at rates of pay significantly below that which reflect the value of their work, as they have been doing for a very significant period of time.<sup>369</sup>

*HSU submissions in response to question 2*

[329] The HSU addressed question 2 of our Statement and Directions<sup>370</sup> of 10 February 2023 in its oral submissions during the hearing of 13 February 2023.

[330] The HSU submitted that it is the common-sense view, to avoid any potential issues resulting from the interim increase coinciding the Annual Wage Review, that the interim increase should occur first, although in its submission the interim increase should occur before 30 June 2023.<sup>371</sup>

*ANMF submissions in reply*

[331] The ANMF reiterated its previous position that, in the absence of probative evidential support, the Full Bench cannot be satisfied that increases sought by the Unions would have a 'detrimental impact on the viability of aged care providers'.<sup>372</sup>



**[332]** The ANMF noted the Joint Employers say it is ‘speculative’ whether any party would seek to have the interim increase apply prior to Commonwealth funding. Should the Joint Employers seek to rely on additional evidence concerning capacity to pay, the ANMF submitted it would object for the following reasons:

1. It was not ‘speculative’ that the Unions sought to have the increases implemented as early as possible. The ANMF has reiterated the Full Bench has no probative evidence to make findings regarding business impact.
2. The Joint Employers are seemingly calling for findings about capacity to pay. They should have submitted evidence about this on 20 January 2023.
3. The Commission directed ‘evidence in reply’ be filed by 09 February 2023. Evidence from the Joint Employers regarding capacity to pay does not constitute evidence in reply, as it is not replying to any evidence.
4. If Joint Employers filed evidence on capacity to pay on the appropriate date of 20 January 2023, that would have allowed the Unions to contemplate whether to call their own responsive evidence, by 09 February 2023. Currently, there is no provision in the timetable for such evidence. This unfairly prejudices the ANMF as it will not be able to fairly consider whether it needs to call for responsive evidence.<sup>373</sup>

**[333]** In response to the Joint Employers’ position that the ‘likely impact on business is...conditioned by Commonwealth funding’,<sup>374</sup> the ANMF reiterated there has been no probative evidence demonstrating the extent of the impact on business.<sup>375</sup> The Full Bench would not find that varying the award before Commonwealth funding commences would be ‘materially negative’,<sup>376</sup> and would ‘weigh heavily’<sup>377</sup> against that outcome, or ‘weighs heavily’<sup>378</sup> in favour of aligning the interim increase with Commonwealth funding.<sup>379</sup>

**[334]** In reply to the Joint Employer’s position that any approach to funding may introduce a regulatory burden in home care settings,<sup>380</sup> the ANMF submitted this depends on the terms of contracts with consumers and there are none in evidence.<sup>381</sup>

**[335]** With respect to the ‘security of tenure’ issue identified by the Joint Employers<sup>382</sup> the ANMF submitted it is not clear how delaying the wage increase will impact this.<sup>383</sup>

**[336]** The ANMF submitted there is no evidence supporting the Joint Employer’s submission with respect to how much ‘lead time’<sup>384</sup> is required. The ANMF submit that operators have known since 17 November 2020 that a 25 per cent wage increase was sought and in that time they have had the opportunity to engage in planning and modelling.<sup>385</sup>

**[337]** With respect to timing and implementation, the ANMF submitted that the Joint Employers<sup>386</sup> and the HSU<sup>387</sup> provided statements of principles with little difference. The ANMF adopts the position of the HSU rather than that of the Joint Employers.<sup>388</sup>

[338] Contrary to the Joint Employers, the ANMF submitted that aligning the increases with the Commonwealth's funding proposal, would not be the preferable application of these principles. The ANMF submitted that this because the current wage settings currently and historically very significantly undercompensated aged care employees for the work that they do, having regard to work value. Further, given the interim nature of the wage increase, even after it is implemented, employees will be undercompensated having regard to work value.<sup>389</sup>

[339] The ANMF submitted that aged-care employees have been subsidising employers, the Commonwealth and subsidising the taxpayer, or some combination of these three, and that this subsidy will continue, given the increase proposed is interim.<sup>390</sup>

[340] The ANMF submitted that the Joint Employers' submissions are to the effect that employees should continue to be undercompensated and continue to subsidise the profit margins for the employers, until the proper compensation for aged care employees will not determinately affect aged care employers at all. The ANMF submitted this approach is inconsistent with equity, good conscience and the merits of the matter and would not 'reasonably balance' the interests of both employers and employees, but subordinate the interests of aged-care employees to those of their employers.<sup>391</sup>

[341] In response to the Joint Employers<sup>392</sup>, the ANMF submitted that:

1. The employers have had adequate time to prepare, given they have known about these applications for more than two years;
2. The increase is moderate, in the context of the extent of historical undervaluation. The fact of it being an 'interim increase' phases the increase necessary to eliminate under-compensation and there is no need for any further phasing;
3. The employers have not provided evidence as to which date is manageable.<sup>393</sup>

[342] The ANMF submitted the existing arrangements cannot be described as a 'careful balance'<sup>394</sup> and that the *Stage 1 decision* attests that the balance has resulted in aged-care employees being very significantly undercompensated for their work.<sup>395</sup>

[343] Further the ANMF accepted and adopted the positions of the HSU in answer to the Joint Employers' submissions in regard to capacity to pay and phasing.<sup>396</sup>

[344] The ANMF agreed with and adopts the proposition that the material identified by the UWU is relevant to phasing.<sup>397</sup> The ANMF submitted that these submissions weigh in favour of immediate adoption of the interim increase and the ANMF agreed with and adopted the AWU's submissions regarding enterprise bargaining.<sup>398</sup>

[345] The ANMF submitted with the HSU, UWU, and AWU that the position adopted by the Commonwealth<sup>399</sup> amounts to a departure from its previous commitments. The ANMF submitted there is no evidence that the Commonwealth cannot move more quickly, and this is

further reason why the Full Bench should reject the Joint Employers' submission that phasing-in should align with Commonwealth 'commitments'.<sup>400</sup>

*ANMF submissions during the Hearing of 13 February 2023*

[346] In its oral submissions, the ANMF stated that the Commission should treat with caution the suggestion made by the Joint Employers that "delinking" the implementation of the interim increase from the Commonwealth's funding proposal will materially negatively impact the ability of aged care providers to provide critical services to vulnerable members of the community.<sup>401</sup>

[347] The ANMF also submitted that the impact of any increase on business, particularly with respect to the phasing will be only one consideration to be taken into account and this cannot be determinative.<sup>402</sup>

*ANMF submissions in response to question 2*

[348] In response to question 2, the ANMF submitted that if the interim increase does not commence operation as soon as possible, a departure from the Commonwealth's proposal would be appropriate whereby the increase is effective from 30 June 2023.<sup>403</sup>

*Joint Employer submissions in reply*

[349] The Joint Employers noted that all of the union parties, via various formulations, have asked for the Full Bench to divert from the Commonwealth's proposed funding timetable and instead sought for the 15 per cent interim wage increase to come into effect immediately.<sup>404</sup>

[350] The Joint Employers submitted that if the timing and phasing of the interim increase aligns with the Commonwealth's funding proposal, this would satisfy s.134.<sup>405</sup> The Joint Employers further contended that should the Full Bench depart from the Commonwealth's funding proposal and require industry to pay unfunded wage increases, careful consideration of the balance of s.134 is required.<sup>406</sup>

[351] The Joint Employers submitted that absent Commonwealth funding "the outcome for many employers will be the imposition of further losses and deficits and the undermining of normal and prudent financial operations; introducing further erosion to already challenged financial stability."<sup>407</sup> The Joint Employers added that the relevance of this is amplified by industry's role in providing services to a vulnerable group within the community.<sup>408</sup>

[352] The Joint Employers submitted that the Commission should take into consideration a variety of factors when determining whether to depart from the Commonwealth's funding proposal, including the:

- (a) extent of over award payments paid whether at common law or through enterprise agreements;
- (b) extent to which employers absorb increases to minimum wages in the relevant awards into these over award payments;

(c) diverse financial position of various operators; and

(d) general financial state of the age care industry.<sup>409</sup>

[353] In relation to these factors, the Joint Employers relied on the evidence of witnesses Grant Corderoy of StewartBrown, Johannes Brockhaus of Buckland Aged Care Services, Michelle Jenkins of Community Vision Australia and James Shaw of Royal Freemasons' Benevolent Institution, filed with their submissions in reply of 9 February 2023.<sup>410</sup>

[354] The Joint Employers submitted that it should be uncontroversial that the aged care industry is only sustainable on the basis of government funding and that the primary provider of this funding is the Commonwealth government. The Joint Employers noted that operators in the industry do run a business in the normal sense but acknowledge the purpose rather than profit motivated nature of the industry.<sup>411</sup>

[355] The Joint Employers relied on the evidence of Grant Corderoy wherein he states that 'the aged care sector is experiencing significant financial and sustainability and viability concerns,'<sup>412</sup> and submitted that the findings of the StewartBrown *Aged Care Financial Performance Survey Industry Report* of September 2022 ('StewartBrown Survey Report (September 2022)') should raise concerns in regards to s. 134(1)(f) and the setting of fair and reasonable minimum safety net for both employees *and* employers.<sup>413</sup> In particular, the Joint Employers relied on the following excerpt of the report:<sup>414</sup>

"The Survey for the 3 months ending September 2022 continues to highlight the declining financial sustainability of the industry, with residential aged care now remaining at a **critical financial sustainability position** for many providers.

The average operating results for residential aged care homes in all geographic sectors was an operating loss of \$21.29 per bed day (Sep-21 \$7.30 pbd loss) This represents a loss of \$7,092 per bed per annum which is extrapolated to a **residential industry loss in excess of \$345 million** for the three month period.

The alarming statistic is that 70% of aged care homes operated at a loss (56% at Sep-21) and 51% operated at a EBITDA (cash loss) (32% at Sep21)."<sup>415</sup>

...

"Home Care financial performance has stagnated over the last four financial years with the average operating result for Sep-22 being \$3.56 per care recipient (client) per day. This is not an adequate return based on the investment required and business risk to provide these essential services to the elderly in a domestic home setting."<sup>416</sup>

[356] The Joint Employers referred to the StewartBrown Survey Report (September 2022) to demonstrate the 'material proportionality' of direct care labour costs to revenue<sup>417</sup> and submitted that increasing direct care labour costs increases the major cost component of providing care generally.<sup>418</sup> In support of this, the Joint Employers referred to Mr Corderoy's

estimates of the total costs to the aged care industry of the 15 per cent interim increase being paid but underfunded:

- (a) \$639 million for the period 1 March 2023 to 1 July 2023; and
- (b) \$575 million for the 2024 financial year.<sup>419</sup>

[357] The Joint Employers submitted that the Commission’s consideration of the timing and phasing of the interim wage increase must commence with the understanding that without funding, operating costs will be materially impacted in an already challenged financial context.<sup>420</sup>

[358] The Joint Employers noted that it is unknown what proportion of the interim wage increase will be passed on to employees receiving above award wages and what will be absorbed into existing enterprise agreements, citing s.206 of the FW Act.<sup>421</sup>

[359] The Joint Employers submitted that the Commonwealth’s funding proposal ‘at least implicitly’ operates on the basis that all direct aged care employees will receive the 15 per cent interim wage increase on award rates. The Joint Employers submitted it is unclear if there will be additional funding for an increase above this based on the use of average labour costs and individual circumstances of operators.<sup>422</sup>

[360] The Joint Employers submitted that actual amounts of additional funding to cover on-costs of the increase will impact on the outcome and is a significant concern of operators. The Joint Employers submitted that although there is no certainty, the evidence filed demonstrates that all operators will pay the 15 per cent increase on award rates from the from the additional funding. However, some operators are concerned that they may not be able to afford much of an increase for those on above award rates, whilst others will have a preference, if the funding is available, to pass on the entire 15 per cent increase even if there may not be a legal requirement to do so.<sup>423</sup>

[361] The Joint Employers noted that there does not appear to be evidence available on how many employees are covered by enterprise agreements, not covered by enterprise agreements but otherwise receiving over award payments or are only paid minimum award rates.<sup>424</sup> Nonetheless, the Joint Employers submitted that the industry is seen as being award reliant despite the majority of the lay witness evidence being provided in the enterprise agreement coverage context.<sup>425</sup> Appendix A to the Joint Employers’ submissions in reply provided an analysis of award vs enterprise agreement coverage of the lay witnesses heard in these proceedings.

[362] The Joint Employers referred to the evidence of Ms Anna-Marie Wade as it relates to the *NSWNMA and HSU NSW Enterprise Agreement 2017-2020*.<sup>426</sup> The Joint Employers submitted Ms Wade’s evidence aligns with the witness evidence filed with their reply submissions and that:

- (a) Nurses are likely to be paid well above minimum award rates in an enterprise agreement such that many employers covered by those agreements could legally absorb the whole 15 per cent increase; and

- (b) Aged care workers are likely to be paid marginally above minimum award rates in enterprise agreements thus requiring an employer to pass on most of the interim wage increase.<sup>427</sup>

[363] The Joint Employers submitted that it would be reasonable for the Commission to conclude that some employers will have a legal right to absorb some or potentially all of the interim increase on award rates for nurses and some, but unlikely all of that increase, for care workers into enterprise agreement payments. Although some employers may want to be able to pay more to these employees.

[364] The Joint Employers submitted that it should be taken from the lay evidence filed with its reply submissions that some operators will be financially compelled to absorb the interim increase where they can, some, while facing increased deficits will try to pass on the entire increase despite no legal obligation to do so and some may pass on the full increase only when it is fully funded.

[365] The Joint Employers submitted that the evidence shows that if compelled to pay all or a portion of the 15 per cent interim increase without funding, operators will incur losses. Pointing to the financial position of specific operators, the Joint Employers submitted that some operators will experience increased deficits and a further denuding of limited historical reserves while others may be able to cover the losses by surpluses from other business operations outside of residential aged care or home care, but will nevertheless suffer impairments to their overall financial stability.<sup>428</sup>

[366] The Joint Employers submitted that employers will respond in a variety of ways in the absence of funding for the interim wage increase with some operators opting to absorb the costs and reducing the losses they suffer, while others that may not have this capacity may be tipped over the edge in terms of financial stability.<sup>429</sup>

[367] The Joint Employers concluded that they support the interim wage increase on the basis that its operation is aligned with the additional Commonwealth funding as proposed by the Commonwealth.<sup>430</sup> The Joint Employers submitted that only this approach ensures employers do not face unfunded losses in so doing renders the considerations of s.134(1)(f) to be neutral. The Joint Employers submitted that any other approach would drive the consideration of s.134(1)(f) to be materially against the Unions and be sufficient to persuade the Full Bench against it.

*Joint Employer submissions during the Hearing of 13 February 2023*

[368] In their oral submissions, Joint Employers cited a number of cases<sup>431</sup> they submitted support the proposition that fairness in terms of the Commission's task of 'setting a fair and relevant safety net' is to be assessed from the perspective of both employees and employers.<sup>432</sup>

[369] The Joint Employers also submitted that the aged care industry lacks the economic framework of other industries in that it cannot respond to major costs pressures by increasing prices or issuing redundancies to save costs.<sup>433</sup>

[370] The Joint Employers submitted the evidence clearly demonstrates that to introduce the wage increases without funding has the consequence for aged care employers that their business is financially weakened and that this is proper matter for the Commission to contemplate in considering the union's claim.<sup>434</sup>

[371] The Joint Employer's further submitted that the aged care sector is a distressed industry, and that granting the union's claim in respect of the timing of the interim increases will drive deficits and weaken businesses, and that the Commission should instead adopt the Commonwealth's timetable, particularly in light of the aged care industry's role in supporting and caring for a vulnerable community.<sup>435</sup>

*Joint Employers' submissions in response to question 2*

[372] The Joint Employers submitted that an effective date of 30 June 2023 for the interim increase to avoid coincidence with the Annual Wage Review is acceptable.<sup>436</sup>

## **5.2 Witness evidence submitted by the Joint Employers**

[373] Together with their reply submissions of 9 February 2023, the Joint Employers also filed witness evidence from Grant Corderoy, Johannes Brockhaus, James Shaw and Michelle Jenkins.<sup>437</sup> Mr Corderoy was cross-examined by the HSU during the Hearing held before us on 13 February 2023.<sup>438</sup> This evidence is summarised below.

### *Evidence of Grant Corderoy*

[374] Grant Corderoy gave evidence about his role as Senior Partner with StewartBrown, Chartered Accountants<sup>439</sup> and his experience and involvement in the aged care sector in particular.<sup>440</sup> He outlined the establishment of the StewartBrown *Aged Care Financial Performance Survey* (StewartBrown Survey Report) which is published quarterly.<sup>441</sup> The StewartBrown Survey Report is designed for each participant organisation to compare and benchmark their operating performance through a number of financial and non-financial measures.<sup>442</sup> Mr Corderoy outlined the operation of the StewartBrown Survey Report.<sup>443</sup>

[375] Using the data from the StewartBrown Survey Report (September 2022), Mr Corderoy made projections regarding the financial sustainability and viability of the aged care sector.<sup>444</sup> Mr Corderoy stated that, should the interim increase be adopted in line with the timeline of the Commonwealth's funding commitment, there should be no economic impact on the sector.<sup>445</sup> If the interim increase is adopted earlier and without Commonwealth funding, Mr Corderoy predicts there will be a significant economic impact on the aged care sector.<sup>446</sup>

[376] Mr Corderoy's cross examination covered the operation and purpose of the StewartBrown Survey Reports and the 2020, 2021 and 2022 Financial Year Reports.<sup>447</sup> He responded to questions about the September 2022 and September 2021 Survey Reports, as well as home care across the 2020, 2021 and 2022 Survey Reports.<sup>448</sup>

[377] He confirmed the purpose of the StewartBrown Survey Report is for operators to use expense-based metrics to compare their performance to that of other operators.<sup>449</sup> Mr Corderoy stated StewartBrown does not advise operators of potential changes that could be made, but

only presents the data and responds to questions about data.<sup>450</sup> Mr Corderoy responded to questions about the revenue and expenditure measures for direct care across 2020, 2021 and 2022.<sup>451</sup> He confirmed in 2021 and 2020 with respect to direct care there was a surplus of \$13.63 per bed per day.<sup>452</sup> The revenue being received in direct care was in part subsidising the losses that were derived from indirect care and accommodation costs.<sup>453</sup> In 2022, the outcome on a per bed per day basis with respect to direct care also delivered a surplus, albeit a smaller one than results in 2021 and 2022.<sup>454</sup> Mr Corderoy attributes this to a variance in government grants provided due to the COVID-19 pandemic.<sup>455</sup>

[378] Mr Corderoy addressed the StewartBrown Survey Report (September 2022).<sup>456</sup> He confirmed his position that issues relating to attraction and retention of staff are critically important and should be addressed as a matter of urgency.<sup>457</sup> He stated he believed the interim increase would assist in retention, but doubted it would assist in attraction.<sup>458</sup> He stated the interim increase was but one component required to address staffing issues in the sector.<sup>459</sup>

[379] Mr Corderoy addressed the September 2021 and September 2022 reports,<sup>460</sup> confirming that with respect to direct care the overall operating result went down from \$6.76 to 11 cents per bed per day as a surplus.<sup>461</sup> Further, there was an increase in revenue during this period, which was offset by an increase in costs.<sup>462</sup>

[380] Mr Corderoy responded to questions about home care across the 2020, 2021 and 2022 Survey Reports.<sup>463</sup> Mr Corderoy confirmed home care operators continue to derive a surplus on a per client per day basis.<sup>464</sup> Further, Mr Corderoy answered questions about 'Home Care Revenue Utilisation'.<sup>465</sup> He confirmed that revenue utilisation, that is the services actually provided, as a percentage of funding received from the Commonwealth, remains less than 90 per cent.<sup>466</sup>

[381] During re-examination by the Joint Employers, Mr Corderoy was taken to his oral evidence regarding attraction and retention of staff and arrangements regarding unspent home care funds.<sup>467</sup>

### ***Statement of Johannes Brockhaus***

[382] Johannes Brockhaus gave evidence about his role as the CEO of Buckland Aged Care Services.<sup>468</sup> Mr Brockhaus' witness statement covered the various positions he has held within the aged care sector, some background on the Buckland facility, the financial position of the Buckland facility, the impact of awarding the interim increase on direct care workers and the possible impact of awarding the interim increase without Commonwealth funding.<sup>469</sup> Mr Brockhaus was not called for cross-examination.

### ***Statement of James Alexander Lachlan McLean Shaw***

[383] James Shaw gave evidence about his roles as the Deputy CEO and Chief Financial Officer of the Royal Freemasons' Benevolent Institution.<sup>470</sup> Mr Shaw's witness statement covered some background and the financial position of the Royal Freemasons' Benevolent Institution, the impact of awarding the interim increase on direct care workers and the possible impact of awarding the interim increase without Commonwealth funding.<sup>471</sup> Mr Shaw was not called for cross-examination.



### *Statement of Michelle Jenkins*

[384] Michelle Jenkins gave evidence about her role as the CEO of Community Vision Australia Limited (Community Vision).<sup>472</sup> Ms Jenkins' statement covered the background, employee breakdown and financial position of Community Vision.<sup>473</sup> Ms Jenkins outlined the impact of an interim increase on wages, flagging that Community Vision will likely make the decision to absorb part of the interim increase into the Enterprise Agreement over award payments.<sup>474</sup> Ms Jenkins also addressed the possible impact of the interim increase without Commonwealth funding.<sup>475</sup> Ms Jenkins was not called for cross-examination.

### *Submissions on the weight of the witness evidence*

[385] During the Hearing on 13 February, we dealt with an objection by the ANMF and HSU to the witness evidence filed by the Joint Employers on 9 February 2023, summarised above.<sup>476</sup> We ruled to admit the evidence on the basis that the parties may make submissions as to its weight, and that the HSU would be cross-examining Mr Corderoy.<sup>477</sup>

### *HSU submissions on weight of witness evidence*

[386] The HSU submitted that the Joint Employers' witness evidence filed on 9 February 2023 should be given little weight.<sup>478</sup>

[387] The HSU submitted that the Joint Employer evidence was not responsive to any submissions filed by other parties and dealt with issues addressed by the Joint Employers' submissions of 20 January 2023. This contravenes the directions of the Full Bench. Further, the HSU submitted the evidence was filed one business day before the hearing of the matter on 13 February 2023. The HSU submitted this provided insufficient time for the union parties to deal with what was a substantial amount of evidence. As a consequence, the union parties were denied a reasonable opportunity to properly test and challenge this evidence.<sup>479</sup>

[388] The HSU submitted in any event the evidence would be given little weight as it does not set out the basis for the opinions it contains. For example, the assertion at paragraph 34 of Mr Corderoy's statement, relating to the alleged overall costs of the interim increase across the sector, does not provide the basis of the calculation or make apparent the method of calculation. The HSU submitted that the assertions provided by Mr Shaw, Mr Brockhaus and Ms Jenkins regarding the financial circumstances of the providers for which they work were given without any documentary support or proper capacity for union parties or the Commission to interrogate.<sup>480</sup>

### *ANMF submissions on weight of witness evidence*

[389] The ANMF submitted that Mr Corderoy's evidence does not meet the standards of evidence.<sup>481</sup> The Full Bench can accept Mr Corderoy has 'specialised knowledge' in accountancy.<sup>482</sup> However, Mr Corderoy's evidence goes beyond accountancy in his attempt to provide expertise of a statistician and an economist.<sup>483</sup> The Full Bench cannot accept that the views Mr Corderoy expresses are representative, nor can the Full Bench accept his prognostications of what effect funding changes will be on the industry.<sup>484</sup>

[390] The ANMF submitted that the StewartBrown Survey Report (Sept 2022) proleptically deals with this criticism. The authors of the survey accept that there are differences between their survey group and the sector as a whole,<sup>485</sup> and the ANMF submitted that the survey should not be accepted as representative of the sector.<sup>486</sup>

[391] The ANMF submitted that the Full Bench has insufficient information regarding the background work undertaken prior to the reporting of the survey results.<sup>487</sup> For example, the survey excludes ‘outliers’ but does not provide a clear indication of what constitutes an ‘outlier’.<sup>488</sup>

[392] The ANMF submitted the purpose of the StewartBrown Survey Reports is to produce a set of results participating providers can use to benchmark their facility against a similar comparator.<sup>489</sup> The survey deliberately excludes providers whose results may not be useful for benchmarking, for example recently acquired facilities.<sup>490</sup> Accordingly, the results do not amount to a representative, sector-wide survey.<sup>491</sup>

[393] The ANMF submitted there is insufficient information provided about the reasoning behind the ‘data cleaning’ process involved in the StewartBrown Survey Reports.<sup>492</sup> The ANMF submitted the Full Bench would need further detail to be satisfied the report meets the rules for expert evidence.<sup>493</sup>

[394] The ANMF submitted the bottom-line figures given by Mr Corderoy of the impact of any unfunded wage increases were not supported by any calculations.<sup>494</sup> These figures are unproven and should not be accepted.<sup>495</sup>

[395] The Full Bench should afford little weight to the analyses of StewartBrown and the statement of Mr Corderoy.<sup>496</sup>

[396] The ANMF also submitted the Full Bench should give very little weight to the statements of Mr Brockhaus, Mr Shaw and Ms Jenkins.<sup>497</sup>

[397] The ANMF submitted that:

1. Their statements are not supported by financial records;
2. There is insufficient evidence to rely on the calculations provided in the statements; and
3. Mr Brockhaus proports to give opinion about various matters, however he does not have ‘specialised knowledge’ upon which to base his opinions.<sup>498</sup>

*Joint Employer submissions on weight of witness evidence*

[398] The Joint Employers submitted the Full Bench should not accept the arguments of the ANMF and the HSU that the weight of the reply evidence should be adversely impacted by the purported non-compliance with the directions of the Commission.<sup>499</sup> The Joint Employers rejected this and/or any resulting prejudice to the Unions.<sup>500</sup>

[399] The Joint Employers submitted their submissions dated 9 February 2023 complied with directions and that their reply evidence fits within the nature of ‘reply’, being that it goes to the context and consequence of the Unions’ position that the 15 per cent interim increase should be paid immediately.<sup>501</sup>

[400] The Joint Employers rejected the position of the ANMF that they were prejudiced by not being able to challenge the reply evidence.<sup>502</sup> The Unions had equal opportunity to file reply evidence and, had they done so, the Joint Employers would have been impacted by the same 3-day timetable between the filing of evidence and the hearing. The Joint Employers noted the ANMF declined the opportunity to cross examine the witnesses.<sup>503</sup>

[401] The Joint Employers submitted any assertion that Mr Corderoy does not have sufficient ‘specialised knowledge’ should be rejected.<sup>504</sup> The Commission has previously recognised that Mr Corderoy has specialised knowledge within the context of the aged care Sector.<sup>505</sup>

[402] The Joint Employers submitted that given the HSU contended little weight should be put on the \$1.2 billion quoted by Mr Corderoy, they should have taken the opportunity to put this to Mr Corderoy during cross examination.<sup>506</sup>

[403] In response to the Unions’ challenge of the weight attached to the lay witness evidence, the Joint Employers submitted that the Unions declined the opportunity to cross examine Mr Brockhaus, Ms Jenkins and Mr Shaw. It is improper to seek to discredit the evidence in a submission, especially when all were available for cross-examination.<sup>507</sup>

[404] The Joint Employers submitted that each witness gave evidence based on their specific experience as CEOs or CFOs and were well placed to provide evidence to the Full Bench about the financial status of their businesses, the evidence was filed in compliance with the directions and the Commissions should have full regard to it.<sup>508</sup>

### 5.3 Consideration

#### *Timing and implementation*

[405] Paragraphs [976]–[990] of the *Stage 1 decision* set out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

[406] The Full Bench stated that s.166 of the FW Act creates a presumption that a determination varying modern award minimum wages comes into operation on 1 July in the next financial year after it is made but to displace this presumption the Commission need only be satisfied that it is ‘appropriate’ to specify a different operative date.<sup>509</sup>

[407] The Full Bench considered that in determining the operative date of a determination under Part 2-3, the Commission must exercise its power in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objectives of the FW Act and ‘equity, good conscience and the merits of the matter’ (s.578).<sup>510</sup>

[408] The Full Bench held that fairness is ‘plainly a relevant consideration’, given that the modern awards objective speaks of a ‘fair and relevant safety net’ and the minimum wages

objective is the establishment and maintenance of a ‘safety net of fair minimum wages’. The Full Bench considered that fairness is to be assessed from the perspective of both employees and employers affected by the variation determination.<sup>511</sup>

**[409]** Paragraphs [986]–[989] set out the observations by the Full Bench in the *Penalty Rates – Transitional Decision* about matters relevant to the determination of the transitional arrangements to implement the *Penalty Rates Decision* and the application of these observations in a number of subsequent Full Bench decisions. Parties were invited to comment on the appropriateness of those principles and their application to the current proceedings.<sup>512</sup>

**[410]** In our Statement and Directions of 10 February 2023 we expressed our *provisional* view that the interim increase established by the *Stage 1 decision* should apply from 30 June 2023.

**[411]** The Commonwealth supported the interim increase applying no earlier than 1 July 2023 in order to make the necessary and proper adjustments to funding mechanisms, the Joint Employers say timing should be dependent on funding and each of the Unions seeks the increase apply in full as soon as possible.

**[412]** In the *Stage 1 decision* the Full Bench said:

“[922] Three 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 wages for direct care workers while that process takes place.”<sup>513</sup>

**[413]** We have decided that the interim increase should be paid, in full, from 30 June 2023 and should not be subject to any phasing-in and issued a Decision to that effect on 21 February 2023.

[414] We acknowledge the submissions made by the Joint Employers in relation to capacity to pay outside Commonwealth funding increases and the related evidence of various employers. We have also considered their submissions in relation to phasing-in as an approach to balancing the modern awards objective. While we acknowledge that phasing-in may be a valid approach to increases in particular circumstances, there is no decision rule that this is the approach to be utilised in all cases. Whether phasing-in is appropriate is a matter to be determined based on the particular circumstances before the Commission.

[415] We have considered the advice of the Commonwealth as to how it intends to fund the increase – with a 10 per cent increase in funding provided from 1 July 2023 and a further 5 per cent from 1 July 2024. While we acknowledge that the impact of the interim increase on employers will be ameliorated by the Commonwealth decision with respect to funding, we are not convinced that the Commonwealth proposal as to phasing-in of the funding of the increase should be determinative of our decision with respect to the timing of the interim increase. Further, we note the Commonwealth’s acceptance of this.

[416] We acknowledge the evidence of the Joint Employers in relation to the impact of the increase if it is not phased-in. While we accept that there may be some impact if the Commonwealth maintains its position in relation to funding the interim increase, the evidence before us does not allow us to conclude that the employers cannot support 5 per cent of the increase for a period of 12 months (beyond which, on the Commonwealth proposal, the second part of its funding will come into effect).

[417] Balanced against these considerations are the clear findings that existing minimum wages in the Awards do not properly compensate direct care workers in residential or in-home aged care settings, for the value of the work performed. We have also had regard to the Commonwealth submission in these proceedings, pointing to the findings in the *Stage 1 decision*, that work in the aged care sector has been undervalued because of gender-based assumptions and that there have been historical barriers to the assessment of work value in female dominated industries. We consider that the skills of direct care workers in the aged care sector have been “hidden” for the predominant reason that the vast majority of workers are women and that there are compelling reasons to recognise this by flowing an interim wage increase to direct care workers from the earliest possible date, having regard to the need to give notice to employers of the increases.

[418] This is also consistent with the recent amendments to the FW Act relating to matters relevant to this case, including the promotion of job security and gender equality, eliminating gender-based undervaluation of work, promoting the full economic participation of women and addressing gender-based pay gaps. To delay the interim increases would be inconsistent with these objectives.

[419] We reiterate what the Full Bench said in the *Stage 1 decision*, that the 15 per cent increase is interim in nature with the extent of any final increase in rates of pay not yet determined and not to be determined until Stage 3. It may be that an increase beyond this interim increase is justified following the finalisation of Stage 3. To phase-in the interim increase of 15 per cent over a period of up to 1 year as proposed by the Joint Employers could result either in multiple increases being necessitated in the second year as a result of the Stage 3 decision or a

more extensive delay beyond the 12 months from the first of the interim increases to the final increase in satisfaction of the claims.

[420] In all of the circumstances, we consider that it is fair and reasonable that the interim increase should come into effect on 30 June 2023. This date will ensure no confusion in relation to increases from the Annual Wage Review, which will, in all likelihood, take effect from 1 July 2023. We are also satisfied that it is appropriate that the interim increase not apply until 30 June 2023. While it is correct that, should we consider it reasonable to do so, we could apply the interim increase from an earlier date, we consider it prudent to ensure fair notice to employers of the date of effect of the increase to enable employers to make the necessary arrangements for the payment of the increase.

***Section 134(1)(f): the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden***

[421] In the *Stage 1 decision*, the Full Bench held that it was ‘unable to reach a concluded view on whether the proposed interim determination is necessary to achieve the modern awards objective’. The Full Bench noted:

“One of the matters we are required to take into account in forming that evaluative judgment is ‘the likely impact of any exercise of modern award powers on business, including on ... employment costs’ (s.134(f)). As is evident from the discussion earlier in this chapter, the likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is not yet known.”<sup>514</sup>

[422] In the *Stage 1 decision*, the Full Bench noted that as the Commonwealth is the principal funder in the aged care sector, absent additional Commonwealth funding the cost to business of increasing aged care sector minimum wages is likely to be substantial, depending on the quantum and the phasing.

[423] During the course of closing oral argument, counsel for the Commonwealth stated the funding support it provided would mitigate the impact on employers of any determination arising from these proceedings, but the extent of that mitigation will depend on decisions made by the Australian Government after the Commission has come to a concluded or preliminary view about the Applications. Counsel for the Commonwealth was not in a position to comment upon whether the funding provided would cover *all* of the employment costs flowing from any increase awarded.<sup>515</sup>

[424] The Full Bench considered that the extent to which the Commonwealth provides funding was plainly relevant to its assessment of whether a variation to minimum wages in the Awards is necessary to achieve the modern awards objective, in particular the extent of funding bears on the question of whether such a variation provides a ‘fair and relevant...safety net’ and upon the considerations in s.134(1)(f). The Full Bench determined that as the extent of Commonwealth funding was unknown, it was unable to reach a concluded view on its consideration of s.134(1)(f).<sup>516</sup>

[425] Our determination that the interim increase should come into effect on 30 June 2023, does not fully align with the Commonwealth's proposed funding commitment. Consequently, many employers will likely be responsible for 5% of the increase until the Commonwealth provides full funding. We consider that this increase in employment costs weighs against the interim increase. However, we do not consider there to be sufficient evidence to ascertain the extent and impact of these increased costs and to conclude there is a material negative impact on business. While we accept the Joint Employers' submission that there will likely be some initial transitional impact in the Home Care sector, we are not satisfied there is sufficient evidence to conclude that the regulatory burden on employers will be increased by the interim increase. As indicated in the *Stage 1 decision*, we do not consider the interim increase itself to affect productivity.

## 6. The modern awards objective

[426] The remaining considerations in the modern awards objective, being, ss.134(1)(a), 134(1)(b), 134(1)(c), 134(1)(d), 134(1)(da), 134(1)(g) and 134(1)(h), will be dealt with in this section.

[427] The Full Bench expressed some *provisional* views in respect of the s.134(1) considerations and provided the parties with an opportunity in Stage 2 of the proceedings to comment on these and make submissions in respect of the impact on employers once the extent of Commonwealth funding support is known.

[428] Overall, the HSU, ANMF, and Joint Employers all submit that the interim increases proposed are necessary to achieve the modern awards objective.<sup>517</sup>

### *s.134(1)(a): relative living standards and the needs of the low paid*

[429] In the *Stage 1 decision*, the Full Bench determined that most of the award classifications subject to the interim increase are 'low paid' within the meaning of s.134(1)(a), with the evidence in the proceedings demonstrating that many of these workers face challenges in meeting financial obligations due to their low rates of pay.<sup>518</sup>

[430] The Full Bench expressed the *provisional* view that s.134(1)(a) weighs in favour of the variation of the Awards to give effect to the interim increase determined to be justified by work value reasons.<sup>519</sup>

[431] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(a).<sup>520</sup>

[432] The HSU accepts the *provisional* view<sup>521</sup> and additionally submitted that consideration of s. 134(1)(a) favours a conclusion that the interim increase should commence as soon as possible.<sup>522</sup>

[433] The ANMF agreed with the view of the Full Bench that s.134(1)(a) weighs in favour of the variation of the relevant awards to give effect to the interim increase determined to be justified by work value reasons.<sup>523</sup>

[434] The UWU submitted that the interim increases proposed in the *Stage 1 decision* are necessary to achieve the modern awards objective.<sup>524</sup> The UWU concurs with the Full Bench that s.134(1)(a) weighs in favour of awarding the interim increase.<sup>525</sup> Additionally, the UWU submitted that consideration of s.134(1)(a) is required to determine the ‘fairness’ of specifying an operation date other than 1 July, in respect of s.166.

[435] The Joint Employers submitted that the interim increases proposed are necessary to achieve the modern awards objective but did not directly comment on the *provisional* views concerning s.134(1)(a).<sup>526</sup>

[436] No party has put forward any basis for the Full Bench to depart from the *provisional* views expressed in the *Stage 1 decision*, and we confirm that we consider relative living standards and the needs of the low paid weighs in favour of the interim increase.

***s.134(1)(b): the need to encourage collective bargaining***

[437] In the *Stage 1 decision*, the Full Bench referred to observations made in previous annual wage review decisions wherein the Expert Panel pointed to the ‘complexity of factors which may contribute to decision making about whether or not to bargain’ and concluded that it is ‘unable to predict the precise impact [of its decisions] on collective bargaining with any confidence.’<sup>527</sup> The Full Bench agreed with the Expert Panel’s observations and considered that it is ‘very difficult’ to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector:

“The proposition that increasing minimum wages may encourage collective bargaining on matters other than pay seems to be somewhat optimistic and speculative. Indeed, if correct, we would have expected to have seen it manifest already, given that Government funding arrangements presently constrain wage bargaining.”<sup>528</sup>

[438] The Full Bench expressed the *provisional* view that s.134(1)(b) weighs against the variation of the relevant Awards to give effect to the interim increase.<sup>529</sup>

[439] The Commonwealth accepts the *provisional* view and does not make any further submissions in respect of s.134(1)(b).<sup>530</sup>

[440] The HSU submitted it does not follow from a finding that the variations would not encourage collective bargaining, that the factor necessarily weighs against variations being made.<sup>531</sup> If the Full Bench had found that the variations would create a disincentive to collective bargaining, this would weigh against the variations being made. However, in circumstances where the finding is that the variations will have no real impact on bargaining, the HSU submitted this is more correctly considered a neutral consideration.<sup>532</sup>

[441] With respect to s.134(1)(b) the ANMF accepts that there is a complexity of factors which may contribute to decision making about whether or not to bargain and that it is difficult to predict the effect of increasing minimum wages on collective bargaining but disagrees with the Full Bench.<sup>533</sup> Even where amending the award would not positively encourage bargaining, the ANMF submitted that this consideration would be neutral and would not weigh against an increase.<sup>534</sup>



[442] The UWU disagrees with the Full Bench's provisional view that consideration of the need to promote collective bargaining weighs against awarding the increase.<sup>535</sup> The UWU submitted that the Commission does not specifically address the ANMF's submission that the increase in minimum wage rates would increase incentives or the necessity to negotiate enterprise-specific trade-offs and productivity benefits.<sup>536</sup>

[443] The UWU submitted that although considerations of s.134(1)(b) must be finely balanced, the Full Bench gives 'too short shrift' to the ANMF's submission.<sup>537</sup> The UWU submits that a finding that improvement in minimum rates of pay with concomitant improvements in funding will provide more scope for industrial parties operating in the sector to engage in collective bargaining is not speculative and is entirely consistent with the evidence before the Full Bench.<sup>538</sup> The UWU submits this finding should be made and that this tips the balance in respect to the s.134(1)(b) in support of awarding the interim increase.<sup>539</sup>

[444] The Joint Employers did not make specific submissions regarding s.134(1)(b).

[445] We are not persuaded to alter the provisional view that increasing minimum wages will *encourage* collective bargaining. The observations of the Expert Panel with which the Full Bench in the *Stage 1 decision* agreed, that it is very difficult to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector, were acknowledged by the ANMF. We confirm our agreement with these observations. We are, however, persuaded that the need to encourage collective bargaining is more appropriately treated as a neutral consideration, rather than as a consideration weighing against the interim increase.

***s.134(1)(c): the need to promote social inclusion through increased workforce participation***

[446] In the *Stage 1 decision*, the Full Bench noted evidence provided by the Commonwealth that the aged care sector is facing 'a projected shortfall in workers' with modelling by the Commonwealth Department of Health and Aged Care estimating that the workforce will need to expand by an average of 6.6 per cent each year over the next 5 years to support quality of care and growing demand.<sup>540</sup>

[447] The Full Bench considered that increasing minimum wages will assist in attracting and retaining employees in the aged care sector, thereby promoting social inclusion through increased workforce participation and expressed the *provisional* view that s.134(1)(c) weighs in favour of the variation of the Awards to give effect to the interim increase.<sup>541</sup>

[448] The Commonwealth accepts the *provisional* view and does not make any further submissions in respect of s.134(1)(c).<sup>542</sup>

[449] The HSU accepts the *provisional* view and does not make any further comments in respect of s.134(1)(c).<sup>543</sup>

[450] With respect to s.134(1)(c) the ANMF agreed with the view of the Full Bench that increasing minimum wages will assist in attracting and retaining employees and thereby promote social inclusion through increased workforce participation.<sup>544</sup>

[451] The UWU agreed that consideration of s.134(1)(c) weighs in favour of the decision to award the interim increase.<sup>545</sup>

[452] The Joint Employers did not make specific submissions regarding s.134(1)(c).

[453] No party put forward any basis for the Full Bench to depart from the *provisional* views expressed in the *Stage 1 decision*, and we confirm that we consider that the need to promote social inclusion through increased workforce participation weighs in favour of the interim increase.

***s.134(1)(d): the need to promote flexible modern work practices and the efficient and productive performance of work***

[454] In the *Stage 1 decision*, the Full Bench expressed the *provisional* view that s.134(1)(d) was not a relevant consideration in respect of the interim increase.<sup>546</sup>

[455] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(d).<sup>547</sup>

[456] The HSU accepts the *provisional* view and did not make any further comments in respect of s.134(1)(d).<sup>548</sup>

[457] The ANMF accepts that s.134(1)(d) is not relevant to the determination of the proposed interim increase.<sup>549</sup>

[458] The Joint Employers did not make specific submissions regarding s.134(1)(d).

[459] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.134(1)(d).

***s.134(1)(da): the need to provide additional remuneration for employees working overtime; or employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts***

[460] In the *Stage 1 decision*, the Full Bench expressed the *provisional* view that s.134(1)(da) was not a relevant consideration in respect of the interim increase.<sup>550</sup>

[461] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(da).<sup>551</sup>

[462] The HSU accepts the *provisional* view and did not make any further comments in respect of s.134(1)(da).<sup>552</sup>

[463] The ANMF accepts that s.134(1)(da) is not relevant to the determination of the proposed interim increase.<sup>553</sup>

[464] The Joint Employers did not make specific submissions regarding s.134(1)(da).

[465] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.134(1)(da).

***s.134(1)(g): the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards***

[466] In the *Stage 1 decision*, the Full Bench expressed the *provisional* view that s.134(1)(g) was not a relevant consideration in respect of the interim increase.<sup>554</sup>

[467] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(g).<sup>555</sup>

[468] The HSU accepts the *provisional* view in respect of s.134(1)(g).<sup>556</sup> In relation to the timing of the increase, the HSU stated that it considers the factor in s.134(1)(g) to be of limited significance.<sup>557</sup> The HSU submitted that the interim increase involves a straightforward percentage increase. It asks of employers, a similar undertaking as what is required as a result of the annual wage review.<sup>558</sup> Accordingly, no finding can be made that any period of adjustment is needed to allow employers to give effect to the interim increase determined by the Full Bench.<sup>559</sup>

[469] The ANMF accepts that s.134(1)(g) is not relevant to the determination of the proposed interim increase.<sup>560</sup>

[470] The UWU submitted that consideration of s.134(1)(g) is required to determine the ‘fairness’ of specifying an operation date other than 1 July, in respect of s.166.<sup>561</sup>

[471] The Joint Employers did not make specific submissions regarding s.134(1)(g).

[472] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.134(1)(g).

***s.134(1)(h): the likely impact of any increase of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy***

[473] In the *Stage 1 decision*, the Full Bench was not persuaded that varying the Awards to give effect to the interim increase would have any material effect on the national economy. The Full Bench expressed the *provisional* view that s.134(1)(h) was a neutral consideration.<sup>562</sup>

[474] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(h).<sup>563</sup>

[475] The HSU accepts the *provisional* view in respect of s.134(1)(h).<sup>564</sup> The HSU submitted that the finding of the Full Bench that the interim increase is not likely to have any relevant impact on the national economy, weighs against a delayed implementation of the interim increase.<sup>565</sup>

[476] The ANMF agreed with the Full Bench that s.134(1)(h) is a neutral consideration.<sup>566</sup>

[477] UWU noted it previously made submissions in relation to s.134(1)(h)<sup>567</sup> but did not seek to press this position, noting the *provisional* views expressed.<sup>568</sup>

[478] The Joint Employers agreed with the Full Bench that s.134(1)(h) is a neutral consideration.<sup>569</sup>

[479] We confirm the provisional view expressed in the *Stage 1 decision* in respect of s.134(1)(h).

### ***Conclusion on Modern Awards Objective***

[480] With the exception of s.134(1)(f), the other factors that must be taken into account in ensuring that the relevant awards provide a fair and relevant minimum safety net of terms and conditions, are either positive or neutral. The impact on business is a matter of significance, however as the Full Bench in the *Stage 1 decision* reiterated, the modern awards objective requires that we take into account each of the s.134(1) considerations, with no particular primary attached to any single consideration.<sup>570</sup>

[481] We are satisfied that the interim increase is necessary to achieve the modern awards objective, as amended by the Secure Jobs, Better Pay Act.

## **7. The minimum wages objective**

[482] This section deals with the relevant considerations of the minimum wages objective other than s.284(1)(aa), dealt with above.

[483] In the *Stage 1 decision*, the Full Bench noted that there is a substantial degree of overlap in the considerations relevant to the minimum wages objective and the modern awards objective, although some are not expressed in the same terms.<sup>571</sup> The Full Bench expressed a number of *provisional* views in respect of the s.284(1) considerations, noting that it was common ground between the parties that the consideration in s.284(1)(e) is not relevant in the context of the Applications.

[484] In respect to the minimum wages objective, the HSU repeated its submissions relating to ss.134(1)(e) and 284(1)(d) and otherwise agrees with the *provisional* views.<sup>572</sup>

[485] The ANMF agreed with the *provisional* view of the Full Bench that s.284(1)(a) is a neutral consideration. With respect to ss.284(1)(b) and 284(1)(c), which are in substantially the same terms as ss.134(1)(c) and 134(1)(a) respectively, the ANMF also agreed with Full Bench's *provisional* views and submitted that the interim increases are necessary to achieve the minimum wages objective.<sup>573</sup>

[486] The Joint Employers accept the *provisional* views of the Full Bench in respect of the minimum wages objective set out at paragraphs [1073]-[1083] of the *Stage 1 decision*. The

Joint Employers submitted that the interim increase is necessary to achieve the minimum wages objective.<sup>574</sup>

***s.284(1)(a): the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth***

[487] In the *Stage 1 decision*, the Full Bench determined that similarly to s.134(1)(h), the consideration in s.284(1)(a) is directed at the likely impact of a variation to modern award minimum wages on the national economy and focuses on the aggregate (as opposed to sectoral) impact of such variation. The Full Bench adopted the same *provisional* view as that adopted in respect of s.134(1)(h) that the consideration in s.284(1)(a) is neutral in the context of the Applications.<sup>575</sup>

[488] We confirm the provisional view expressed in the *Stage 1 decision* in respect of s.284(1)(a).

***s.284(1)(b): promoting social inclusion through increased workforce participation***

[489] The Full Bench in the *Stage 1 decision* noted that s.284(1)(b) is in the same terms as s.134(1)(c) and expressed the same *provisional* view that the consideration weighs in favour of a variation of the Awards to give effect to the interim increase.<sup>576</sup>

[490] We confirm the provisional view expressed in the *Stage 1 decision* in respect of s.284(1)(b).

***s.284(1)(c): relative living standards and the needs of the low paid***

[491] The Full Bench in the *Stage 1 decision* noted that s.284(1)(c) is expressed in the same terms as s.134(1)(a) and expressed the same *provisional* view that the consideration weighs in favour of a variation of the Awards to give effect to the interim increase.<sup>577</sup>

[492] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.284(1)(c).

***Conclusion on Minimum Wages Objective s.284(1)***

[493] We are satisfied that the interim increase is necessary to achieve the minimum wages objective, as amended by the Secure Jobs, Better Pay Act.

***Conclusion on s.157(2)***

[494] For the reasons we set out above, we are satisfied that the interim increase to the modern award minimum wages of direct care workers and the employees identified in paragraphs [69]-[75] is necessary to achieve the modern awards objective and minimum wages objective, pursuant to s.157(2)(b). As we are also satisfied that the increase is justified by work value reasons pursuant to s.157(2)(a), the requirements of s.157(2) of the FW Act are met. In making the variation to modern award minimum wages for these employees, we have taken into account

the national minimum wage as currently set in a national minimum wage order, pursuant to s.135(2) of the FW Act.

[495] Accordingly, we decide to grant the interim increase of 15 per cent to modern award minimum wages in accordance with our Decision of 21 February 2023.



VICE PRESIDENT

*Appearances:*

*Mr M Gibian SC and Mr L Saunders* (of counsel) on behalf of the Health Services Union

*Mr J McKenna and Mr J Hartley* (of counsel) on behalf of the Australian Nursing and Midwifery Federation

*Ms L Harrison* on behalf of the United Workers Union

*Mr G Taylor* on behalf of the Australian Workers Union

*Mr N Ward* on behalf of Aged & Community Care Providers Association Limited and Australian Business Industrial

*Mr Y Shariff SC and Mr D Fuller* (of counsel) on behalf of the Commonwealth

*Hearing details:*

Melbourne

2023

13 February.

Printed by authority of the Commonwealth Government Printer

<PR762004>

## Abbreviations

ABI	Australian Business Industrial
ACSA	Aged & Community Services Australia
Aged Care Act	<i>Aged Care Act 1997 (Cth)</i>
Aged Care Award	<i>Aged Care Award 2010</i>
ACCPA	Aged & Community Care Providers Association Ltd
AIN	Assistant in Nursing
AN-ACC	Australian National Aged Care Classification
ANMF	Australian Nursing and Midwifery Federation
Awards	<i>The Aged Care Award 2010, Nurses Award 2020 and Social, Community, Home Care and Disability Services Award 2010</i>
AWU	Australian Workers Union
CHSP	Commonwealth Home Support Programme
Commission	Fair Work Commission
Direct aged care workers	Employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs.
Eagar Second Supplementary Report	Prof Kathleen Eagar, <i>Second Supplementary Report of Prof Kathleen Eagar</i> dated 20 January 2023
EN	Enrolled Nurse
FW Act	<i>Fair Work Act 2009 (Cth)</i>
Secure Jobs, Better Pay Act	<i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)</i>
HCPP	Home Care Package Program
HCW	Home care worker or Home care employee
HSU	Health Services Union
IHACPA	Independent Health and Aged Care Pricing Authority
Joint Employers	The Aged & Community Care Providers Association Ltd and Australian Business Industrial
Junor Report	Honorary Assoc Prof Anne Junor, <i>Fair Work Commission matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010</i> dated 28 October 2021, as amended 5 May 2022
Joint Statement	<i>Joint statement regarding Stages 2 and 3 of the Work Value Case</i> dated 16 December 2022
LASA	Leading Age Services Australia
Nurses Award	<i>Nurses Award 2020</i>

PCW	Personal Care Worker
<i>Penalty Rates Decision</i>	<i>4 yearly review of Modern Awards – Penalty Rates</i> <a href="#">[2017] FWCFB 1001</a>
<i>Penalty Rates Transitional Decision</i>	<i>4 yearly review of Modern Awards – Penalty Rates – Transitional Arrangements</i> <a href="#">[2017] FWCFB 3001</a>
RAO	Recreational Activities Officer/Lifestyle Officer
RN	Registered Nurse
Royal Commission	<i>Royal Commission into Aged Care Quality and Safety</i>
SCHADS Award	<i>Social, Community, Home Care and Disability Services Award 2010</i>
Secure Jobs, Better Pay Act	<i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)</i>
<i>Teachers Decision</i>	<i>Independent Education Union of Australia [2021]</i> FWCFB 2051
Unions	The Australian Nursing and Midwifery Federation, the Health Services Union and the United Workers’ Union
UWU	United Workers’ Union

---

<sup>1</sup> [2023] FWCFB 40.

<sup>2</sup> [\[2022\] FWCFB 200](#).

<sup>3</sup> *Stage 1 decision* at [931].

<sup>4</sup> *Stage 1 decision* at [902]–[903].

<sup>5</sup> *Stage 1 decision* at [922].

<sup>6</sup> *Stage 1 decision* at [933]–[934].

<sup>7</sup> *Stage 1 decision* at [935].

<sup>8</sup> *Stage 1 decision* at [936]–[937].

<sup>9</sup> *Stage 1 decision* at [957], [961], [966]–[967].

<sup>10</sup> *Stage 1 decision* at [968].

<sup>11</sup> *Stage 1 decision* at [51].

<sup>12</sup> Statement [\[2022\] FWCFB 208](#).

<sup>13</sup> Statement [\[2022\] FWCFB 214](#).

<sup>14</sup> Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, item 346.

<sup>15</sup> Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, items 347 and 348.

<sup>16</sup> Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, item 347.

<sup>17</sup> Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, items 349 and 350.

<sup>18</sup> Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, item 352.

<sup>19</sup> [2023] FWCFB 32.

<sup>20</sup> Transcript, 13 February 2023 at PN90.

<sup>21</sup> Transcript, 13 February 2023 at PN397.

<sup>22</sup> [2023] FWCFB 45.

<sup>23</sup> Joint Statement dated 16 December 2022 at [1]–[6].



- 
- <sup>24</sup> [2023] FWCFB 32.
- <sup>25</sup> Commonwealth submissions dated 16 December 2022 at [33]–[34].
- <sup>26</sup> Commonwealth submissions dated 16 December 2022 at [35].
- <sup>27</sup> [2023] FWCFB 32.
- <sup>28</sup> Transcript, 13 February 2023 at PN438-PN439.
- <sup>29</sup> Transcript, 13 February 2023 at PN440; Commonwealth submissions in reply, dated 9 February 2023 at [10].
- <sup>30</sup> HSU submissions dated 20 January 2023 at [5] citing the Joint Statement dated 16 December 2022 at [1]–[6].
- <sup>31</sup> HSU submissions dated 17 February 2023 at [8]–[9].
- <sup>32</sup> HSU submissions dated 17 February 2023 at [10].
- <sup>33</sup> HSU submissions dated 17 February 2023 at [11].
- <sup>34</sup> HSU submissions dated 17 February 2023 at [26] citing Joint Employer closing submissions in reply dated 19 August 2022 at [5.19]–[5.20].
- <sup>35</sup> Citing the Joint Statement dated 16 December 2022 at [3].
- <sup>36</sup> HSU submissions dated 17 February 2023 at [28] citing Joint Employer submissions dated 15 February 2023 at [2.8].
- <sup>37</sup> HSU submissions dated 17 February 2023 at [28].
- <sup>38</sup> HSU submissions dated 17 February 2023 at [29] citing *Stage 1 decision* at [935].
- <sup>39</sup> HSU submissions dated 17 February 2023 at [29].
- <sup>40</sup> HSU submissions dated 17 February 2023 at [30].
- <sup>41</sup> HSU submissions dated 17 February 2023 at [31].
- <sup>42</sup> Transcript, 13 February 2023 at PN397.
- <sup>43</sup> HSU submissions dated 17 February 2023 at [17]–[20] citing Report to the Full Bench – Lay Witness Evidence Report dated 20 June 2022 at [128].
- <sup>44</sup> HSU submissions dated 17 February 2023 at [21] citing Witness statement of Theresa Heenan dated 20 October 2021 at [72]–[80].
- <sup>45</sup> ANMF submissions dated 20 January 2023 at [112]–[113].
- <sup>46</sup> ANMF submissions dated 20 January 2023 at [114].
- <sup>47</sup> ANMF submissions in reply dated 9 February 2023 at [1] citing the Joint Employers submission dated 20 January at [6] and [95].
- <sup>48</sup> ANMF submissions in reply dated 9 February 2023 at [4] citing the Joint Employers submission dated 20 January at [6] and [95].
- <sup>49</sup> ANMF submissions in reply dated 9 February 2023 at [3].
- <sup>50</sup> Transcript, 13 February 2023 at PN446.
- <sup>51</sup> Joint Statement dated 16 December 2022 at [3].
- <sup>52</sup> UWU submissions dated 20 January 2023 at [53].
- <sup>53</sup> UWU submissions dated 20 January 2023 at [54]; see *Stage 1 decision* at [1093]–[1094].
- <sup>54</sup> UWU submissions dated 20 January 2023 at [54].
- <sup>55</sup> Transcript, 13 February 2023 at PN502-PN503.
- <sup>56</sup> Transcript, 13 February 2023 at PN504.
- <sup>57</sup> Joint Employers submissions dated 20 January 2023 at [95].
- <sup>58</sup> Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at [1.2].
- <sup>59</sup> Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at [2.1].
- <sup>60</sup> Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at [2.8].
- <sup>61</sup> Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at 2023 at [3.1].
- <sup>62</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [4].

- <sup>63</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [5] Citing the Joint Employers submissions dated 22 July 2022 at Annexure G.
- <sup>64</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [6].
- <sup>65</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [7(a)].
- <sup>66</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [7(b)].
- <sup>67</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [7(c)].
- <sup>68</sup> Joint Employers note on Home care employee evidence dated 17 February 2023 at [8].
- <sup>69</sup> *Stage 1 decision* at [935].
- <sup>70</sup> *Stage 1 decision* at [1048].
- <sup>71</sup> *Stage 1 decision* at [1048].
- <sup>72</sup> *Stage 1 decision* at [1050].
- <sup>73</sup> *Annual Wage Review 2017–18* [\[2017\] FWCFB 3500](#) at [34].
- <sup>74</sup> *Stage 1 decision* at [1052].
- <sup>75</sup> *Stage 1 decision* at [1053].
- <sup>76</sup> *Stage 1 decision* at [1055].
- <sup>77</sup> *Stage 1 decision* at [1056].
- <sup>78</sup> *Stage 1 decision* at [1057].
- <sup>79</sup> *Stage 1 decision* at [1058] citing *Equal Remuneration Decision 2015* [\[2015\] FWCFB 8200](#) at [17] of the summary following [367].
- <sup>80</sup> *Stage 1 decision* at [1059]–[1060].
- <sup>81</sup> Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 at [354].
- <sup>82</sup> Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 at [355].
- <sup>83</sup> *Stage 1 decision* at [1083].
- <sup>84</sup> Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.
- <sup>85</sup> Commonwealth submissions dated 16 December 2022 at [48].
- <sup>86</sup> Commonwealth submissions dated 16 December 2022 at [45].
- <sup>87</sup> Commonwealth submissions dated 16 December 2022 at [46].
- <sup>88</sup> Commonwealth submissions dated 16 December 2022 at [54].
- <sup>89</sup> Commonwealth submissions dated 16 December 2022 at [55].
- <sup>90</sup> Commonwealth submissions dated 16 December 2022 at [58].
- <sup>91</sup> Commonwealth submissions dated 16 December 2022 at [59].
- <sup>92</sup> Commonwealth submissions dated 16 December 2022 at [60].
- <sup>93</sup> Commonwealth submissions dated 16 December 2022 at [61]–[62].
- <sup>94</sup> Commonwealth submissions dated 16 December 2022 at [63].
- <sup>95</sup> Commonwealth submissions dated 16 December 2022 at [64].
- <sup>96</sup> Commonwealth submissions dated 16 December 2022 at [65].
- <sup>97</sup> Commonwealth submissions dated 16 December 2022 at [66] citing the *Stage 1 decision* at [356] and [1048].
- <sup>98</sup> Commonwealth submissions dated 16 December 2022 at [67] citing the *Stage 1 decision* at [758].
- <sup>99</sup> Commonwealth submissions dated 16 December 2022 at [68].
- <sup>100</sup> Commonwealth submissions dated 16 December 2022 at [69].
- <sup>101</sup> HSU submissions dated 20 January 2023 at [8].
- <sup>102</sup> HSU submissions dated 20 January 2023 at [8].
- <sup>103</sup> HSU submissions dated 20 January 2023 at [9].
- <sup>104</sup> HSU submissions dated 20 January 2023 at [10].
- <sup>105</sup> *Stage 1 decision* at [355].

- 
- <sup>106</sup> HSU submissions dated 20 January 2023 at [11].
- <sup>107</sup> HSU submissions dated 20 January 2023 at [11].
- <sup>108</sup> HSU submissions dated 20 January 2023 at [11].
- <sup>109</sup> HSU submissions dated 20 January 2023 at [31].
- <sup>110</sup> HSU submissions dated 20 January 2023 at [42].
- <sup>111</sup> HSU submissions dated 20 January 2023 at [42].
- <sup>112</sup> ANMF submissions dated 20 January 2023 at [14].
- <sup>113</sup> ANMF submissions dated 20 January 2023 at [15].
- <sup>114</sup> ANMF submissions dated 20 January 2023 at [20].
- <sup>115</sup> ANMF submissions dated 20 January 2023 at [24].
- <sup>116</sup> ANMF submissions dated 20 January 2023 at [25].
- <sup>117</sup> ANMF submissions dated 20 January 2023 at [26].
- <sup>118</sup> ANMF submissions dated 20 January 2023 at [27].
- <sup>119</sup> ANMF submissions dated 20 January 2023 at [30]-[32].
- <sup>120</sup> ANMF submissions dated 20 January 2023 at [33]-[34] citing the *Stage 1 decision* at [866].
- <sup>121</sup> ANMF submissions dated 20 January 2023 at [35].
- <sup>122</sup> ANMF submissions dated 20 January 2023 at [37]-[38] citing the *Stage 1 decision* at [356].
- <sup>123</sup> ANMF submissions dated 20 January 2023 at [39]-[47] citing the *Stage 1 decision* at [856].
- <sup>124</sup> ANMF submissions dated 20 January 2023 at [47].
- <sup>125</sup> ANMF submissions dated 20 January 2023 at [49].
- <sup>126</sup> ANMF submissions dated 20 January 2023 at [52].
- <sup>127</sup> ANMF submissions dated 20 January 2023 at [53].
- <sup>128</sup> ANMF submissions dated 20 January 2023 at [54]-[58].
- <sup>129</sup> ANMF submissions dated 20 January 2023 at [62].
- <sup>130</sup> At [345]-[347].
- <sup>131</sup> ANMF submissions dated 20 January 2023 at [65] citing the *Secure Jobs Better Pay Explanatory Memorandum* [345]-[347].
- <sup>132</sup> ANMF submissions dated 20 January 2023 at [66].
- <sup>133</sup> ANMF submissions dated 20 January 2023 at [67].
- <sup>134</sup> ANMF submissions dated 20 January 2023 at [68]-[69]. See also evidence from Assoc Prof Smith and Dr Lyons summarised ANMF closing submissions dated 22 July 2022 at [780]-[783] and ANMF closing submissions in reply dated 17 August 2022 at [339]-[357].
- <sup>135</sup> UWU submissions dated 20 January 2023 at [2(c)].
- <sup>136</sup> UWU submissions dated 20 January 2023 at [8]; Commonwealth Submissions dated 16 December at [37]-[69].
- <sup>137</sup> UWU submissions dated 20 January 2023 at [17] citing [\[2022\] FWCFB 200](#) at [1053]-[1063].
- <sup>138</sup> UWU submissions dated 20 January 2023 at [18].
- <sup>139</sup> UWU submissions dated 20 January 2023 at [18].
- <sup>140</sup> [\[2015\] FWCFB 8200](#).
- <sup>141</sup> UWU submissions dated 20 January 2023 at [19] citing *Equal Remuneration Decision 2015* [\[2015\] FWCFB 820010](#).
- <sup>142</sup> UWU submissions dated 20 January 2023 at [19].
- <sup>143</sup> UWU submissions dated 20 January 2023 at [20] citing *Stage 1 decision* at [1059].
- <sup>144</sup> UWU submissions dated 20 January 2023 at [21].
- <sup>145</sup> UWU submissions dated 20 January 2023 at [22].
- <sup>146</sup> UWU submissions dated 20 January 2023 at [23] citing HSU submissions dated 20 January 2023 at [7]-[11], [38]-42].
- <sup>147</sup> UWU submissions dated 20 January 2023 at [29]-[30].

- <sup>148</sup> Joint Employers submissions dated 20 January 2023 at [24]-[25].
- <sup>149</sup> Joint Employers submissions dated 20 January 2023 at [69]-[71].
- <sup>150</sup> *Stage 1 decision* at [1072].
- <sup>151</sup> Joint Employers submissions dated 20 January 2023 at [72]-[73].
- <sup>152</sup> Commonwealth submissions in reply dated 10 February 2023 at [13].
- <sup>153</sup> Commonwealth submissions in reply dated 10 February 2023 at [14] citing Explanatory Memorandum Secure Jobs, Better Pay.
- <sup>154</sup> Commonwealth submissions in reply dated 10 February 2023 at [15] citing the ANMF submissions dated 20 January 2023 at [83]-[85]; and HSU submissions dated 20 January 2023 at [18].
- <sup>155</sup> Commonwealth submissions in reply dated 10 February 2023 at [15].
- <sup>156</sup> HSU submissions in reply dated 9 February 2023 at [2]-[3].
- <sup>157</sup> HSU submissions in reply dated 9 February 2023 at [4].
- <sup>158</sup> HSU submissions in reply dated 9 February 2023 at [5] citing the Joint Employers submission dated 20 January 2023.
- <sup>159</sup> HSU submissions in reply dated 9 February 2023 at [6]-[7].
- <sup>160</sup> HSU submissions in reply dated 9 February 2023 at [35]-[36].
- <sup>161</sup> ANMF submission in reply dated 9 February 2023 at [6] citing the Joint Employers submission dated 20 January at [12].
- <sup>162</sup> ANMF submission in reply dated 9 February 2023 at [7] citing the Joint Employers submission dated 20 January at [20].
- <sup>163</sup> ANMF submission in reply dated 9 February 2023 at [8].
- <sup>164</sup> ANMF submission in reply dated 9 February 2023 at [8].
- <sup>165</sup> ANMF submission in reply dated 9 February 2023 at [9] citing the Joint Employers submission dated 20 January at [24]-[26].
- <sup>166</sup> ANMF submission in reply dated 9 February 2023 at [9].
- <sup>167</sup> ANMF submission in reply dated 9 February 2023 at [11].
- <sup>168</sup> ANMF submission in reply dated 9 February 2023 at [12] citing the Joint Employers submissions dated 20 January at [39]; [17]-[28].
- <sup>169</sup> ANMF submission in reply dated 9 February 2023 at [16].
- <sup>170</sup> ANMF submission in reply dated 9 February 2023 at [18] citing ANMF submission dated 20 January 2023 at [22]-[26].
- <sup>171</sup> ANMF submission in reply dated 9 February 2023 at [37] citing the HSU submissions dated 20 January 2023 at [8].
- <sup>172</sup> ANMF submission in reply dated 9 February 2023 at [38] citing the HSU submissions dated 20 January 2023 at [42]. [14]-[16], [19], [27]-[28] and [43]-[48].
- <sup>173</sup> Joint Employers submissions in reply dated 9 February 2023 at [46].
- <sup>174</sup> Joint Employers submissions in reply dated 9 February 2023 at [47].
- <sup>175</sup> Joint Employers submissions in reply dated 9 February 2023 at [48].
- <sup>176</sup> Joint Employers submissions in reply dated 9 February 2023 at [50].
- <sup>177</sup> *Stage 1 decision* at [758], [1048].
- <sup>178</sup> *Stage 1 decision* at [829], [865].
- <sup>179</sup> *Stage 1 decision* at [1095].
- <sup>180</sup> *Stage 1 decision* at [1083].
- <sup>181</sup> [2023] FWCFB 32.
- <sup>182</sup> Commonwealth submissions dated 16 December 2022 at [8].
- <sup>183</sup> Commonwealth submissions dated 16 December 2022 at [9].
- <sup>184</sup> Commonwealth submissions dated 16 December 2022 at [10].
- <sup>185</sup> Commonwealth submissions dated 16 December 2022 at [11].
- <sup>186</sup> Commonwealth submissions dated 16 December 2022 at [12].
- <sup>187</sup> Commonwealth submissions dated 16 December 2022 at [13].

- 
- <sup>188</sup> Commonwealth submissions dated 16 December 2022 at [14]–[16].
- <sup>189</sup> Commonwealth submissions dated 16 December 2022 at [17].
- <sup>190</sup> Commonwealth submissions dated 16 December 2022 at [18].
- <sup>191</sup> Commonwealth submissions dated 16 December 2022 at [26] citing *Australian Workers’ Union* [2022] FWCFB 4 at [154].
- <sup>192</sup> Commonwealth submissions dated 16 December 2022 at [27].
- <sup>193</sup> [\[2021\] FWCFB 6021](#).
- <sup>194</sup> Commonwealth submissions dated 16 December 2022 at [28]–[30].
- <sup>195</sup> Commonwealth submissions dated 16 December 2022 at [31].
- <sup>196</sup> Commonwealth submissions dated 16 December 2022 at [32].
- <sup>197</sup> Commonwealth submissions dated 16 December 2022 at [20].
- <sup>198</sup> Commonwealth submissions dated 16 December 2022 at [21].
- <sup>199</sup> Commonwealth submissions dated 16 December 2022 at [22] citing *Stage 1 decision* at [904].
- <sup>200</sup> Commonwealth submissions dated 16 December 2022 at [23].
- <sup>201</sup> Commonwealth submissions dated 16 December 2022 at [24].
- <sup>202</sup> HSU submissions dated 20 January 2023 at [12].
- <sup>203</sup> HSU submissions dated 20 January 2023 at [13] citing *Penalty Rates – Transitional Arrangements* [\[2017\] FWCFB 3001](#); *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)* [\[2021\] FWCFB 6021](#); *Re Australian Workers’ Union* [2022] FWCFB 4; *Stage 1 decision* at [976]–[990].
- <sup>204</sup> HSU submissions dated 20 January 2023 at [14].
- <sup>205</sup> Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, dated 1 March 2021.
- <sup>206</sup> HSU submissions dated 20 January 2023 [15] citing *Stage 1 decision* at [890] and [899]; [922] and [1004]; [938] and [967]–[968]; [1010]–[1012]; 1039; 1048; 1072 and 1084.
- <sup>207</sup> HSU submissions dated 20 January 2023 at [16(a)-(g)].
- <sup>208</sup> HSU submissions dated 20 January 2023 at [16].
- <sup>209</sup> *Stage 1 decision* at [922].
- <sup>210</sup> 4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims [\[2019\] FWCFB 7094](#) at [39].
- <sup>211</sup> HSU submissions dated 20 January 2023 at [14].
- <sup>212</sup> HSU submissions dated 20 January 2023 at [17].
- <sup>213</sup> HSU submissions dated 20 January 2023 at [18].
- <sup>214</sup> HSU submissions dated 20 January 2023 at [19].
- <sup>215</sup> HSU submissions dated 20 January 2023 at [21].
- <sup>216</sup> HSU submissions dated 20 January 2023 at [22]–[23].
- <sup>217</sup> HSU submissions dated 20 January 2023 at [25].
- <sup>218</sup> HSU submissions dated 20 January 2023 at [26] citing Commonwealth Submissions dated 8 August 2022.
- <sup>219</sup> HSU submissions dated 20 January 2023 at [27].
- <sup>220</sup> HSU submissions dated 20 January 2023 at [28] citing the *Stage 1 decision* at [911].
- <sup>221</sup> HSU submissions dated 20 January 2023 at [28].
- <sup>222</sup> HSU submissions dated 20 January 2023 at [29].
- <sup>223</sup> HSU submissions dated 20 January 2023 at [43]–[45].
- <sup>224</sup> HSU submissions dated 20 January 2023 at [48] citing *SCHADS 4 yearly review Substantive Claims decision* [\[2019\] FWCFB 6067](#).
- <sup>225</sup> HSU submissions dated 20 January 2023 at [48]; *Stage 1 decision* at [1039].
- <sup>226</sup> HSU submissions dated 20 January 2023 at [48].
- <sup>227</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023.
- <sup>228</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [17]–[19].
- <sup>229</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [27]–[28].

- <sup>230</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [29]-[32].
- <sup>231</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [31].
- <sup>232</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [32].
- <sup>233</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [33]-[34].
- <sup>234</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [35]-[36].
- <sup>235</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [40]-[41].
- <sup>236</sup> Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [42]-[44].
- <sup>237</sup> ANMF submissions dated 20 January 2023 at [72]-[74].
- <sup>238</sup> ANMF submissions dated 20 January 2023 at [77].
- <sup>239</sup> ANMF submissions dated 20 January 2023 at [78]-[79] citing *Stage 1 decision* at [974]-[990].
- <sup>240</sup> ANMF submissions dated 20 January 2023 at [81] citing *Stage 1 decision* at [1004].
- <sup>241</sup> ANMF submissions dated 20 January 2023 at [83].
- <sup>242</sup> ANMF submissions dated 20 January 2023 at [82]-[83].
- <sup>243</sup> ANMF submissions dated 20 January 2023 at [84]-[85].
- <sup>244</sup> ANMF submissions dated 20 January 2023 at [87] citing s 166(4) FW Act.
- <sup>245</sup> ANMF submissions dated 20 January 2023 at [87].
- <sup>246</sup> ANMF submissions dated 20 January 2023 at [89].
- <sup>247</sup> ANMF submissions dated 20 January 2023 at [97].
- <sup>248</sup> ANMF submissions dated 20 January 2023 at [100].
- <sup>249</sup> ANMF submissions dated 20 January 2023 at [96] citing Commonwealth Submissions dated 16 December 2023 at [12.3].
- <sup>250</sup> UWU submissions dated 20 January 2023 at [31] citing Commonwealth submissions dated 16 December at [5], [27] & [31].
- <sup>251</sup> UWU submissions dated 20 January 2023 at [32] HSU submissions dated 20 January 2023 at [19].
- <sup>252</sup> UWU submissions dated 20 January 2023 at [33].
- <sup>253</sup> UWU submissions dated 20 January 2023 at [34].
- <sup>254</sup> UWU submissions dated 20 January 2023 at [35] citing the *Stage 1 Decision* at [984]; *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* [\[2017\] FWCFB 3001](#) at [69] (the Penalty Rates Transitional Decision).
- <sup>255</sup> UWU submissions dated 20 January 2023 at [35].
- <sup>256</sup> UWU submissions dated 20 January 2023 at [35].
- <sup>257</sup> UWU submissions dated 20 January 2023 at [39].
- <sup>258</sup> UWU submissions dated 20 January 2023 at [40].
- <sup>259</sup> UWU submissions dated 20 January 2023 at [41].
- <sup>260</sup> Reply Witness statement of Lauren Elizabeth Beamer Hutchins, LH-12, “Introduction”.
- <sup>261</sup> Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, dated 1 March 2021, Volume 2, section 4.10, at p.213.
- <sup>262</sup> UWU submissions dated 20 January 2023 at [46(1)].
- <sup>263</sup> UWU submissions dated 20 January 2023 at [46] citing [2005] AIRC 28, [PR954938](#) at [368] – [374].
- <sup>264</sup> UWU submissions dated 20 January 2023 at [46] citing *Penalty Rates Transitional Decision* at [138].
- <sup>265</sup> UWU submissions dated 20 January 2023 at [46].
- <sup>266</sup> UWU submissions dated 20 January 2023 at [26] citing Commonwealth Submissions dated 16 December at [8].
- <sup>267</sup> UWU submissions dated 20 January 2023 at [26].
- <sup>268</sup> Transcript, 13 February 2023 at PN501.
- <sup>269</sup> AWU submissions dated 20 January 2023 at [3].
- <sup>270</sup> AWU submissions dated 20 January 2023 at [4].

- 
- <sup>271</sup> AWU submissions dated 20 January 2023 at [6].
- <sup>272</sup> AWU submissions dated 20 January 2023 at [7] and Attachment AWU1.
- <sup>273</sup> AWU submissions dated 20 January 2023 at [8].
- <sup>274</sup> AWU submissions dated 20 January 2023 at [9].
- <sup>275</sup> AWU submissions dated 20 January 2023 at [10]-[13].
- <sup>276</sup> AWU submissions dated 20 January 2023 at [15].
- <sup>277</sup> AWU submissions dated 20 January 2023 at [16]-[17].
- <sup>278</sup> AWU submissions dated 20 January 2023 at [8] citing the Joint Statement dated 16 December 2022 at [1]-[6].
- <sup>279</sup> AWU submissions dated 20 January 2023 at [18].
- <sup>280</sup> AWU submissions dated 20 January 2023 at [19] citing *Application by Independent Education Union of Australia New South Wales/Australian Capital Territory (130N-NSW)* [\[2021\] FWCFB 6021](#).
- <sup>281</sup> AWU submissions dated 20 January 2023 at [20].
- <sup>282</sup> AWU submissions dated 20 January 2023 at [22].
- <sup>283</sup> AWU submissions dated 20 January 2023 at [23].
- <sup>284</sup> Transcript, 13 February 2023 at PN512.
- <sup>285</sup> Joint Employers submissions dated 20 January 2023 at [57], citing *Stage 1 decision* at [976]-[990].
- <sup>286</sup> Joint Employers submissions dated 20 January 2023 at [80]-[81].
- <sup>287</sup> Joint Employers submissions dated 20 January 2023 at [82].
- <sup>288</sup> Joint Employers submissions dated 20 January 2023 at [84] citing *Australian Workers' Union* [2022] FWCFB 4, [154], quoted at [980] of the *Stage 1 decision*; see FW Act s 166(1)(a).
- <sup>289</sup> Joint Employers submissions dated 20 January 2023 at [83]-[86]; see Commonwealth submissions dated 16 December 2022.
- <sup>290</sup> Joint Employers submissions dated 20 January 2023 at [87].
- <sup>291</sup> [\[2017\] FWCFB 3011](#).
- <sup>292</sup> *Penalty Rates – Transitional Arrangements* [\[2017\] FWCFB 3001](#) as cited in *Stage 1 decision* at [980].
- <sup>293</sup> Joint Employers submissions dated 20 January 2023 at [90].
- <sup>294</sup> Joint Employers submissions dated 20 January 2023 at [91].
- <sup>295</sup> Joint Employers submissions dated 20 January 2023 at [92]-[93] citing *Stage 1 decision*; see FW Act s 166(1)(a). See also *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch* [\[2021\] FWCFB 6021](#).
- <sup>296</sup> Joint Employers submissions dated 20 January 2023 at [46].
- <sup>297</sup> Joint Employers submissions dated 20 January 2023 at [45] citing *Stage 1 decision* at [1066], summarising the Joint Employers closing submissions dated 22 July 2022 at [23.20].
- <sup>298</sup> Joint Employers submissions dated 20 January 2023 at [48].
- <sup>299</sup> Joint Employers submissions dated 20 January 2023 at [49] citing the *Stage 1 decision* at [904].
- <sup>300</sup> Joint Employers submissions dated 20 January 2023 at [49]-[51].
- <sup>301</sup> Joint Employers submissions dated 20 January 2023 at [53]; see also *Stage 1 decision* at [1065].
- <sup>302</sup> Joint Employers submissions dated 20 January 2023 at [55]-[57].
- <sup>303</sup> Joint Employers submissions dated 20 January 2023 at [55]-[59].
- <sup>304</sup> Joint Employers submissions dated 20 January 2023 at [60].
- <sup>305</sup> Joint Employers submissions dated 20 January 2023 at [62].
- <sup>306</sup> Commonwealth submissions in reply dated 10 February 2023 at [2] citing Commonwealth submissions dated 8 August 2022.
- <sup>307</sup> Commonwealth submissions in reply dated 10 February 2023 at [4].
- <sup>308</sup> Commonwealth submissions in reply dated 10 February 2023 at [5] citing Commonwealth submissions dated 16 December 2022.

- <sup>309</sup> Commonwealth submissions in reply dated 10 February 2023 at [8] citing the HSU submissions dated 20 January 2023 at [21].
- <sup>310</sup> Commonwealth submissions in reply dated 10 February 2023 at [9] citing the Joint Employer Submission dated 20 January 2023 at [48]; and Commonwealth submissions dated 16 December 2022 at [14]-[18].
- <sup>311</sup> Commonwealth submissions in reply dated 10 February 2023 at [10].
- <sup>312</sup> Commonwealth submissions in reply dated 10 February 2023 at [11] citing HSU submissions dated 20 January 2023 at [19]; ANMF submissions dated 20 January 2023 at [77] and [86]-[87]; UWU submissions dated 20 January 2023 at [2](b).
- <sup>313</sup> Commonwealth submissions in reply dated 10 February 2023 at [12].
- <sup>314</sup> Commonwealth submissions in reply dated 10 February 2023.
- <sup>315</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [2] citing the Eagar second supplementary report.
- <sup>316</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [2] citing The Commonwealth's submissions dated 16 December 2022 at [12.3].
- <sup>317</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [3] citing the Eagar second supplementary report at [3].
- <sup>318</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [3].
- <sup>319</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [4].
- <sup>320</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [6].
- <sup>321</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [7].
- <sup>322</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [8] citing the Eagar second supplementary report at [32]-[34].
- <sup>323</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [8].
- <sup>324</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [9] citing the Eagar second supplementary report at [34].
- <sup>325</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [9].
- <sup>326</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [10.2] citing Commonwealth Submissions dated 16 December 2022 at [11.2].
- <sup>327</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [10.2] citing Commonwealth Submissions dated 16 December 2022 at [11.3].
- <sup>328</sup> Commonwealth submissions in reply dated 10 February 2023 Annexure at [10].
- <sup>329</sup> Transcript, 13 February 2023 at PN436.
- <sup>330</sup> Transcript, 13 February 2023 at PN437.
- <sup>331</sup> HSU submissions in reply dated 9 February 2023 at [11] citing the Joint Employers submissions dated 20 January 2023 at [51]-[52].
- <sup>332</sup> HSU submissions in reply dated 9 February 2023 at [11] citing HSU submissions dated 20 January 2023 at [47]-[48].
- <sup>333</sup> HSU submissions in reply dated 9 February 2023 at [12]-[14] citing the Joint Employers submissions dated 20 January 2023 at [42].
- <sup>334</sup> HSU submissions in reply dated 9 February 2023 at [15]-[16] citing the Commonwealth submissions dated 29 August 2022 at [5]-[6], [16].
- <sup>335</sup> HSU submissions in reply dated 9 February 2023 at [17].
- <sup>336</sup> HSU submissions in reply dated 9 February 2023 at [18] citing Commonwealth Submissions dated 16 December 2022 at [5.1]-[5.2].
- <sup>337</sup> HSU submissions in reply dated 9 February 2023 at [18].
- <sup>338</sup> HSU submissions in reply dated 9 February 2023 at [19].
- <sup>339</sup> HSU submissions in reply dated 9 February 2023 at [20].
- <sup>340</sup> Commonwealth submissions dated 16 December 2022 at [14]-[18].



- 
- <sup>341</sup> HSU submissions in reply dated 9 February 2023 at [21] citing the Joint Employers submissions dated 20 January 2023 at [48].
- <sup>342</sup> HSU submissions in reply dated 9 February 2023 at [22] citing the e Joint Employers submissions dated 20 January 2023 at [52].
- <sup>343</sup> HSU submissions in reply dated 9 February 2023 at [22] citing The Joint Statement dated 16 December 2022 at [2].
- <sup>344</sup> HSU submissions in reply dated 9 February 2023 at [23].
- <sup>345</sup> HSU submissions in reply dated 9 February 2023 at [24] citing the Joint Employer submissions dated 20 January 2023 at [55].
- <sup>346</sup> HSU submissions in reply dated 9 February 2023 at [24].
- <sup>347</sup> HSU submissions in reply dated 9 February 2023 at [25].
- <sup>348</sup> HSU submissions in reply dated 9 February 2023 at [26].
- <sup>349</sup> HSU submissions in reply dated 9 February 2023 at [27] citing the Second Supplementary Eagar Report at [28].
- <sup>350</sup> HSU submissions in reply dated 9 February 2023 at [27] citing the Second Supplementary Eagar Report at [31(b)]-[32].
- <sup>351</sup> HSU submissions in reply dated 9 February 2023 at [27] citing the Second Supplementary Eagar Report at [233]-[34].
- <sup>352</sup> HSU submissions in reply dated 9 February 2023 at [28].
- <sup>353</sup> HSU submissions in reply dated 9 February 2023 at [29].
- <sup>354</sup> HSU submissions in reply dated 9 February 2023 at [31] citing the Joint Employer submissions dated 20 January 2023 at [86].
- <sup>355</sup> HSU submissions in reply dated 9 February 2023 at [32].
- <sup>356</sup> HSU submissions in reply dated 9 February 2023 at [33] see statement of Paul Sadler dated 1 March 2022 at [48]-[52]; Statement of Anna-Marie Wade dated 23 May 2022 at [26]-[45].
- <sup>357</sup> HSU submissions in reply dated 9 February 2023 at [33] citing reply witness statement of Lauren Hutchins dated 22 April 2022 at [43]-[44].
- <sup>358</sup> HSU submissions in reply dated 9 February 2023 at [33].
- <sup>359</sup> HSU submissions in reply dated 9 February 2023 at [37] citing ANMF submissions dated 20 January 2023 at [77] and [86]-[89].
- <sup>360</sup> HSU submissions in reply dated 9 February 2023 at [37].
- <sup>361</sup> [2022] FWCFB 4.
- <sup>362</sup> HSU submissions in reply dated 9 February 2023 at [38].
- <sup>363</sup> HSU submissions in reply dated 9 February 2023 at [39] citing ANMF submissions dated 20 January 2023 at [96].
- <sup>364</sup> HSU submissions in reply dated 9 February 2023 at [39].
- <sup>365</sup> Transcript, 13 February 2023 at PN336-PN337.
- <sup>366</sup> Transcript, 13 February 2023 at PN338-PN342.
- <sup>367</sup> Transcript, 13 February 2023 at PN344-PN347.
- <sup>368</sup> Transcript, 13 February 2023 at PN344-PN348; citing *Social, Community, Home Care and Disability Services Industry Award 2010*, [\[2019\] FWCFB 6067](#) at [136]-[138].
- <sup>369</sup> Transcript, 13 February 2023 at PN360.
- <sup>370</sup> [2023] FWCFB 32.
- <sup>371</sup> Transcript, 13 February 2023 at PN386.
- <sup>372</sup> ANMF submissions in reply dated 9 February 2023 at [19] citing ANMF submissions dated 22 April 2022 at [148]-[155]; ANMF closing submissions dated 22 July 2022 at [849]-[855]; ANMF closing submissions in reply dated 17 August 2022 at [200].
- <sup>373</sup> ANMF submissions in reply dated 9 February 2023 at [20]-[24].
- <sup>374</sup> Joint Employers submissions dated 20 January at [44] and [82(a)].
- <sup>375</sup> ANMF submissions in reply dated 9 February 2023 at [25].
- <sup>376</sup> ANMF submissions in reply dated 9 February 2023 at [26] citing Joint Employers submission dated 20 January at [47].

- <sup>377</sup> ANMF submissions in reply dated 9 February 2023 at [26] citing Joint Employers submission dated 20 January at [51].
- <sup>378</sup> ANMF submissions in reply dated 9 February 2023 at [26] citing Joint Employers submission dated 20 January at [53].
- <sup>379</sup> ANMF submissions in reply dated 9 February 2023 at [26].
- <sup>380</sup> Joint Employers submissions dated 20 January at [55]-[61] and [82(e)].
- <sup>381</sup> ANMF submissions in reply dated 9 February 2023 at [27].
- <sup>382</sup> Joint Employers submissions dated 20 January at [58].
- <sup>383</sup> The ANMF submissions in reply dated 9 February 2023 at [28].
- <sup>384</sup> Joint Employers submissions dated 20 January at [59]-[61].
- <sup>385</sup> ANMF submissions in reply dated 9 February 2023 at [29].
- <sup>386</sup> Joint Employers submissions dated 20 January at [88]-[89].
- <sup>387</sup> HSU submissions dated 20 January 2023 at [13].
- <sup>388</sup> ANMF submissions in reply dated 9 February 2023 at [30].
- <sup>389</sup> ANMF submissions in reply dated 9 February 2023 at [31] citing the Joint Employers submission dated 20 January at [90].
- <sup>390</sup> ANMF submissions in reply dated 9 February 2023 at [32].
- <sup>391</sup> ANMF submissions in reply dated 9 February 2023 at [34].
- <sup>392</sup> ANMF submissions in reply dated 9 February 2023 at [35] citing Joint Employers submission dated 20 January at [92].
- <sup>393</sup> ANMF submissions in reply dated 9 February 2023 at [35] citing Joint Employers submission dated 20 January at [92].
- <sup>394</sup> ANMF submissions in reply dated 9 February 2023 at [36] citing Joint Employers submission dated 20 January at [91].
- <sup>395</sup> ANMF submissions in reply dated 9 February 2023 at [36].
- <sup>396</sup> ANMF submissions in reply dated 9 February 2023 at [38] citing HSU submissions dated 20 January 2023 at [42], [14]-[16], [19], [27]-[28] and [43]-[48].
- <sup>397</sup> ANMF submissions in reply dated 9 February 2023 at [39] citing UWU submissions dated 20 January 2023 at [41], [43]-[46].
- <sup>398</sup> ANMF submissions in reply dated 9 February 2023 at [39] citing AWU submissions dated 20 January 2023.
- <sup>399</sup> ANMF submissions in reply dated 9 February 2023 at [40] citing the Commonwealth submissions dated 16 December 2023.
- <sup>400</sup> ANMF submissions in reply dated 9 February 2023 at [40].
- <sup>401</sup> Transcript, 13 February 2023 at PN468.
- <sup>402</sup> Transcript, 13 February 2023 at PN473; PN487.
- <sup>403</sup> Transcript, 13 February 2023 at PN444.
- <sup>404</sup> Joint Employers submissions in reply dated 9 February 2023 at [4].
- <sup>405</sup> Joint Employers submissions in reply dated 9 February 2023 at [6].
- <sup>406</sup> Joint Employers submissions in reply dated 9 February 2023 at [7].
- <sup>407</sup> Joint Employers submissions in reply dated 9 February 2023 at [8].
- <sup>408</sup> Joint Employers submissions in reply dated 9 February 2023 at [9].
- <sup>409</sup> Joint Employers submissions in reply dated 9 February 2023 at [11].
- <sup>410</sup> Joint Employers submissions in reply dated 9 February 2023 at [12]-[13].
- <sup>411</sup> Joint Employers submissions in reply dated 9 February 2023 at [14]-[15].
- <sup>412</sup> Joint Employers submissions in reply dated 9 February 2023 at [16] citing statement of Grant Corderoy, 8 February 2023 at [32].
- <sup>413</sup> Joint Employers submissions in reply dated 9 February 2023 at [17] and [19].
- <sup>414</sup> Joint Employers submissions in reply dated 9 February 2023 at [18].
- <sup>415</sup> Joint Employers submissions in reply dated 9 February 2023 at [18] citing statement of Grant Corderoy dated 8 February 2023 and Stuart Brown Report p 1.

- 
- <sup>416</sup> Joint Employers submissions in reply dated 9 February 2023 at [8] Corderoy and StuartBrown Report p 3.
- <sup>417</sup> Joint Employers submissions in reply dated 9 February 2023 at [20] citing StuartBrown Report Table 1 p 9.
- <sup>418</sup> Joint Employers submissions in reply dated 9 February 2023 at [21].
- <sup>419</sup> Joint Employers submissions in reply dated 9 February 2023 at [22] citing Witness Statement of Grant Corderoy dated February 2023, [34].
- <sup>420</sup> Joint Employers submissions in reply dated 9 February 2023 at [23].
- <sup>421</sup> Joint Employers submissions in reply dated 9 February 2023 at [24].
- <sup>422</sup> Joint Employers submissions in reply dated 9 February 2023 at [25].
- <sup>423</sup> Joint Employers submissions in reply dated 9 February 2023 at [26].
- <sup>424</sup> Joint Employers submissions in reply dated 9 February 2023 at [27].
- <sup>425</sup> Joint Employers submissions in reply dated 9 February 2023 at [27]-[28].
- <sup>426</sup> Joint Employers submissions in reply dated 9 February 2023 at [30], citing Amended statement of Anna-Marie Wade dated 23 May 2022 at [15]-[19].
- <sup>427</sup> Joint Employers submissions in reply dated 9 February 2023 at [31].
- <sup>428</sup> Joint Employers submissions in reply dated 9 February 2023 at [35-36].
- <sup>429</sup> Joint Employers submissions in reply dated 9 February 2023 at [37]-[40].
- <sup>430</sup> Joint Employers submissions in reply dated 9 February 2023 at [41] citing Commonwealth submission dated 16 December 2022 at [8]-[18]
- <sup>431</sup> *Re 4 yearly review of modern awards – Penalty Rates* [\[2019\] FWCFB 1001](#); *Re Annual Wage Review 2017-18* [\[2018\] FWCFB 3500](#); *Re 4 yearly review of modern awards - Pharmacy Industry Award 2010* [\[2018\] FWCFB 7621](#); *Re Independent Education Union of Australia* [\[2021\] FWCFB 2051](#); *Re Alpine Resorts Award 2010* [\[2018\] FWCFB 4984](#).
- <sup>432</sup> Transcript, 13 February at PN541.
- <sup>433</sup> Transcript, 13 February 2023 at PN547.
- <sup>434</sup> Transcript, 13 February 2023 at PN561-PN564.
- <sup>435</sup> Transcript, 13 February 2023 at PN570.
- <sup>436</sup> Transcript 13 February 2023 at PN523.
- <sup>437</sup> Joint Employers submissions in reply dated 9 February 2023 at [12].
- <sup>438</sup> Transcript, 13 February 2023, PN214-PN312.
- <sup>439</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [1].
- <sup>440</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [5]-[6].
- <sup>441</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [14]-[21]
- <sup>442</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [15].
- <sup>443</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [14]-[31].
- <sup>444</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [32]-[40].
- <sup>445</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [33].
- <sup>446</sup> Witness Statement of Grant Corderoy, dated 9 February 2023 at [34].
- <sup>447</sup> Transcript, 13 February 2023, PN216-PN269.
- <sup>448</sup> Transcript, 13 February 2023, PN270-PN312.
- <sup>449</sup> Transcript, 13 February 2023, PN227-PN229.
- <sup>450</sup> Transcript, 13 February 2023, PN231.
- <sup>451</sup> Transcript, 13 February 2023, PN233-PN257.
- <sup>452</sup> Transcript, 13 February 2023, PN251, PN254.
- <sup>453</sup> Transcript, 13 February 2023, PN253-PN254.
- <sup>454</sup> Transcript, 13 February 2023, PN255.
- <sup>455</sup> Transcript, 13 February 2023, PN260.

- <sup>456</sup> Transcript, 13 February 2023, PN270-PN294.
- <sup>457</sup> Transcript, 13 February 2023, PN276 and PN277.
- <sup>458</sup> Transcript, 13 February 2023, PN279.
- <sup>459</sup> Transcript, 13 February 2023, PN281.
- <sup>460</sup> Transcript, 13 February 2023, PN290-PN295.
- <sup>461</sup> Transcript, 13 February 2023, PN291.
- <sup>462</sup> Transcript, 13 February 2023, PN292.
- <sup>463</sup> Transcript, 13 February 2023, PN295-PN312.
- <sup>464</sup> Transcript, 13 February 2023, PN301.
- <sup>465</sup> Transcript, 13 February 2023, PN302-313.
- <sup>466</sup> Transcript, 13 February 2023, PN303.
- <sup>467</sup> Transcript, 13 February 2023, PN315-324.
- <sup>468</sup> Witness Statement of Johannes Brockhaus, dated 9 February 2023 at [2]
- <sup>469</sup> Witness Statement of Johannes Brockhaus, dated 9 February 2023 at [2]-[5], [7]-[14], [15]-[19], [20]-[26] and [27]-[34].
- <sup>470</sup> Witness Statement of James Alexander Lachlan McLean Shaw, dated 9 February 2023 at [2].
- <sup>471</sup> Witness Statement of James Alexander Lachlan McLean Shaw, dated 9 February 2023 at [5]-[15], [6]-[21] and [22]-[28].
- <sup>472</sup> Witness Statement of Michelle Jenkins, dated 9 February 2023 at [2].
- <sup>473</sup> Witness Statement of Michelle Jenkins, dated 9 February 2023 at [5]-[30].
- <sup>474</sup> Witness Statement of Michelle Jenkins, dated 9 February 2023 at [31]-[34].
- <sup>475</sup> Witness Statement of Michelle Jenkins, dated 9 February 2023 at [35]-[43].
- <sup>476</sup> ANMF submissions dated 9 February 2023 at [20]; Transcript 13 February 2023 at PN123.
- <sup>477</sup> Transcript 13 February 2023 at PN171.
- <sup>478</sup> HSU submissions dated 17 February 2023 at [3].
- <sup>479</sup> HSU submissions dated 17 February 2023 at [3]-[4].
- <sup>480</sup> HSU submissions dated 17 February 2023 at [6].
- <sup>481</sup> ANMF submissions dated 16 February 2023 at [2]-[3] citing the *Evidence Act 1995 (Cth) s 79; Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- <sup>482</sup> ANMF submissions dated 16 February 2023 at [5].
- <sup>483</sup> ANMF submissions dated 16 February 2023 at [6].
- <sup>484</sup> ANMF submissions dated 16 February 2023 at [7].
- <sup>485</sup> ANMF submissions dated 16 February 2023 at [7] citing StewartBrown Aged Care Financial Performance Survey Sector Report (FY22) p 3.
- <sup>486</sup> ANMF submissions dated 16 February 2023 at [7]-[10].
- <sup>487</sup> ANMF submissions dated 16 February 2023 at [11].
- <sup>488</sup> ANMF submissions dated 16 February 2023 at [12]-[13].
- <sup>489</sup> ANMF submissions dated 16 February 2023 at [14].
- <sup>490</sup> ANMF submissions dated 16 February 2023 at [15].
- <sup>491</sup> ANMF submissions dated 16 February 2023 at [18].
- <sup>492</sup> ANMF submissions dated 16 February 2023 at [19]-[23].
- <sup>493</sup> ANMF submissions dated 16 February 2023 at [21]-[23].
- <sup>494</sup> ANMF submissions dated 16 February 2023 at [24].
- <sup>495</sup> ANMF submissions dated 16 February 2023 at [25].
- <sup>496</sup> ANMF submissions dated 16 February 2023 at [25].
- <sup>497</sup> ANMF submissions dated 16 February 2023 at [27].

- 
- <sup>498</sup> ANMF submissions dated 16 February 2023 at [26] citing Statement of Johannes Brockhaus dated 9 February 2023 at [2]-[6] and [31]-[33].
- <sup>499</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3].
- <sup>500</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3(a)].
- <sup>501</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3(b)].
- <sup>502</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3(d)].
- <sup>503</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3](c)(iv).
- <sup>504</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [5].
- <sup>505</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [5] citing *Health Sector Awards - Pandemic Leave* [\[2020\] FWCFB 3561](#) (8 July 2020) at [99].
- <sup>506</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [6].
- <sup>507</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [7].
- <sup>508</sup> Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [8].
- <sup>509</sup> *Stage 1 decision* at [982].
- <sup>510</sup> *Stage 1 decision* at [983].
- <sup>511</sup> *Stage 1 decision* at [984].
- <sup>512</sup> *Stage 1 decision* at [990].
- <sup>513</sup> *Stage 1 decision* at [922].
- <sup>514</sup> *Stage 1 decision* at [1006].
- <sup>515</sup> *Stage 1 decision* at [916].
- <sup>516</sup> *Stage 1 decision* at [915].
- <sup>517</sup> HSU submissions dated 20 January 2023 at [31]; ANMF submissions dated 20 January 2023 at [104]; Joint Employers submissions dated 20 January 2023 at [74]-[79].
- <sup>518</sup> *Stage 1 decision* at [1012].
- <sup>519</sup> *Stage 1 decision* at [1012].
- <sup>520</sup> Commonwealth submissions dated 16 December 2022 at [3.1].
- <sup>521</sup> HSU submissions dated 20 January 2023 at [35].
- <sup>522</sup> HSU submissions dated 20 January 2023 at [16](d).
- <sup>523</sup> ANMF submissions dated 20 January 2023 at [90] citing *Stage 1 decision* at [1008].
- <sup>524</sup> UWU submissions dated 20 January 2023 at [2(a)].
- <sup>525</sup> UWU submissions dated 20 January 2023 at [10].
- <sup>526</sup> Joint Employers submissions dated 20 January 2023 at [74]-[79].
- <sup>527</sup> *Stage 1 decision* at [1028].
- <sup>528</sup> *Stage 1 decision* at [1029].
- <sup>529</sup> *Stage 1 decision* at [1030].
- <sup>530</sup> Commonwealth submissions dated 16 December 2022 at [3.1].
- <sup>531</sup> HSU submissions dated 20 January 2023 at [36].
- <sup>532</sup> HSU submissions dated 20 January 2023 at [37].
- <sup>533</sup> ANMF submissions dated 22 July 2022, at [857]-[869].
- <sup>534</sup> ANMF submissions dated 20 January 2023 at [92] citing *Stage 1 decision* at [1028].
- <sup>535</sup> UWU submissions dated 20 January 2023 at [11].
- <sup>536</sup> UWU submissions dated 20 January 2023 at [12] citing ANMF Form 46 Application to vary a modern award (AM2021/63) dated 17 May 2021 at [27]; 4 November December at [1015].
- <sup>537</sup> UWU submissions dated 20 January 2023 at [13].
- <sup>538</sup> UWU submissions dated 20 January 2023 at [13].

- <sup>539</sup> UWU submissions dated 20 January 2023 at [13].
- <sup>540</sup> *Stage 1 decision* at [1038].
- <sup>541</sup> *Stage 1 decision* at [1039]–[1040].
- <sup>542</sup> Commonwealth submissions dated 16 December 2022 at [3.1].
- <sup>543</sup> HSU submissions dated 20 January 2023 at [35].
- <sup>544</sup> ANMF submissions dated 20 January 2023 at [93] citing *Stage 1 decision* at [1039].
- <sup>545</sup> UWU submissions dated 20 January 2023 at [14].
- <sup>546</sup> *Stage 1 decision* at [1008].
- <sup>547</sup> Commonwealth submissions dated 16 December 2022 at [3.1].
- <sup>548</sup> HSU submissions dated 20 January 2023 at [35].
- <sup>549</sup> ANMF submissions dated 20 January 2023 at [90].
- <sup>550</sup> *Stage 1 decision* at [1008].
- <sup>551</sup> Commonwealth submissions dated 16 December 2022 at [3.1].
- <sup>552</sup> HSU submissions dated 20 January 2023 at [35].
- <sup>553</sup> ANMF submissions dated 20 January 2023 at [90].
- <sup>554</sup> *Stage 1 decision* at [1008].
- <sup>555</sup> Commonwealth submissions dated 16 December 2022 at [3.1].
- <sup>556</sup> HSU submissions dated 20 January 2023 at [35].
- <sup>557</sup> HSU submissions dated 20 January 2023 at [16(f)].
- <sup>558</sup> HSU submissions dated 20 January 2023 at [16(f)].
- <sup>559</sup> HSU submissions dated 20 January 2023 at [16(f)].
- <sup>560</sup> ANMF submissions dated 20 January 2023 at [90].
- <sup>561</sup> UWU submissions dated 20 January 2023 at [35].
- <sup>562</sup> *Stage 1 decision* at [1072].
- <sup>563</sup> Commonwealth submissions dated 16 December 2022 at [3(a)].
- <sup>564</sup> HSU submissions dated 20 January 2023 at [35].
- <sup>565</sup> HSU submissions dated 20 January 2023 at [16(h)].
- <sup>566</sup> ANMF submissions dated 20 January 2023 at [102] citing *Stage 1 decision* at [1072].
- <sup>567</sup> UWU submissions in reply dated 19 August 2022 at [18].
- <sup>568</sup> UWU submissions dated 20 January 2023 at [27].
- <sup>569</sup> Joint Employers submissions dated 20 January 2023 at [71].
- <sup>570</sup> *Stage 1 decision* at [1075].
- <sup>571</sup> *Stage 1 decision* at [1074].
- <sup>572</sup> HSU submissions dated 20 January 2023 at [49].
- <sup>573</sup> ANMF submissions dated 20 January 2023 at [105]–[110].
- <sup>574</sup> Joint Employers submissions dated 20 January 2023 at [32].
- <sup>575</sup> *Stage 1 decision* at [1079]–[1080].
- <sup>576</sup> *Stage 1 decision* at [1081].
- <sup>577</sup> *Stage 1 decision* at [1082].